The Federalism Problems with the Indian Child Welfare Act

By Timothy Sandefur[*]

DRAFT – Dec. 1, 2021
Forthcoming in the ~~*American Indian Law Review*~~ *Texas Review of Law & Politics*

"The powers-that-be refuse to recognize the Indian as an ordinary human being, but insist that he be taken care of and 'protected'…. The key to this complicated problem is, simply, To recognize the Indian as a person and a citizen…*as an individual*."

—Susan La Flesche Picotte[1]

[*] Vice President for Litigation, Goldwater Institute. My thanks to Adi Dynar of the New Civil Liberties Alliance for helpful suggestions.

[1] Susan La Flesche Picotte (Inshata Theamba), *Introduction*, WILLIAM JUSTIN HARSHA, PLOUGHED UNDER 5 (1881).

Author's Note

The following article was accepted for publication by the *American Indian Law Review (AILR)*, and a publication contract signed on May 26, 2021. On November 23, 2021, the *AILR* chose to breach that contract, and announced its refusal to publish the article, due to the fact that the editors disagree with my conclusions.[2] The *AILR* claims on its website to be "a nationwide scholarly forum for analysis of developments in legal issues pertaining to Native Americans and indigenous peoples worldwide."[3] This incident proves that that is not true. The *AILR* is instead a partisan journal whose editors will refuse to publish legal arguments that its editors disagree with—even if doing so requires them to violate their signed publication contracts. I am grateful to the editors of the *Texas Review of Law and Politics* for living up to the standards of academic debate—not to mention the obligations of contract—by publishing this article instead.

Introduction

The Indian Child Welfare Act of 1978 (ICWA)[4] establishes a set of rules governing child welfare cases involving "Indian children." These rules override state law and reduce the protections afforded to such children, thereby making it harder for state child welfare agencies to protect them from abuse or neglect, or to find them adoptive homes when needed.[5] Because

[2] For details, *see* Timothy Sandefur, *American Indian Law Review Tries to Cancel Me,* Freespace, Dec. 1, 2021, https://sandefur.typepad.com/freespace/2021/12/american-indian-law-review-tries-to-cancel-me.html.
[3] *See* American Indian Law Review, https://digitalcommons.law.ou.edu/ailr/.
[4] 25 U.S.C. § 1901 et seq.
[5] *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017).

ICWA's definition of "Indian child" is based on genetic ancestry,[6] the Act has come under criticism for establishing a prohibited racial classification.[7] But ICWA also intrudes on other constitutional values, involving the relationship between the federal government and the states. In the 2018 case of *Brackeen v. Zinke*,[8] a federal district court found various provisions of ICWA unconstitutional on the grounds that they violated federalism principles. That decision was partially affirmed and partially reversed by a narrowly divided *en banc* panel that released opinions totaling more than 300 pages,[9] addressing many of these important structural constitutional questions. This article sets aside debates about race to discuss, in light of the *Brackeen* decision, how ICWA violates principles of federalism—specifically, the limits on Congress's regulatory powers, the anti-commandeering principle, and the non-delegation doctrine.

I

WHAT ICWA DOES

To appreciate ICWA's federalism problems, it is helpful to briefly review how the act operates. This is complicated by the fact that it is an extremely unusual statute. For one thing, it appears to be the only federal law that, by its terms, is enforced exclusively by *state* officers.[10] It

[6] 25 U.S.C. § 1903(4) (defining "Indian child").
[7] *See, e.g.,* Sandefur, *Penalty Box, supra* note 3 at 59–70; NAOMI SCHAEFER RILEY, THE NEW TRAIL OF TEARS 145-168 (2016); Walter Olson, *This Isn't the Way to Protect Families' Rights,* CATO UNBOUND, Aug. 10, 2016, https://www.cato-unbound.org/print-issue/2102; *see also* Timothy Sandefur, *Fifth Circuit Will Reconsider Constitutionality of ICWA's Race-Based Burdens*, 12/3/2019 U. CHI. L. REV. ONLINE 1, 4–5 (2019) (arguing that even if ICWA does not impose a racial classification, it imposes a national origin classification).
[8] Brackeen v. Zinke, 338 F.Supp.3d 514 (N.D. Tex. 2018).
[9] Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).
[10] It is significant that, in a law review note arguing that the anti-commandeering theory discussed herein would threaten the viability of other Indian laws if endorsed by the courts, authors Leanne Gale and Kelly McClure were unable to identify *any* other Indian statute that commandeers state executive and judicial officials in a manner that

does not create a federal court system to hear child welfare cases, or establish a federal child welfare agency, or empower or require federal officials to act with respect to "Indian children." Instead, it imposes duties on *state* child welfare officials, state courts, and private parties.[11] On the other hand, it does *not* apply in tribal courts[12]—only in state courts—and it does not govern tribal lands. Instead, it applies to child welfare cases that occur *off* of tribal lands. This means that while state courts must follow ICWA's race-matching foster care and adoption placement criteria,[13] tribal courts are not required to do so.[14]

ICWA applies to certain "child custody proceedings" involving "Indian children."[15] Child custody proceedings include cases seeking the termination of parental rights (TPR), the placement of children in foster care, and adoption. "Indian child" is defined as a child who is either (a) a member of a federally recognized Indian tribe, or (b) is "eligible" for membership in a tribe and has a biological parent who is a tribal member.[16] Tribes establish their own eligibility criteria, and these differ from tribe to tribe, but all employ biological ancestry alone as a consideration, and do not consider cultural or political factors. A child who lacks any political, cultural, religious, linguistic, or other affiliation with a tribe, who has never visited tribal lands, and who is only a potential, but an actual, member of a tribe, is considered an "Indian child"

---

even resembles ICWA. *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292, 338–44 (2020).

[11] *See, e.g.,* 25 U.S.C. § 1912(d) (requiring states to provide "remedial services and rehabilitative programs" to abusive or neglectful parents before terminating their parental rights); 25 U.S.C. § 1911(b) (compelling state courts to transfer jurisdiction over certain child welfare cases to tribal court).

[12] 25 C.F.R. § 23.103(b)(1).

[13] 25 U.S.C. § 1915(a), (b).

[14] As a result, tribal courts sometimes approve of adoption of "Indian children" by adults who are not entitled to the preference. *See* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 153 (2008) (noting that after the tribal government prevailed in the lengthy legal dispute over the adoption in *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989), the tribal court permitted the adoption to proceed).

[15] 25 U.S.C § 1903.

[16] 25 U.S.C § 1903(4). It is essential to keep in mind the distinction between tribal membership, which is exclusively a matter of tribal law, and "Indian child" status under ICWA, which is a function of federal and state law. *See* In re Abbigail A., 1 Cal. 5th 83, 95 (2016) (noting this distinction).

under ICWA so long as she fits the biological profile.[17] A child who is adopted by a tribal member, lives on tribal lands, speaks a tribal language, etc., is *not* an "Indian child" if she lacks a biological parent who is a tribal member.[18]

ICWA requires state courts hearing child custody cases involving "Indian children" who are not domiciled on a reservation to transfer those cases to tribal court, unless there is "good cause" not to.[19] Where a state court proceeds to adjudicate such a case, it must comply with a set of evidentiary and procedural requirements that are separate from, and less protective than, those that apply to non-"Indian children." Thus if the state seeks to terminate the parental rights of an abusive parent in a case involving an "Indian child," it must prove beyond a reasonable doubt, based on expert witness testimony, that the child is likely to experience serious emotion or physical damage if TPR is not granted.[20] This is a different, far more demanding, standard than applies to non-"Indian children"; in their cases, the state may terminate parental rights based on clear and convincing evidence of the existence of the statutory grounds for TPR.[21] Another

[17] *See, e.g.,* In re Alexandria P., 204 Cal.Rptr.3d 617 (Cal. Ct. App. 2016) (six year old with no cultural, social, political, or religious connection to the tribe was deemed "Indian" based exclusively on genetic ancestry).
[18] *See, e.g.,* In re Francisco D., 178 Cal. Rptr. 3d 388, 395-96 (Cal. Ct. App. 2014) (determining that ICWA does not apply to a child adopted by a member of an Indian tribe).
[19] 25 U.S.C. § 1911(b). "Good cause" is not defined either in ICWA or its implementing regulations, but the BIA has stated that transfer may *not* be denied on the grounds that a child lacks any cultural affiliation with a tribe. 25 C.F.R. § 23.118(c). This regulation was meant in part to override the "Existing Indian Family" doctrine, which holds that ICWA does not apply to a child whose sole connection to a tribe is biological. That doctrine was devised as a saving construction to prevent ICWA from being unconstitutionally applied based solely on race. The regulations' overriding of the doctrine means that the trial court is *not* supposed to consider, when deciding whether to relinquish jurisdiction, the question of whether the child has any non-biological connection to the tribe. *See further* Sandefur, *Penalty Box, supra* note 3 at 65–70 (discussing how the elimination of the doctrine also eliminates the argument that ICWA is non-race based).
[20] 25 U.S.C. §1912(f).
[21] *See, e.g.*, Jade K. v. Loraine K., 380 P.3d 111, 113 (Ariz. Ct. App. 2016); In Int. of J.A.B., 374 S.E.2d 839, 840 (Ga. Ct. App. 1988); S.C. Dep't of Soc. Servs., Chester Cty. Div. v. Doster, 324 S.E.2d 86, 87 (S.C. Ct. App. 1984). In *ICWA's Irony*, 45 AM. INDIAN L. REV. 1 (2021), Professor Marcia Zug attempts to downplay the significance of this and other differences between ICWA's rules and those of state law, but her argument with respect to TPR is that some states have recently adopted laws permitting the reinstatement of terminated parental rights for non-"Indian" children in some circumstances, which she claims amounts "in effect" to "retroactively raising the applicable termination standard." *Id*. at 38. This is dubious. There is all the difference in the world between laws that make it harder to terminate the rights of abusive parents, as ICWA does, and laws that enable formerly abusive parents who

difference in the treatment of "Indian" and non-"Indian" children under ICWA is that if a state seeks to place an at-risk "Indian child" in foster care, the state must prove—again with expert witness testimony—that the child faces serious emotional or physical risk, and must make this showing by clear and convincing evidence. For non-Indian children, the preponderance of the evidence standard applies, and expert witness testimony is not required.[22]

These higher evidentiary burdens mean that state child welfare officers are often barred from protecting "Indian children" from abuse, because an "Indian child" must be abused *worse*, and for *longer*, than a child of non-Native heritage, before the state can rescue that child from harm.[23] In addition, when a state seeks to place an "Indian child" in foster care or in an adoptive home, ICWA requires state court to place the child in accordance with specified "placement preferences," which mandate that the child be placed with other "Indians" instead of with adults who are white, black, Hispanic, Asian, or of any other ethnic background.[24] ICWA also allows tribal governments to override these placement preferences, and to establish a different schedule of preferences, which state and federal officials must then follow.[25]

These restrictions are extraordinary not only because they are triggered by a child's biological ancestry, but also because they represent an extension of federal power into an area traditionally reserved to states. Family law, and the law relating to child neglect or abuse, have "long been regarded as a virtually exclusive province of the States."[26] It goes virtually without saying that Congress could not impose a nationwide law of adoption and child care (although it

---

have reformed to regain parental rights upon an appropriate showing. However laudable the latter might be, they in no way diminish the differential—and harmful—distinction created by ICWA.

[22] *See, e.g.*, Richmond Dep't of Soc. Servs. v. Carter, 507 S.E.2d 87, 88–89 (Va. Ct. App. 1998); In Int. of A.Y.H., 483 N.W.2d 820, 823 (Iowa 1992). Zug, *supra* note 19, makes no effort to address this difference in treatment.

[23] *See further* Sandefur, *Penalty Box, supra* note 3 at 47–50.

[24] 25 U.S.C. § 1915(a), (b).

[25] 25 U.S.C. § 1915(c).

[26] Sosna v. Iowa, 419 U.S. 393, 404 (1975).

can, of course, offer states funds in exchange for their complying with certain rules[27]). Yet ICWA does something like this. It does not exactly purport to create a wholly separate legal system for "Indian children." Instead, it represents a strange hybrid, which, among other things, simultaneously (a) establishes some federal rights enforceable in state court, (b) dictates rules for state courts to follow when implementing *their own* laws, (c) implements a federal administrative program which state executive and judicial officers must enforce, and (d) gives tribes authority to override state and federal law. This raises many serious federalism concerns.

II
ICWA EXCEEDS THE COMMERCE CLAUSE

A The One and Only Commerce Clause

The constitutional source of Congress's power to adopt ICWA is supposedly the Commerce Clause, which gives Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[28] This text is important because one preliminary question in assessing ICWA's constitutionality is whether the scope of Congress's power with respect to tribes differs from its power with respect to states. The Supreme Court has ruled, after all, that Congress cannot exploit the *interstate* commerce power to control ordinary non-economic matters that fall within traditional state jurisdiction, such as violent crime[29] or the possession of a firearm.[30] This limitation arises from the word "commerce," which refers

[27] This is what Congress did in the Adoption and Safe Families Act (ASFA), 42 U.S.C. § 671, et seq.
[28] U.S. CONST. art I § 8 cl. 3. Congress cited this along with "other constitutional authority" as the basis for ICWA's adoption. 25 U.S.C. § 1901(1).
[29] United States v. Morrison, 529 U.S. 598 (2000); *see also* Jones v. United States, 529 U.S. 848, 857–58 (2000) (construing federal arson statute narrowly to avoid constitutional problems that would arise if Congress sought to punish wholly intra-state crime of arson).
[30] United States v. Lopez, 514 U.S. 549 (1995).

expressly to commercial transactions and therefore excludes matters that are qualitatively non-commercial.[31] Logically, if Congress's power under the Indian Commerce Clause is likewise limited to the regulation of economic exchange, ICWA would fall outside of that power, since it governs qualitatively non-economic matters occurring wholly within state lines—i.e., foster care, adoption, and protection against child abuse or neglect.

Those championing ICWA's constitutionality are therefore at pains to show that the Constitution gives Congress broader power with respect to tribes than it does with respect to interstate commerce. This idea is *prima facie* implausible given that the Commerce Clause is a single clause, which uses the word "commerce" only once—meaning that the power given to Congress with respect to tribes is grammatically the same power (literally the exact same single word) that is given to Congress with respect to interstate economic activity and relations with foreign nations. It is extremely counterintuitive to suggest that a constitutional provision that authorizes X with respect to A, B, and C, results in three substantively different meanings of X.[32] This is not to deny, of course, that regulations of commerce with foreign nations, states, and

[31] Professor Amar has recently argued to the contrary that "commerce" in the Commerce Clause does not refer to commercial transactions, but to all "truly interstate, international or tribal" matters. AKHIL REED AMAR, THE WORDS THAT MADE US 736 n.3 (2021). In doing so, he entirely ignores Professor Barnett's finding that the term "commerce" at the time of the framing referred overwhelmingly to commercial transactions. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003). Amar does cite founding-era statutes such as 1 Stat. 137 (1790), to support his claim that Congress exercised authority to regulate both "trade" and "intercourse" with tribes, the latter term purportedly referring to matters "beyond economic regulation," *supra* at 736 n.3, but this ignores Professor Natelson's explanation that this and other statutes relating to "intercourse" were adopted not pursuant to the Commerce Clause, but pursuant to the treaty power. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 254 (2007). As explained in Section II.B below, Amar's argument therefore suffers from anachronism.

[32] *See further id.* at 215 ("Contemporaneous legal sources testify to a rule of construction holding that the same word normally had the same meaning when applied to different phrases in an instrument."). *But see* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) ("Notwithstanding the supposed strength and appeal of the presumption of intrasentence uniformity, the courts do not subscribe to the unified commerce clause theory. In fact, the courts view each subpart of the Commerce Clause as if it were its own separately phrased clause.").

tribes, may take different forms.[33] But that does not justify interpreting the Clause in a manner that places *substantively* broader authority in the single word "commerce" with respect to one of these three settings than with respect to the others. To do so would violate basic interpretive principles.[34] If "John plays baseball with his childhood friends, the Baltimore Orioles, and his children," he is very likely to play the game differently in each instance—but it would violate basic principles of grammar to conclude that he plays football, or a video game version of baseball. Likewise, the power "to regulate commerce" may be exercised in different *manner* with respect to tribes, foreign nations, and states, but it remains *substantively* the same power, and subject to the same limits, including federalism-based limits. Congress cannot rely on this power as a basis for controlling qualitatively non-commercial or intra-state matters with respect to states, and it cannot do so with respect to tribes.

B The Non-Textual "Plenary" Power

Nevertheless, some scholars, and Judge Duncan in the "Background" section of his *Brackeen* opinion, have sought to reach beyond the Clause's text to argue that Congress's authority with respect to tribes is broader than its authority with respect to foreign nations or interstate commercial activity. Professor Gregory Ablavsky even titles his article on the subject

[33] For example, "[i]n foreign commerce, the federalism constraints that limit Congress's interstate commerce power are absent." United States v. Park, 938 F.3d 354, 372 (D.C. Cir. 2019). The opposite is true with respect to ICWA cases, however, given that ICWA governs family law—a quintessential state-law matter—and regulates the citizens of states, and matters occurring on non-tribal lands.

[34] *See, e.g.*, In re Phar-Mor, Inc. Sec. Litig., 892 F. Supp. 676, 687 (W.D. Pa. 1995) ("Were we to accept plaintiffs' argument…we would be applying two different meanings to the same word as it is used in the single sentence. This we will not do."); United States v. Montgomery Ward & Co., 150 F.2d 369, 377 (7th Cir. 1945) ("a rather heavy load rests on him who would give different meanings to the same word… [T]wo different meanings to the same word will not be indulged."); Abbott v. Essex Co., 59 U.S. (18 How.) 202, 216 (1855) ("A rule of construction which would give different meanings to the same words, in the same sentence, [can rarely] be tolerated.").

"*Beyond* the Indian Commerce Clause," precisely because his analysis lays aside the plain text.[35] He cites historical "evidence"—which he admits is spotty and sometimes contradictory—that "suggests that Indian 'commerce' did mean something different" at the time of the framing "than foreign or interstate commerce" did.[36] Yet as the Supreme Court has reminded us in a number of recent high-profile cases, "extratextual considerations" and historical practices cannot trump the text of the law.[37] Had the Constitution's authors and ratifiers intended something other than the word "commerce" in the Commerce Clause, they would have made that intention clear in the wording.[38] They did not. Instead, the one and only Commerce Clause gives one and only one power: the power to regulate "commerce"—that is, commercial transactions. And even Ablavsky concludes that "the authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was *not* plenary."[39]

Yet in *Brackeen*, Judge Duncan, relying on Ablavsky's scholarship, asserted that "the Framers…endow[ed] the national government with exclusive, plenary power in regulating Indian affairs under the…Constitution."[40] He supported this by confounding two different principles: absolutism (which is what "plenary" literally means[41]) and preemption. Ablavsky and Judge Duncan cite extensive evidence that the founders intended for the federal Indian commerce

[35] Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (emphasis added)).
[36] *Id*. at 1026.
[37] *See, e.g.,* McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020). *See also* Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law.")
[38] *See also* Nixon v. United States, 506 U.S. 224, 232 (1993) ("the plain language of the enacted text is the best indicator of intent.").
[39] Ablavsky, *Beyond, supra* note 33 at 1084.
[40] *Brackeen*, 994 F.3d at 300 (opinion of Duncan, J.).
[41] *See, e.g.,* Mashunkashey v. Mashunkashey, 134 P.2d 976, 979 (Okla. 1942) ("The word "plenary" is defined by Webster's New International Dictionary as follows: 'Full; entire; complete; absolute; perfect; unqualified.'").

power to *preempt* state authority to the contrary, arguing that this was due to the founding generation's concern with preventing different states from pursuing different, potentially conflicting policies with respect to Native Americans, and there is no doubt that this was a primary concern of the framers. But preemption is not absolutism, and one searches *Brackeen* in vain for evidence that the Constitution gave the federal government power not only to preclude state authority but also to control matters that are qualitatively distinct from commercial transactions, or beyond the scope of Congress's enumerated powers. True, considerable confusion has resulted from the courts' repeated invocation of "plenary"; the Supreme Court has sometimes referred to Congress's *interstate* and *foreign* commerce powers as "plenary," too.[42] But nobody has suggested that this means Congress can go beyond its "enumerated powers" and assert "a plenary police power."[43] Whatever "plenary" might mean, it does not mean limitless, and cannot mean that Congress is free to disregard constitutional limits on its authority. Congress does not have truly plenary power over American citizens simply because it can bar states from regulating matters of interstate commerce, or truly plenary power over foreign nationals just because it can regulate commerce with foreign nations. Judge Duncan's opinion gives no reason to believe that the *Indian* Commerce Clause is more expansive.

Professor Ablavsky (who nevertheless admits that "during and after ratification…much of the nation's political elite shared an interpretation of Indian relations in which the Indian Commerce Clause played *a minor role*"[44]) attempts to offer such an argument by using a "holistic" approach to constitutional interpretation. While a full discussion of his argument

[42] *See, e.g.,* Gonzales v. Raich, 545 U.S. 1, 29 (2005) (calling interstate commerce power plenary); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423 (1946) (same); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 46 (1824) (same); Bd. of Trustees of Univ. of Illinois v. United States, 289 U.S. 48, 56 (1933) (calling foreign commerce power plenary).
[43] *Lopez*, 514 U.S. at 552, 566.
[44] Ablavsky, *Beyond, supra* note 33 at 1044 (emphasis added).

would be out of place here, two observations are warranted when considering ICWA's federalism implications.

First, it is true that the founding generation was less likely to refer to the Indian Commerce Clause when discussing the scope of federal authority with respect to tribes, because before 1871, relations with tribes primarily took the form of treaties.[45] The founders would have looked not to the Commerce Clause, but to the treaty power, when seeking an answer to whether Congress could control something like intra-state child safety or custody matters. And given that tribes and foreign nations were not subject to the overriding authority of the federal government as states are,[46] they would likely have found it even *less* plausible that Congress could, by treaty, dictate child custody or child welfare matters. In any event, the evidence brought forward in an attempt to prove that the founding generation believed Congress's Indian Commerce Clause authority to be broader than its Interstate Commerce Clause authority is better explained by reference to the now-defunct treaty-making power than by any hidden dimension in the word "commerce." Child custody matters are not commerce now, and were not commerce then. If Congress did have power to regulate child custody matters at all (which is doubtful[47]), it was under the treaty power—but ICWA, of course, is not a treaty.

---

[45] Congress prohibited the making of treaties with Indian tribes 1871. *See* 25 U.S.C. § 71. This was "constitutionally suspect." *United States v. Lara*, 541 U.S. 193, 218, (2004) (Thomas, J., concurring); *see further* Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021). Toler argues (rightly, in my view) that Congress should "[r]escind[] the 1871 statute and reinitiat[e] tribal treaty-making," which would be "consistent with the text and history of the Constitution…[and] restore[] the careful checks and balances set forth in the Constitution's structure, [including] requiring consent of two-thirds of the members present in the Senate." *Id*. at 482. In any event, the Supreme Court has said that Congress's purported closure of the treaty process with relation to tribes had no effect on "Congress' plenary powers to legislate on problems of Indians," *Antoine v. Washington*, 420 U.S. 194, 203 (1975), meaning that it neither contracted *nor expanded* the scope of the Commerce Clause.

[46] *See* Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115–16 (2002) ("unlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause…the federal government has no legitimate claim to legal supremacy over Indian tribes.").

[47] In *Federalist* No. 33 at 206 (J. Cooke ed., 1961), Alexander Hamilton thought it hard to "imagine[]" that Congress could ever "by some forced constructions of its authority" seek to change the domestic law of states such as "the law of descent [i.e., inheritance]." Such a thing was so implausible, in fact, that it could only be imagined by people whose "animosity to the Constitution amounted to "imprudent zeal."

Second, the so-called plenary power—which Ablavsky refers to as "[a] nineteenth-century innovation" not found in ratification-era writings[48]—is grounded not in the Commerce Clause but in powers relating to international diplomacy and war,[49] because at the time of the founding Native Americans were regarded as (potentially hostile) aliens. The "plenary" theory Judge Duncan endorsed in *Brackeen* holds that tribes, having once been enemy foreign nations, and then having been conquered, are today an occupied people over whom the federal government holds the kind of total control that an occupying invasion force exerts.[50] As Judge Duncan put it, "supreme federal power over the states with respect to foreign affairs and the western territories…collectively authorized [a] 'fiscal-military state committed to western expansion.'"[51] Then, as the federal government gradually "envelop[ed]…the Indian nations" through military might, it undertook a legal "duty of protection to the tribes."[52] Significantly, that duty was to tribes *qua* tribes, not to individual members of tribes—and, according to this theory, that same obligation continues unaltered to this day. However benevolently exercised in the service of a trust obligation, however, the power involved remains in principle the same kind of absolute authority that a conquering power exercises over a vanquished people—that is, despotic power.[53]

---

[48] Ablavsky, *Beyond, supra* note 33 at 1053.
[49] *See* United States v. Lara, 541 U.S. 193, 200 (2004) ("This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of [the 'plenary'] power." (citations omitted)).
[50] It is certainly true that early American law regarded Natives as conquered peoples, effectively at the mercy of the federal government, which was bound only by the structures of natural law and the claims of "humanity." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589 (1823). This conception, writes G. Edward White, relied on the assumption that Native Americans were "incapable of fully adapting to a modernizing Western world and thus fated to be wards of the state." 1 G. EDWARD WHITE, LAW IN AMERICAN HISTORY 53 (2012).
[51] *Brackeen*, 994 F.3d at 276 (opinion of Duncan, J.) (quoting Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 999 (2014)).
[52] *Id.* at 279 (opinion of Duncan. J.).
[53] *Cf.* 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1378 (Indianapolis: Liberty Fund, 2005) (1625) (describing this power as "despotick"). Whether a military conqueror holds the kind of power that would authorize something along the lines of ICWA remains doubtful. Grotius suggests as much, but only on the theory that the conquered people essentially become the slaves of the conqueror, *id*. at 1374-80, and nobody has ever suggested that militarily defeated Native Americans thereby became slaves. It is even more doubtful that a similar theory would

Whatever the merits of this narrative, however, it ignores a crucial detail from after the founding: In 1924, Native Americans were made citizens of the United States, and of the state where they reside.[54] This is an overwhelmingly significant fact—and yet it goes unmentioned by the *Brackeen* court. The grant of American citizenship to Native Americans necessarily transformed the relationship between federal (and state) governments and tribal members. While Native citizens remain citizens of tribes, with certain unique legal consequences flowing therefrom, they are not aliens.[55] They "share in the territorial and political sovereignty of the United States,"[56] and are constitutionally entitled to the same legal protections other Americans enjoy. States owe them the same obligations of protection and due process that they owe to other citizens.[57] While state authority over reservation land is obviously curtailed, and tribes retain authority "over Indians who consent to be tribal members,"[58] tribal members cannot be treated by American law as foreigners, let alone as a vanquished foe whose rights exist merely at the sufferance of the victor.[59]

---

survive in light of the modern law of nations. During the allied occupation of Japan, for example, laws relating to adoption were changed, but this was with the consent of the legislature of occupied Japan, and in any event the changes were relatively minor. *See* Cornelia Weiss, *The Nineteenth Amendment and the U.S. "Women's Emancipation Policy" in Post-World War II Occupied Japan: Going Beyond Suffrage*, 53 AKRON L. REV. 387, 420–22 (2019); Kurt Steiner, *Postwar Changes in the Japanese Civil Code,* 25 WASH. L. REV. & ST. B.J. 286 (1950) (discussing postwar changes in Japanese family law).

[54] 8 U.S.C. § 1401(b); U.S. CONST. Amend. XIV § 1.

[55] Clinton, *No Federal Supremacy Clause, supra* note 41 at 251 characterizes the Indian Citizenship Act as "an effort to subvert tribal sovereignty by co-opting tribal members through the substitution of a new allegiance." But like all American citizens, tribal members are free at any time to surrender their American citizenship if they choose. And as Clinton acknowledges, Native Americans are by and large proud of their American citizenship. *Id.* at 247-48. *See also* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 854 (1990) ("For most Native American communities, then, amalgamation into the American polity was brought about through a grant of American citizenship…. After the Indian Citizenship Act of 1924, Native American governments and tribal courts in the United States no longer were outside the federal union.").

[56] Duro v. Reina, 495 U.S. 676, 693 (1990).

[57] *See, e.g.,* McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172–73 (1973).

[58] *Duro*, 495 U.S. at 693.

[59] *See further* Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 334-36 (2017) ("American Indians are citizens…. The Fourteenth Amendment applies to states in relation to American Indians just as it does to all other citizens. States may not discriminate against American Indians except when such discrimination is narrowly tailored to a compelling state interest.")

This fact disrupts the model advanced in Judge Duncan's *Brackeen* opinion, which views the Indian Commerce Clause power as effectively as all-encompassing and absolute (albeit benevolently exercised), as opposed to being the ordinary regulatory power that the federal government has with respect to commerce among the several states. He holds that federal power with regard to tribes—not tribal members, but tribes themselves—was essentially transferred undiminished from the days in which Natives were subjugated enemy aliens to the present day, so that Congress's power with respect to tribes "remains doctrine imposed by…'the conqueror.'"[60] It is on that premise that he bases his conclusion that Congress can do whatever is "reasonably related to the special government-to-government political relationship between the United States and the Indian tribes," including things that are "not…specifically directed at Indian self-government."[61] This is a remarkably patronizing legal theory; one that is, in the words of Walter Echo-Hawk, "plucked out of thin air…against the backdrop of federal guardianship of dependent, supposedly inferior race of people—a dubious basis upon which to sanction the rule of Native people by unlimited power, a despotic power aimed at no other Americans in U.S. history."[62]

The better view is that the extension of citizenship to tribal members makes truly "plenary"—i.e., absolute—power inapplicable, assuming it was ever legitimate in the first place.[63] *Absolute* power is, after all, *not* a feature of constitutional government among citizens.

[60] Ablavsky, *Beyond, supra* note 33 at 1088–89 (quoting Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823)).
[61] *Brackeen*, 994 F.3d at 334 (en banc).
[62] WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 163 (2010).
[63] True, the Supreme Court has said that "the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government," Bd. of Comm'rs of Creek Cty. v. Seber, 318 U.S. 705, 718 (1943), but this can be true only if the word "plenary" is given a drastically different meaning than it ordinarily carries.

It is instead a feature of the state of war.[64] And it is therefore revealing that instead of substantiating the principle of plenary (that is, absolute or despotic) federal power over Native American citizens, Judge Duncan's opinion instead makes a case for *preemptive* federal power, which is a wholly different subject. This argument is, in short, a *non sequitur*.[65] The fact that the federal government bears the primary responsibility of matters relating to Native Americans, and can preempt the states in service of that responsibility, does not show that this power is absolute, i.e., "plenary," or that it gives Congress authority to establish a federal family law code within the states.

Whatever the complexities of federal Indian law, however broad the authority of the federal government with respect to Native Americans, and however much the federal and state governments have wronged Native citizens both before and since, the Indian Citizenship Act marks a legal transition from a constitutional regime premised on hostility and alienness to one marked, in principle, by reciprocity, voluntarism, and political equality.[66] This does *not* mean, as the Supreme Court once said, that the Indian Citizenship Act placed Native American citizens "outside the reach of police regulations on the part of Congress,"[67] but it does mean that arguments in favor of essentially limitless federal power with respect to Native Americans are meritless, and that the history of conquest is insufficient to justify the federal government's (or a

[64] John Locke, *Second Treatise of Civil Government* § 17 *in* PETER LASLETT, ED., JOHN LOCKE: TWO TREATISES OF CIVIL GOVERNMENT 320 (REV. ED. 1963) (1689) ("he who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him."). *See also* GROTIUS, *supra* note 51 at 1377 (describing the absolute power gained by a conqueror as meaning that the defeated people "are not a State, but a Multitude of Slaves.").

[65] More accurately, it is a species of "motte-and-bailey" fallacy, which occurs when one conflates a logically indefensible position with a logically defensible one, then advances the former by arguments that only establish the latter. *See generally* Nicholas Shackel, *The Vacuity of Postmodernist Methodology*, 36 METAPHILOSOPHY 295 (2005). In this case, it advances the argument for substantively plenary power through arguments that only establish federal preemption.

[66] *Cf.* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1116–17 (2004) ("the conferral of citizenship…did not and could not yield a plenary power over the new citizens. After all, the federal government does not have plenary power over all U.S. citizens.").

[67] In re Heff, 197 U.S. 488, 509 (1905), overruled by United States v. Nice, 241 U.S. 591 (1916).

state's) disregard of constitutional protections that apply to Native citizens, including the protections of federalism.[68] The federal and state governments can do things to non-citizens that it cannot do to citizens—they can deport noncitizens,[69] or deny them certain public benefits,[70] or employment,[71] or the right to vote[72]—none of which can be done to citizens. On the contrary, state and federal governments owe citizens, particularly children, a duty of protection.[73] Whatever else the Indian Citizenship Act did, it utterly prohibited states from denying Native American citizens the equal protection of the laws.[74] Any truly "holistic" analysis of Congress's constitutional powers and duties with respect to Native Americans must incorporate these facts.

ICWA, however, disregards this principle and forces state officials to treat Native children, including those who are not tribal members, but who, based on biological ancestry are *eligible* for membership, differently from other American citizen children. It requires the application of different, more burdensome standards of proof. It forces state courts to transfer jurisdiction over their cases to tribal courts, even though these children do not reside on tribal land and even if they have no cultural, political, social, or religious connection to a tribe, and

---

[68] As the Court has often emphasized, federalism is as much a protection for the individual citizen as are the more familiar provisions of the Bill of Rights. *See, e.g.,* Bond v. United States, 564 U.S. 211, 221–22 (2011); New York v. United States, 505 U.S. 144, 181 (1992).
[69] *See* Holland L. Hauenstein, *Note: Unwitting and Unwelcome in Their Own Homes: Remedying the Coverage Gap in the Child Citizenship Act of 2000*, 104 IOWA L. REV. 2123, 2134–39 (2019) (describing deportation of people who, although adopted by American citizens, were not granted citizenship in the United States).
[70] *See, e.g.,* 8 U.S.C. § 1622.
[71] Foley v. Connelie, 435 U.S. 291, 297–300 (1978).
[72] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).
[73] "Citizenship as…a ground of protection was old when Paul invoked it in his appeal to Caesar," wrote Justice Jackson in *Johnson v. Eisentrager*, 339 U.S. 763, 769–70 (1950). "The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection…. [T]he Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance…. It is neither sentimentality nor chauvinism to repeat that 'Citizenship is a high privilege.'" *Id*. (citation omitted). *See also* Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 723 (1877) ("Every State owes protection to its own citizens"); Frowert v. Blank, 54 A. 1000, 1001–02 (Pa. 1903) ("Every state owes a duty to its citizens to protect them in the assertion of their claims"). To be clear, it is not my contention that states are *parens patriae* to their citizens in challenges to federal authority, a doctrine rejected in *Massachusetts v. Mellon,* 262 U.S. 447, 485–86 (1923). My contention is simply that states and the federal government are obligated to respect and protect the individual rights of their citizens, particularly children.
[74] *See* Fletcher, *supra* note 57 at 336.

even where tribal courts lack personal jurisdiction.[75] And it effectively overrides the "best interest of the child" standard, either by establishing a separate-but-equal "Indian" version of the best interest test, or by imposing a *per se* presumption that it is always in the best interest of an "Indian child" to be placed in accordance with tribal government preferences.[76] To the extent that this differential treatment has been justified by analogy to the federal government's powers relating to *foreigners*—for instance, by analogy to international adoptions[77]—the fact that "Indian children" are American citizens shows that this is a false premise. And whatever the scope of the tribal trust relationship, the fact that the children in question are citizens of the state and of the United States militates against the idea that Congress can discharge its trust relationship in a manner that prejudices their individual rights.

Judge Duncan's discussion of the federal-tribal relationship makes no reference to these considerations. Instead, it elevates the federal government's obligation toward tribes, viewed in their corporate or collective capacities, above any concern for the individuals of which they consist. Indeed, his treatment of the "enduring covenant" between the federal government and the "tribes" focuses *exclusively* on federal obligations toward the sovereignty of tribal entities, and makes no mention of the federal and state governments' covenants with America citizens of Native American ancestry.[78] It speaks at length of Congress's obligation to preserve the

[75] 25 U.S.C. § 1911(b); 25 C.F.R. § 23.118(c).
[76] *See* Sandefur, *Penalty Box, supra* note 3 at 11–18.
[77] *See, e.g.,* Zug *supra* note 19 at 83–87 (attempting analogy between ICWA and international adoptions).
[78] *Brackeen*, 994 F.3d at 302 (opinion of Duncan, J.). The use of the term "covenant" brings to mind the explanation in the preamble of the Massachusetts Constitution (written by John Adams) that "[t]he body politic…is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Mass. Const. preamb. Judge Duncan's analysis neglects this *individual* covenant that exists between the federal (and state) governments on one hand, and their Native citizens on the other. Yet "the Constitution protect *persons*, not *groups*." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Moreover, any true consideration of the covenant to which Judge Duncan refers would have to include reference to the Indian Civil Rights Act, 25 U.S.C. § 1302, which purports to guarantee various individual rights, such as the rights of due process.

"existence of tribal communities"—i.e., tribes as institutions, not *members* of tribes—and makes no mention of the obligation of state and federal governments to secure the individual rights of their citizens.[79] True, some scholars have taken the extreme position that the entire classical liberal individual rights paradigm on which the state and federal constitutions are based is categorically inapplicable to Native Americans.[80] But the validity of these generalizations, and the merit *vel non* of a political society premised not on choice but on blood, are beside the point because the Indian Citizenship Act made Native Americans fellow citizens, and entitled them to have courts prioritize their *individual* rights.[81]

Equally noteworthy—but unmentioned in *Brackeen*—is that whatever obligation Congress may have to perpetuate the existence of tribes, it also has an obligation to protect the legitimate sovereignty of states.[82] As the Supreme Court has observed, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."[83] While Congress may supersede state authority in pursuance of one of its enumerated powers, it is nevertheless obligated to respect and preserve the states'

[79] *Brackeen*, 994 F.3d at 305-06 (opinion of Duncan, J.).
[80] *See, e.g.,* STEPHEN CURRY, INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT 99 (2004) ("To be citizens on a par with others is to be de facto whites, to engage in a process not of their making, and so to have indigenous voices silenced."); DUTHU, *supra* note 12 at 140 (arguing that principles of individual rights are only a "Western legal theory" inapplicable to Native Americans). *See also* Christine Zuni, *Strengthening What Remains*, 7-WTR KAN. J.L. & PUB. POL'Y, 17, 28 (Winter 1997) (chart claiming that whereas individual rights are "paramount" in the "Anglo-American model," the "paramount" value in "indigenous communities" is the "rights of the community.").
[81] Of course, one great advantage to the individual rights paradigm is that it permits those who would prefer to modify or even waive those rights to do so. In other words, an adult citizen can decide, pursuant to the individual rights guaranteed under the state and federal constitutions, that she would prefer to live in the tribal community if she chooses. In the same way, and for the same reason, a proper application of the classical best interest of the child standard in a child welfare case will include an evaluation of whether the child would be better off in the tribal community.
[82] *See, e.g.*, Com. of Pa., Dep't of Pub. Welfare v. United States, 781 F.2d 334, 342 (3d Cir. 1986) (referring to "the federal judicial obligation to protect state sovereignty and laws absent clear declarations by Congress.")
[83] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

constitutionally appropriate autonomy.[84] How to resolve conflicts between these two considerations is, of course, for Congress to decide, subject to the Constitution.[85] But the point here is that the federalism problems raised by ICWA's intrusion onto state autonomy cannot be waved away by talismanic reference to the tribal trust relationship.

Nor can it be dismissed by merely citing Congress's "plenary" powers. In fact, in this respect, Judge Duncan's *Brackeen* made a revealing yet contradictory comment. Citing *Delaware Tribal Business Committee v. Weeks*[86]—which said that "Indian legislation" must comply with "the equal protection component of the Fifth Amendment," and that whatever "plenary" may mean, "it is not absolute" power[87]—he concluded that *Weeks* "in no way shackles Congress's authority."[88] Yet in a footnote, he referred to *Weeks*'s statement that Congress's "plenary" power must be exercised "consistent[ly] with the anticommandeering doctrine and other constitutional principles" as "*unremarkable*."[89] But it is quite remarkable indeed, because if indeed the "plenary" authority is subordinate to constitutional principles such as federalism, due process, and equal protection, then not only does the Constitution "shackle" Congress's authority, but the constitutional objections to ICWA are simply not resolved by reference to Congress's purportedly plenary authority. This "unremarkable" proposition demonstrates that

[84] *See further* Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (observing that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Alden v. Maine, 527 U.S. 706, 713 (1999) ("Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance."); Texas v. United States, 86 F. Supp. 3d 591, 650 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015) (referring to the federal government's "duty to protect the states.").
[85] Congress's trust relationship to the tribes is obviously constitutionally constrained. Congress could not, for example, eliminate the existence of a state in the service of its obligation toward tribes. It could not waive the Fourth Amendment search warrant requirement in the service of its obligation toward tribes.
[86] 430 U.S. 73 (1977).
[87] *Id*. at 84 (citations omitted).
[88] *Brackeen*, 994 F.3d at 306 (opinion of Duncan, J.).
[89] *Id.* at 331 n.47 (opinion of Duncan,. J.) (emphasis added).

answering constitutional objections to ICWA by appeals to Congress's "plenary" power is nothing more than question-begging.

C. Even Under the Treaty Power, ICWA Would be Unconstitutional

Even viewing ICWA from the perspective of "the special government-to-government political relationship between the United States and the Indian tribes,"[90] ICWA still fails the constitutional test. First, the federal government cannot use its foreign affairs powers in ways that deprive American citizens of their right to due process. And second, Congress cannot use the treaty power to expand its reach to cover matters denied to Congress by the Constitution. However "plenary" federal power may be in respect to tribes or foreign relations, it must still be exercised in accordance with federalism and due process, as Judge Duncan conceded.[91]

In *Reid v. Covert*,[92] the Supreme Court held that Congress could not, even pursuant to an international agreement with a foreign country, force American citizens to undergo trial in a tribunal that failed to accord the full due process protections guaranteed by the Constitution. The case involved agreement between the United States, Japan, and Britain, under which military courts would hear cases involving crimes committed in those countries by American servicemen stationed there, or by their spouses.[93] When some civilian wives of American servicemen committed crimes, they were tried in these military courts, which did not entitle the defendants to jury trials or other Bill of Rights protections.[94] The Court found this unconstitutional. Congress

[90] *Id.* at 334 (opinion of Duncan, J.).
[91] *Id.* at 331 n.47 (opinion of Duncan, J.).
[92] 354 U.S. 1 (1957).
[93] *Id.* at 15-16.
[94] *Id.* at 16.

could not "exercise power under an international agreement without observing constitutional prohibitions," since that would, "[i]n effect…permit amendment of [the Constitution]" through the treaty power.[95] Neither the power to regulate the military nor the Necessary and Proper Clause could render such an agreement constitutional.[96] The Constitution did not allow Congress to "set[] up a rival system" of courts where American citizens were tried without "the same protection which exists in the civil courts."[97]

The same principles apply with respect to the federal-tribal relationship.[98] Under ICWA, a child custody case involving a child who is eligible for tribal membership must be transferred from the jurisdiction of the state court to the jurisdiction of a tribal court, even if neither the child nor any adult involved in the case is domiciled on—or has ever visited—tribal lands. This results in tribal courts asserting authority to decide cases in the absence of personal jurisdiction.[99] Personal jurisdiction is, of course, a function of due process,[100] and tribal courts are obliged to follow it.[101] Yet ICWA appears simply to assume that tribal courts have personal jurisdiction over children based on their eligibility for tribal membership, even where eligibility depends exclusively on biological ancestry. Congress cannot, of course, create personal jurisdiction by fiat,[102] and the exercise of tribal court jurisdiction over cases where the only "minimum contacts" are a child's biological ancestry is unconstitutional.

---

[95] *Id.* at 17.
[96] *Id.* at 19-20.
[97] *Id.* at 30, 37.
[98] *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693–94 (1990) (citing *Reid* for the proposition that Congress cannot subject American citizens to trial in tribal criminal court).
[99] *See, e.g.,* Matter of C.J., Jr., 108 N.E.3d 677, 695–97 (Ohio 2018); *see also* Sandefur, *Penalty Box, supra* note 3 at 23–32 (discussing ICWA's personal jurisdiction problems).
[100] Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (personal jurisdiction requirement is part of due process).
[101] Red Fox v. Hettich, 494 N.W.2d 638, 645 (S.D. 1993).
[102] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir.1981) (statute "cannot create personal jurisdiction where the Constitution forbids it.")

Moreover, tribal courts are not required to abide by the Bill of Rights.[103] Compulsory transfer of cases involving American citizens not domiciled on reservation, from state courts that have competent jurisdiction into tribal courts that are not bound by constitutional protections, is irreconcilable with the principles of *Reid*. If Congress cannot do this under its international relations power (where, again, it enjoys "plenary" power[104]) it certainly cannot do it under the Indian Commerce Clause. Such transfers, in fact, are not only a violation of due process, but also a violation of federalism, given that states have sovereign authority to create and enforce a legal code governing family law matters within their territory.[105] Forcing states to surrender this jurisdiction to tribunals where that state's citizens will be denied due process protections deprives states of that authority and interferes with the states' obligation to their citizens.

Such intrusion is one reason why, however nebulous the boundaries of the treaty power may be, the Court has always been reluctant to let Congress exploit it in ways that would intrude on matters of traditional state authority. In *Bond v. United States*,[106] the Court fashioned a saving construction of the International Chemical Weapons Treaty in order to avoid the troubling constitutional questions that would arise if Congress were to attempt to prosecute ordinary intra-state crimes falling within the state's jurisdiction. In his concurring opinion, Justice Scalia pointed out that while the Constitution allows Congress to make laws necessary and proper for regulating interstate commerce, it does not give Congress power to make laws necessary and

[103] Nevada v. Hicks, 533 U.S. 353, 383–84 (2001) (Souter J., concurring); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).
[104] California Bankers Ass'n v. Shultz, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress over both interstate and foreign commerce is not open to dispute.")
[105] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601 (1982).
[106] Bond v. United States, 572 U.S. 844, 858 (2014); *see also* United States v. Pink, 315 U.S. 203, 230 (1942) ("even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy"); Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.").

proper for carrying into execution its treaty-making power. Were it otherwise, Congress could "acquir[e] a general police power"[107] by adopting a treaty that dictated matters of state law, and then writing statutes to enforce the treaty's provisions.[108]

Heeding Justice Scalia's warning, the Michigan Federal District Court ruled in 2018 that Congress could not rely on the International Covenant on Civil and Political Rights (ICCPR) to authorize a federal statute against female genital mutilation (FGM), which falls within the police power.[109] "Like the common law assault at issue in *Bond*," the court explained, "FGM is 'local criminal activity' which, in keeping with longstanding tradition and our federal system of government, is for the states to regulate, not Congress. Therefore, even accepting the government's contention that the criminal punishment of FGM is rationally related to the cited articles of the ICCPR, federalism concerns…prevent Congress from criminalizing FGM."[110]

Even assuming that the foreign affairs power is the proper lens through which to analyze ICWA's constitutionality, it plainly fails these tests. Child abuse and neglect, TPR, foster care and adoption, are all matters of state law.[111] For Congress to assert authority—whether as function of its commerce power or some hybrid of the commerce and treaty powers—either to dictate to states how they may decide such cases, or to force states to relinquish jurisdiction over these cases to another sovereignty, is to attempt to bootstrap itself into a police power in just the manner Justice Scalia warned about in *Bond*—a police power, moreover, that applies not on

[107] *Bond,* 572 U.S. at 879 (Scalia, J., concurring).
[108] *See id*. at 875 (Scalia, J., concurring).
[109] United States v. Nagarwala, 350 F. Supp. 3d 613, 617–21 (E.D. Mich. 2018), *appeal dismissed* 2019 WL 7425389 (6th Cir. 2019).
[110] *Id.* at 620–21.
[111] *See, e.g.,* Sosna, , 419 U.S. at 404; Ex parte Burrus, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."); *cf.* United States v. Windsor, 133 S.Ct. 2675, 2689–90 (2013) ("By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States.").

territory governed by tribes, but on *non-tribal* land; in every community in the nation where a child eligible for tribal membership might be subject to a child custody proceeding.

The consequences of ICWA's effort to federalize state family law are extraordinary. Consider, for example, *Matter of Adoption of B.B.*,[112] in which the Utah Supreme Court decided that there is a uniform federal legal standard (of "reasonableness") governing what constitutes the acknowledgement of paternity. Acknowledgment of paternity is quintessentially a matter of state law, and there is no basis in ICWA—let alone the Constitution—for concluding that Congress can impose a uniform federal standard for such a question.[113] Yet in *B.B.*, a state court (and state courts are the fora in which ICWA cases are virtually always decided) put itself in the position of fashioning a federal common law to govern domestic relations matters relating to children who do not reside on tribal land and who, in many cases, are not tribal members at all, but are merely eligible for membership based on genetic ancestry. That marks a truly extreme step toward the "conver[sion] [of] congressional authority" into "a general police power of the sort retained by the States."[114] After all, if there is a single, nationwide standard for acknowledgment of paternity—a legal concept never mentioned in ICWA's text—then surely there is also a single, nationwide standard to govern "active efforts" or even for TPR. And, *ex hypothesi*, there would be nothing to bar Congress from adopting a federal family law code in the manner suggested by Justice Scalia: by ratifying an international agreement that governs the

[112] 417 P.3d 1 (Utah 2017), *cert. denied sub nom.* R.K.B. v. E.T., 138 S.Ct. 1326 (2018).
[113] Unsurprisingly, the Utah Supreme Court's purportedly national standard is in conflict with the laws of other states, where courts have held that *state* law governs acknowledgment of paternity in ICWA cases. *See* Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 174–75 (Tex. App. 1995); Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925, 935 (N.J. 1988). *See also* Kevin Heiner, *Note: Are You My Father? Adopting A Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings*, 117 COLUM. L. REV. 2151, 2172 (2017) ("Not only is there no federal standard, but the interpretation of the term from state to state is far from consistent.").
[114] United States v. Lopez, 514 U.S. 549, 567 (1995).

relations between parents and children. The reasoning of *B.B.* certainly leads toward the federalization of family law.

III

ICWA VIOLATES THE NON-COMMANDEERING PRINCIPLE

A. The Anti-Commandeering Principle

The anti-commandeering principle holds that while federal law is supreme, and therefore takes precedence over state law, Congress cannot force state officials to execute federal law. In *Printz v. United States*,[115] the Court held that federal laws that required state law enforcement officers to "make a reasonable effort" to determine whether a person's purchase of a firearm would be illegal,[116] to maintain and examine certain records,[117] and under some circumstances, to destroy certain records, were unconstitutional.[118] "[C]ompelled enlistment of state executive officers for the administration of federal programs" exceeded Congress's authority, the Court said.[119] The federal government can dispatch its own officers to enforce federal laws—and of course state officials cannot obstruct them—but the federal government cannot "direct state law enforcement officers to participate…in the administration of a federally enacted regulatory scheme."[120]

Printz built on the precedent of *New York v. United States*,[121] which involved the legislative, rather than the executive branch. That case concerned a federal law relating to the disposal of radioactive waste, which directed state legislatures to take title to certain waste,

[115] 521 U.S. 898 (1997).
[116] *Id*. at 903.
[117] *Id.* at 932 n.17.
[118] *Id.* at 903.
[119] *Id*. at 905.
[120] *Id*. at 904.
[121] 505 U.S. 144 (1992).

whether they wanted to or not.[122] The Court found that while Congress may direct the execution of federal laws, and may offer states incentives to adopt legislation Congress deems worthy, it may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[123] To compel states to legislate according to the will of Congress would exceed Congress's power—since Congress may only legislate directly upon citizens[124]—and would violate the federal government's obligation to respect the (albeit limited) sovereignty of the states.

The anti-commandeering principle is not so much a limit on Congress's authority as a rule restricting the means by which Congress exercises its authority. In both *Printz* and *New York*, Congress was exercising its Commerce Clause authority (which, again, has also been called "plenary"[125]), and the Court never denied that Congress could use that power to reach regulate handguns or radioactive waste. But when Congress "regulate[s] commerce…among the several states,"[126] it must do so in a manner that respects the independent authority of state governments.

When it comes to executive branch officials, the anti-commandeering rule is relatively straightforward, because a state's executive branch can simply decline to enforce federal law. But ICWA imposes mandates on both state executive and state judicial officers, which complicates the commandeering question, because state courts are constitutionally obligated to enforce federal law.[127] Some commentators have concluded that the anti-commandeering rule

[122] *Id.* at 153-54.
[123] *Id*. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)).
[124] *See id.* at 162.
[125] *See, e.g., Gonzales*, 545 U.S. at 29; *Gibbons*, 22 U.S. (9 Wheat.) at 46.
[126] U.S. CONST. art. I § 8 cl. 3.
[127] U.S. CONST. art. VI § 2.

cannot in principle apply to state judicial officers.[128] But this is incorrect. The rationale behind the anti-commandeering principle depends on the nature of federal sovereignty: because the federal government does not (with some exceptions) have authority over states in their corporate capacities, but only over individual citizens,[129] Congress can write federal laws that mandate *individual* behavior—and state courts must enforce these laws—but Congress cannot regulate states *qua* states, or make states into "puppets."[130] Congress can accord substantive rights to individuals which state executive officials must respect, and which state courts must enforce in jurisdictionally appropriate cases—for instance, it can adopt a federal civil rights law enforceable in state courts, and as part of that law, it can require state judges to follow certain procedural rules with respect to the application of that federal statute.[131] But it cannot dictate the evidentiary or procedural standards state courts must follow when applying *their own* state laws (say, decreeing what the evidentiary standard in a slip-and-fall tort case must be[132]). To do that would be to dictate to states how they may exercise their own autonomous power—treating them as puppets—just as the federal law in *New York* sought to force the state legislature to pass certain legislation. That unconstitutionally "infring[es] upon the core of state sovereignty."[133]

B. How ICWA's Mandates Cross the Line into Commandeering

[128] *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, 318 (2020).
[129] *See New York,* 505 U.S. at 163.
[130] *Printz,* 521 U.S. at 928 (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975)).
[131] *Printz,* 521 U.S. at 907.
[132] There are exceptions: for example, Congress could choose to use its Fourteenth Amendment authority to supersede state authority in various ways, and presumably could even dictate how state courts enforce their own laws if doing so were "congruent and proportional" to remedy an ongoing violation of state authority. *See generally* Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003).
[133] *New York*, 505 U.S. at 177.

Whether ICWA unconstitutionally commandeers state officials, turns on three questions. First, does it compel state *executive branch* officials to enforce a federal regulatory scheme? Second, does it require state *judicial* officers to enforce federally created substantive rights—in which case it represents an unremarkable application of the Supremacy Clause—or does it dictate to state courts how they may enforce their own state law causes of action? And if the latter, does it do so in a way that is nevertheless constitutionally admissible?

1. ICWA Commandeers State Executive Officials

ICWA imposes several mandates on state executive branch officials. For example, it requires state child welfare officers who seek to take an abused or neglected Indian child into foster care to first make "active efforts" to "provide remedial services and rehabilitative programs" to the child's birth family.[134] This "active efforts" requirement differs from the "reasonable efforts" requirement that is part of all state laws as well as the federal Adoption and Safe Families Act.[135] "Reasonable efforts" means that a state child welfare agency diligently provides social services appropriate to a family's need to prevent the permanent removal of the child from the home.[136] This generally means making services available and providing information and opportunities for rehabilitation—but it does not require the utmost efforts by the state in the face of parental failure to cooperate,[137] and it is excused in cases of "aggravated circumstances" such as drug addiction or sexual molestation.[138] In short, "reasonable efforts

[134] 25 U.S.C. § 1912(d).
[135] *See, e.g.,* 42 U.S.C. § 671(a)(15); Alaska Stat. § 47.10.086 (2016); Iowa Code § 232.102(5)(b); Minn. Stat. § 260.012(a).
[136] *See, e.g.,* Matter of A.M., 105 N.E.3d 389, 416 (Ohio 2018).
[137] *See, e.g.,* People ex rel. C.T.S., 140 P.3d 332, 335 (Colo. Ct. App. 2006).
[138] *See, e.g.,* In re Jac'Quez N., 669 N.W.2d 429, 435 (Neb. 2003).

means doing everything reasonable, not everything possible."[139] By contrast, although ICWA does not define "active efforts," there is general consensus that it requires that the state engage in more than "reasonable efforts,"[140] and it is *not* excused by aggravated circumstances.[141]

Another way in which ICWA forces state executive officials to implement federal administrative rules is with respect to foster care. ICWA requires state officials, when an "Indian child" is placed in foster care, to follow ICWA's placement preferences, which mandate that a child must be placed in foster care either with (a) a member of the family, or (b) with a foster home licensed by the child's tribe, or (c) with an "Indian foster home,"[142] or (d) with an institution approved by *any* tribe, even if not the child's own.[143] Given how few Indian foster homes are available, this presents a serious burden for state child welfare officials.[144] (The *Brackeen* court found part of this requirement unconstitutional on the grounds that failing to distinguish between tribes—so that, say, an Apache child must be placed with a Navajo family

[139] In re Daniel C., 776 A.2d 487, 503 (Conn. App. 2001).
[140] *See, e.g.,* People ex rel. A.R., 310 P.3d 1007, 1015 (Colo. Ct. App. 2012).
[141] *See, e.g.,* In re K.S., 448 S.W.3d 521, 532 (Tex. App. 2014); In re. People ex rel. J.S.B., Jr., 691 N.W.2d 611, 618 (S.D. 2005).
[142] "Indian foster home" is not defined in ICWA, but the BIA defines it as a foster home in which one or more of the foster parents is an Indian as defined in Section 1903(3) of ICWA. *See* 23 C.F.R. § 23.2 (June 14, 2016).
[143] 25 U.S.C. § 1915(b).
[144] *See* John Kelley, *L.A.'s One-and-Only Native American Foster Mom*, THE IMPRINT, June 14, 2016, https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823. The consequence of this shortage is that "Indian children" are frequently placed in "noncompliant" foster homes, with the consequence that they can be, and often are, removed again and placed in another home, and then another, and so forth, in a cycle that only ends when the child "ages out" of the system. *See generally* Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557 (2006) (discussing the phenomenon of "aging out."). This lack of stability can have calamitous consequences for children, to whom stability is a crucial value. *See, e.g.,* VIRGINIA L. COLIN, INFANT ATTACHMENT: WHAT WE KNOW NOW at ii (U.S. Dep't of Health & Human Servs., 1991) ("The importance of early infant attachment cannot be overstated. It is at the heart of healthy child development and lays the foundation for relating intimately with others, including spouses and children."); Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 LAW & INEQ. 401, 402 (2012) ("children who…age out of the foster care system without a permanent family are shown to have consistently negative life outcomes."). Perhaps the most infamous example is that of Richard Cardinal, a First Nations child in Canada who committed suicide in 1984 at the age of 17 after having been placed in 28 homes during his time in the Alberta child welfare system. *See* RICHARD CARDINAL: CRY FROM A DIARY OF A MÉTIS CHILD (Alanis Obomsawin, dir. 1986).

rather than with a white, black, Asian or Hispanic family—lacked even a rational relationship to ICWA's stated goal of preserving tribes.[145])

In addition, when state officials seek to take Indian children into protective foster care or to find them adoptive homes, ICWA requires these officials to introduce expert witness testimony to the effect that doing so is necessary to prevent severe harm to the children.[146] Not just any expert witness will do; Bureau of Indian Affairs (BIA) regulations require that the expert be "qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe," and *forbid* the state from using "the social worker regularly assigned to the Indian child" as the expert witness.[147] This inevitably raises the difficulty and cost whenever state child welfare agencies seeking to protect the rights of at-risk "Indian children."

ICWA also requires state officials to keep and maintain certain records. These records must show the efforts made to comply with the placement preferences, and they must be made available at any time to the Secretary of the Interior or to tribal officials.[148] One reason these records must be maintained is that ICWA gives Indian children, parents, and tribal governments the authority to invalidate any foster care placement or TPR upon a showing that the state court failed to comply with ICWA.[149]

ICWA thus conscripts state executive officials into the enforcement of a federal regulatory scheme in several ways. State child welfare officers (who fall within the executive branch) are compelled to administer ICWA by providing the remedial services mandated by the "active efforts" requirement, to seek out foster or adoptive homes that comply with ICWA's

[145] *Brackeen*, 994 F.3d at 392–401 (en banc).
[146] 25 U.S.C. § 1912(e), (f).
[147] 25 C.F.R. § 23.122(a), (c).
[148] 25 U.S.C. § 1915(e).
[149] 25 U.S.C. § 1914.

preferences, and to keep records to prove these efforts, open to inspection at any time in the event that tribal officials or others wish to undo a placement determination made by a state court.

These mandates are indistinguishable in principle from those invalidated in *Printz*. The en banc majority in *Brackeen* found that they violated the anti-commandeering principle.[150]

2. ICWA Commandeers State Judiciaries

As far as state judiciaries are concerned, ICWA contains provisions that are truly *sui generis*. In cases involving "Indian children," it requires state courts applying their own *state law* TPR statutes to employ the "beyond a reasonable doubt" evidentiary standard, and receive certain testimony from expert witnesses.[151] This is not the evidentiary standard used in the family law of any state with respect to *non*-"Indian children."[152] Also, in cases where state courts apply *their own* foster care statutes, ICWA requires them to use the "clear and convincing evidence" evidentiary standard, again with expert witness testimony,[153] which is not the standard that applies under the law of any state with respect to non-"Indian children." In other words, ICWA substitutes different evidentiary rules within state statutes.

The consequences of these substituted evidentiary standards can be bizarre. In one 2017 Arizona case, for example, a mother who was a member of the Tohono O'odham Nation and lived off the reservation initiated a TPR proceeding against a dangerous and potentially abusive

[150] *Brackeen*, 994 F.3d at 267–69 (per curiam); *id.* at 404–09 (en banc).
[151] 25 U.S.C. § 1912(f).
[152] On the contrary, the Supreme Court made clear in *Santosky v. Kramer,* 455 U.S. 745, 769 (1982), that such a high evidentiary standard would create "evidentiary problems" that "would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption."
[153] 25 U.S.C. § 1912(e).

birth father.[154] Had the child been non-Indian, the applicable evidentiary standard would have been "clear and convincing evidence" pursuant to Arizona statute.[155] The Tohono O'odham law with respect to TPR also uses the "clear and convincing" standard, however.[156] Thus, if the child had been either non-Indian, or if the family had lived on reservation, the "clear and convincing" standard would have applied. But because the family lived off-reservation, and the child qualified as an "Indian child" under ICWA, the Arizona state court was compelled to apply the "beyond a reasonable doubt" standard, instead.[157]

The Supreme Court has never directly addressed the question of whether the anti-commandeering rule can apply to judicial officers.[158] But it logically follows from the principles of anti-commandeering that a federal law forcing state judges to comply with a separate federal rule within the adjudication of a state-law causes of action is the kind of "dragoon[ing]"[159] or "puppet[eering]"[160] that the Constitution forbids.[161] If Congress has "power to regulate individuals, not States"—that is, it can regulate things, but cannot "regulate state governments' regulation" of things[162]—it is plain that commandeering can occur if Congress purports to direct state courts how they may interpret and apply their own laws.[163] On the other hand, Congress can create federal laws that supersede state laws, including statutes that create federal rights which state courts are bound to enforce. Thus in deciding whether ICWA commandeers state

[154] Justine R., et al., v. Quigley, et al., No. CV-17-0298-PR (Ariz. Feb. 13, 2018), on file with Goldwater Institute.
[155] A.R.S. § 8-5347(B).
[156] TOHONO O'ODHAM CODE tit. 3, ch. 1, art. 5, § 1517(F).
[157] The parent, unable to afford the cost of litigation under that standard, withdrew the case. *See* Timothy Sandefur, *Recent Developments in Indian Child Welfare Act Litigation: Moving toward Equal Protection?*, 23 TEX. REV. L. & POL. 425, 447–48 (2019).
[158] *See generally* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).
[159] *Printz*, 521 U.S. at 828 (citation omitted).
[160] *Id.* (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975)).
[161] *See* Bellia, *supra* note 156 at 976 n.160.
[162] *New York*, 505 U.S. at 166.
[163] Again, with the possible exception of when Congress acts pursuant to Section Five of the Fourteenth Amendment.

judicial officers, the crucial distinction is between statutes that create federal substantive rights enforceable in state court, and those that dictate to state courts how they may apply their own laws, which are invalid commandeering.[164]

There are some provisions of ICWA that do create distinct federal legal rights—for example, it gives parents a right, in TPR cases, to have legal documents translated into a Native language where necessary.[165] But in other vital respects, it does not create substantive rights, but dictates how *state* law is to be applied—that is, it establishes the methods state courts must follow when applying causes of action that are creatures of *state* law. This is analogous to a hypothetical federal statute barring states from convicting defendants of robbery or battery absent a confession, or requiring a witness to validate a holographic will. Nor does ICWA simply preempt state child welfare laws. Crucially, it expressly *declines* to do so, but instead directly instructs state courts as to the proper means of implementing *non-preempted* state law.[166]

The *Brackeen* court concluded that ICWA does not commandeer state judicial officers,[167] but the two leading opinions differed in their reasoning. Judge Dennis asserted that ICWA does not tell states how to apply their own laws, but merely "alter[s] substantive aspects of state claims"[168] or "'modif[ies]' the substance of state law claims" in a manner permitted to Congress.[169] He gave as examples of such valid modification several federal statutes that change

---

[164] Bellia, *supra* note 156 at 958–63.
[165] 25 U.S.C. § 1913(a).
[166] This is what makes Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998), inapplicable here. Professors Redish and Sklaver contend that state courts can be required to apply federal statutes that preempt state law, but make no reference to the (admittedly *sui generis*) situation presented by ICWA, in which the statute purports to leave state statutes in place, but compels state courts to interpret them differently with respect to a specific class of citizens.
[167] Except for the recordkeeping requirement in Section 1951(a), which it concluded does unconstitutionally commandeer state courts, because it forces state courts to turn over certain information to the Secretary of the Interior, maintain records of child placement, and make these records available—provisions highly analogous to the record-retention and investigative mandates that were found invalid in *Printz*. *Brackeen*, 994 F.3d at 417–19 (en banc).
[168] *Id.* at 319 (opinion of Dennis, J.).
[169] *Id.* at 318 (opinion of Dennis, J.).

the rules governing state-law litigation, such as statutes that allow people who are prevented from participating in litigation due to their military service to reopen closed state court judgments against them.[170] If Congress can, pursuant to its power to regulate the military, give service members the power to supersede the finality of state court judgments on matters of state law, Judge Dennis reasoned, then it should also have authority under its "plenary" power with respect to tribes to order state courts to follow certain evidentiary standards or to follow other rules in state law cases.[171] Judge Dennis also found that ICWA does not merely dictate how states enforce their own laws, but "creates federal rights," so Congress can require that states comply with certain rules without crossing the line into commandeering.[172]

This theory ignores some important distinctions. Federal laws entitling service members to postpone or reopen state court proceedings during their time in the military are not comparable to the mandates ICWA imposes. The latter change the evidentiary standards state courts must apply when adjudicating state-law causes of action, which alters substantive outcomes in ways that timelines, or opportunities for relitigation, typically do not. Also, the constitutionality of reopenings or postponements is a function of how minimal they are, as the Iowa Supreme Court recognized when it said that such laws "[are] to be used as a shield for defense, and not as a sword for attack, or as an instrument for the oppression of opposing parties."[173] In other words, federal statutory postponements or reopenings are "necessary and proper" for carrying into effect Congress's power to regulate the military, precisely because they do nothing more than delay litigation or prevent default judgments.[174] That is why delays or reopenings are *not*

[170] *See id.* (citing the Soldiers' and Sailor's Relief Act, 54 Stat. 1180).
[171] *Id.* (citing In re Larson, 183 P.2d 688, 690 (Cal. Dist. Ct. App. 1st 1947)).
[172] *Id.* at 319 (opinion of Dennis, J.).
[173] Semler v. Oertwig, 12 N.W.2d 265, 270 (Iowa 1943).
[174] *Cf. Printz,* 521 U.S. at 923-24 (whether a law is "necessary and proper" is determined by reference to its effect on state sovereignty).

automatically given under these statutes. If postponement or reopening would prejudice another party under state law, the state court can refuse to grant that delay or to reopen the case.[175] And a party seeking to reopen a state court judgment under such statutes must first show a meritorious claim or defense *under state law*.[176] ICWA, by contrast, does not apply only where a party's case is *prima facie* meritorious under the state's own laws. Instead, it compels state judges to apply a *different* legal standard than would ordinarily apply under state law. And it contains no exception in the event of prejudice to a party—since, of course, that prejudice is the whole purpose of the Act. And ICWA's evidentiary standards, which apply to cases "under State law," contain no "good cause" exception as the laws postponing litigation or allowing reopening do.[177]

Judge Dennis also pointed to the Foreign Sovereign Immunities Act and the Parental Kidnapping Prevention Act as examples of federal statutes that change the standards governing state law causes of action,[178] but these are disanalogous for similar reasons. The Foreign Sovereign Immunities Act deprives state courts of jurisdiction over cases against certain foreign governments.[179] But ICWA's evidentiary requirements do not simply deprive state courts of jurisdiction; quite the contrary, the evidentiary standards at issue here only apply to cases in which state courts *retain* jurisdiction.[180] And it is doubtful that Congress could alter state law even when legislating with respect to the "vast external realm" of foreign affairs.[181] Congress is

[175] Keefe v. Spangenberg, 533 F. Supp. 49, 50 (W.D. Okla. 1981).
[176] Courtney v. Warner, 290 So. 2d 101, 103–04 (Fla. Dist. Ct. App. 1974).
[177] 25 U.S.C. § 1912(d), (e), (f).
[178] *Brackeen*, 994 F.3d at 318–19 (opinion of Dennis, J.).
[179] 28 U.S.C. § 1604.
[180] *Compare* 25 U.S.C. § 1911(a), (b) (vesting jurisdiction in tribal courts for cases arising on reservation and requiring state courts to transfer jurisdiction to tribal courts for cases not arising on reservation) *with* 25 U.S.C. § 1912(d),(e), and (f) (applying to proceedings "under State law" that remain in state court).
[181] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936). In *Curtiss-Wright,* one of its most expansive interpretations of the foreign affairs power, the Court nevertheless said that the President's authority in international matters "of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id*. at 320. *See also Bond*, 572 U.S. at 857 (interpreting chemical weapons treaty narrowly because doing otherwise "would 'dramatically intrude[ ] upon traditional state criminal jurisdiction.'" quoting United States v. Bass, 404 U.S. 336, 350 (1971)).

not necessarily free to supersede state law on matters falling squarely within states' authority. In any event, as discussed above, the analogy to foreign law on which Judge Dennis premised much of his opinion is misconceived.

As to the Parental Kidnapping Prevention Act,[182] that Act is an exercise of Congress's authority to require state courts to grant full faith and credit to the acts of other states,[183] meaning that it does not purport to dictate to state courts how they are to apply their own domestic laws in wholly intra-state matters. Instead it provides that under certain (interstate) circumstances, state courts must apply the judgments of other state courts. This is in no way comparable to ICWA's provisions imposing different evidentiary standards in child custody matters brought under state law.[184] In fact, the principles of full faith and credit are instructive, because it is a longstanding rule that these principles *do not* require states to enforce the statutes of other jurisdictions in contravention of their own public policies.[185] Full faith and credit does impose a greater obligation on courts to apply foreign *judgments*, but even there, a forum court is not required to do so where the foreign court lacked jurisdiction or denied basic due process in rendering its judgment.[186] ICWA's evidentiary standards leave state courts with no comparable discretion. State courts are commanded to apply ICWA's different evidentiary standards when applying

[182] 28 U.S.C. § 1738A.
[183] *See* State ex rel. Valles v. Brown, 639 P.2d 1181, 1184 (N.M. 1981).
[184] True, some provisions of ICWA require state courts to accord full faith and credit to judgments of tribal courts, 25 U.S.C. § 1911(d), and these provisions are obviously constitutional, but they are not what Judge Dennis was addressing.
[185] Nevada v. Hall, 440 U.S. 410, 421–22 (1979), *overruled on other grounds* Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485 (2019); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939).
[186] *See, e.g.,* Starr v. George, 175 P.3d 50, 55 (Alaska 2008).

their own state statutes, regardless of—indeed, in direct contradiction to[187]—their own state's public policies.[188]

The majority in *Brackeen* took a view slightly different than Judge Dennis.[189] It concluded that ICWA "does [not]…enact federal procedural rules that state courts must prefer over their own procedures…[or] impose procedural rules for state-law claims in state courts," but only "enacts substantive child-custody standards applicable in state child-custody proceedings."[190] This was the extent of the majority's analysis, and it is plainly incorrect: ICWA *does* specify how state courts must operate when they enforce their own child protection statutes, foster care rules, and adoption laws. ICWA explicitly declares that it applies not to some federal substantive law of child welfare (which does not exist anyway) but to "proceeding[s] *under State law*."[191] That is, it presupposes that the substantive law being applied in a child custody proceeding is the *state's* child welfare law.[192] The Act's own text expressly declares that in a

[187] This is because applying ICWA's evidentiary standards (and placement preferences) can conflict with the "best interest of the child" principle that is the foremost public policy of the states in child welfare cases. Most courts have dealt with this conflict in one of two ways. Some have concluded that there is a distinct (that is to say, separate but equal) best interest standard for Indian children, in which the child's individual interests are only one of the "constellation" of factors to be considered (as opposed to the traditional best interest test, which prioritizes the individual child's needs and circumstances above other considerations). *See e.g.,* In re Alexandria P., 204 Cal.Rptr.3d 617, 634 (Cal. Ct. App. 2016). This creates a literal system of separate-but-equal. Others have concluded that ICWA creates a virtually conclusive presumption that placement in accordance with a tribal government's desires is *per se* in the best interest of an Indian child. The first option is, of course, subject to the objection that it is a race-based distinction. This conflicts with the longstanding rule that conclusive presumptions relating to a child's best interests are unconstitutional. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972). *See further* Sandefur, *Penalty Box, supra* note 3 at 55–56.

[188] The "good cause" exception in 25 U.S.C. § 1915 would at first glance seem to offer state courts an opportunity for such discretion, but as noted *infra,* note 211, the exception has been interpreted so as *not* to allow state courts to exercise their independent judgment regarding, for example, whether the best interest of the child warrant departing from ICWA's mandates.

[189] *Brackeen*, 994 F.3d at 416 (en banc).

[190] *Id.* at 417 (en banc).

[191] 25 U.S.C. § 1912(c) (emphasis added).

[192] 25 U.S.C. § 1912(c), (e), (f) (emphasis added).

case brought under state law, separate and distinct federally-dictated evidentiary standards and procedural requirements (expert witness testimony) must be satisfied.[193]

The en banc court found that Congress can "supersede state standards even in realms of traditional state authority such as family and community property law"[194]—citing as examples the Employee Retirement Income Security Act (ERISA), federal laws relating to military retirement income, and the Railroad Retirement Act. But those statutes, like the ones Judge Dennis cited, are disanalogous because they do not instruct state courts how to apply their own state laws. Instead, they overtly supersede state law and grant substantive federal rights (which state courts must enforce).

The *Brackeen* majority cited *Egelhoff v. Egelhoff ex rel. Breiner*[195] as an example of a federal statute (ERISA) "preempt[ing] a state probate rule and so dictat[ing], contrary to state law, the beneficiaries of pension and insurance proceeds."[196] But *Egelhoff* did not involve a federal effort to instruct state judges about how to apply their *own* laws. Instead, it was an ordinary preemption case that found that a state law (which provided that divorce would automatically terminate certain pension benefits to ex-spouses) was superseded by ERISA, which declares that a pension administrator must make payments to "a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.'"[197] *Egelhoff* is simply irrelevant, because ICWA's evidentiary rules do not purport to preempt state law—quite the opposite. Nor does ERISA regulate *judges*, as ICWA does. ERISA regulates plan administrators. And while

[193] In *United States v. Antelope*, 430 U.S. 641, 649 n.11 (1977), the Supreme Court observed that it would be constitutionally troubling if there were a statute that "subjected [Indians] to differing…burdens of proof from those applicable to non-Indians charged with the same offense."
[194] *Brackeen*, 994 F.3d at 417 (en banc).
[195] 532 U.S. 141 (2001).
[196] *Brackeen*, 994 F.3d at 417 (en banc).
[197] *Egelhoff*, 532 U.S. at 147 (quoting 29 U.S.C. § 1002(8)).

it, like other federal laws, relies on the "background principles"[198] of state law, it does not tell state courts what evidentiary standards govern the application of those state laws. Rather, in a routine application of the Supremacy Clause, ERISA nullifies state laws and substitutes federal rules and rights which state courts must enforce. ICWA, by contrast, directly regulates state courts *qua* state courts, and orders them to apply different evidentiary standards than they otherwise would when applying their own laws relating to TPR, adoption, foster care, etc.

To understand the distinction more fully, consider how TPR works. TPR is a function of state statutes, which set out the grounds on which a birth parent's rights can be terminated. Arizona, for example, provides that a court can order TPR if there is adequate proof of abandonment, willful abuse, mental illness, chronic drug or alcohol abuse, imprisonment, voluntary waiver, or other similar facts.[199] These elements must be proven by clear and convincing evidence in cases not involving "Indian children."[200] But in cases involving "Indian children"—who, again, are children who either hold tribal citizenship or who are "eligible" for it tribal membership in the future[201]—ICWA overrides requires a state court, *which is still applying Arizona's TPR statute,* to find the existence of these elements beyond a reasonable doubt instead, based on expert witness testimony.[202] The Arizona legislature could amend its TPR statute if it chose, and change the elements for TPR: it could, for example, repeal the provision relating to chronic drug use, or specify what facts may be used to prove abandonment.[203] If it did so, ICWA

[198] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).
[199] A.R.S. § 8-533.
[200] Arizona Dep't of Econ. Sec. v. Matthew L., 225 P.3d 604, 606 (Ariz. Ct. App. 2010).
[201] 25 U.S.C. § 1903(4).
[202] 25 U.S.C. § 1912(f).
[203] In *Holyfield*, the Supreme Court considered it "improbable" that Congress, in enacting ICWA, could have intended to let states define "domicile" in ways that affected the outcome of ICWA cases because that would lead to a "lack of nationwide uniformity." 490 U.S. at 45. Yet it is plain that ICWA leaves states free to add to, or subtract from, the substantive elements of a cause of action for TPR. *But see* In re Adoption of B.B., 417 P.3d 1 (Utah 2017), *cert. denied sub nom.* R.K.B. v. E.T., 138 S. Ct. 1326 (2018) (declaring that there is a uniform standard of

would *not* preempt that amendment, despite the fact that the amendment would have significant consequences for all child custody proceedings, including ICWA cases, going forward. By contrast, if Arizona were to change its laws relating to pensions, that would have *no* effect on ERISA, and *would* be preempted, because ERISA creates its own set of rules and overrides state laws to the contrary. In short, ICWA's evidentiary provisions do not *preempt* state law, but "intrude" on the "mode of enforcement" of state law, which Congress cannot do.[204] The *Brackeen* court's conclusion that ICWA does not "enact federal procedural rules that state courts must prefer over their own procedures" or "impose procedural rules for state-law claims in state courts" is simply false.[205]

The *Brackeen* decision would give Congress drastic new power to manipulate how state courts apply their own statutes. Consider: Courts have said that Congress has "plenary" power over the "rights, duties, and responsibilities in the framework of the military establishment."[206] Keeping in mind that ICWA applies not just to tribal members but to children who are "eligible" for membership,[207] the *Brackeen* court's reasoning would suggest that Congress could (say) pass a law providing that if 18 year olds who have registered for the draft—and are therefore *eligible* for military service, which is subject to Congress's plenary authority—are involved in a slip-and-fall tort case, the state court may not decide the matter by summary judgment. The Court has also said that Congress has "plenary" power to legislate for the District of Columbia.[208] *Brackeen*'s reasoning would appear to mean that Congress could forbid state courts from

"reasonableness" governing acknowledgment of paternity in ICWA cases). *See also* Sandefur, *Recent Developments, supra* note 155 at 449–52 (discussing *B.B.*).
[204] In re Tarble, 80 U.S. (13 Wall.) 397, 407–08 (1871).
[205] *Brackeen*, 994 F.3d at 417 (en banc).
[206] Chappell v. Wallace, 462 U.S. 296, 301 (1983).
[207] *Brackeen*, 994 F.3d at 398 (opinion of Duncan. J.).
[208] El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 94 (1909).

receiving written testimony in inheritance disputes involving any person who might one day move to Washington, D.C. Congress has "plenary" power to regulate commerce with foreign nations, too.[209] *Brackeen*'s rationale would mean that Congress could pass a law prohibiting state courts from convicting any person of a felony in the absence of a confession, if that person is, due to his ancestry, eligible for Greek or Irish citizenship.[210] In short, the idea that Congress can control how state courts apply their own statutes in cases involving potential members of a class over which it has "plenary" authority would drastically expand federal power.

Judge Dennis brushed aside these implications as "far-fetched, counterfactual, law-school exam hypotheticals,"[211] but they are not more far-fetched than ICWA, which, among other things, forces child protection agencies to return abused children to the families that are abusing them,[212] blocks Native mothers from terminating the parental rights of abusive ex-spouses, even if those ex-spouses are non-Indian,[213] and treats American citizens as if they were foreigners.[214]

3. ICWA's Placement Preferences and Commandeering

[209] Bd. of Trustees of Univ. of Illinois v. United States, 289 U.S. 48, 56 (1933).
[210] *Cf. Brackeen*, 994 F.3d at 338 n.51 (opinion of Dennis, J.).
[211] *Id*. at 331 n.47 (opinion of Dennis, J.).
[212] *See, e.g.,* In re Interest of Shayla H., 855 N.W.2d 774 (Neb. 2014); *see further* Sandefur, *Penalty Box, supra* note 3 at 38–42.
[213] *See, e.g.,* Matter of Adoption of T.A.W., 383 P.3d 492, 496 (Wash. 2016); *see also* Timothy Sandefur, *Family Malpractice*, THE WEEKLY STANDARD, Apr. 13, 2018, https://www.washingtonexaminer.com/weekly-standard/family-malpractice.
[214] Judge Duncan offered other hypothetical examples, such as "a federal law mandating different comparative fault rules in state tort suits involving Swedish visa holders" or "stricter adverse possession rules for French merchants in state property disputes," but in one sense these would be *less* extreme than what ICWA actually does, given that ICWA's separate rules apply not to foreign citizens, but cases involving American citizens who *could someday* have joint citizenship (and to their prospective adoptive or foster parents, even if they are not eligible at all). *Brackeen*, 994 F.3d at 377 (opinion of Duncan, J.). More analogous would be stricter adverse possession rules for persons who *have the option of someday becoming* French merchants, or distinct comparative fault rules in cases involving children whose ancestry entitles them *someday to become* Swedish citizens.

While the *Brackeen* court upheld the constitutionality of ICWA's evidentiary rules it was equally divided regarding the constitutionality of its placement preferences,[215] its requirement that state officials notify tribal governments about the existence of a child welfare proceeding involving an Indian child,[216] and a record-keeping requirement applicable to state courts.[217] This equal division meant that the district court opinion finding these provisions unconstitutional was affirmed.

With respect to the placement preferences, the dispute again centered around whether ICWA creates a substantive federal right enforceable in state court (which by definition does not violate the anti-commandeering rule) or whether it forces states to implement a federal regulatory program. Judge Duncan concluded that because the placement preferences "require state agencies to undertake extensive actions,"[218] they unconstitutionally commandeer state executive agencies. Judge Dennis, by contrast, concluded that the placement preferences "create[] federal rights in favor of Indian children, families, and tribes," and therefore are not commandeering.[219]

Judge Dennis's interpretation is unpersuasive because the placement preferences do not entitle any individual to any particular benefit or result.[220] Instead, they require a state court to follow a certain procedure when placing an at-risk "Indian child" in foster care or an adoptive home: the court must follow a specified schedule of preferences (and the court may depart from that schedule if there is "good cause" for doing so[221]). But this does not guarantee any

[215] 25 U.S.C. § 1915.
[216] 25 U.S.C. § 1912(a).
[217] 25 U.S.C. § 1951(a).
[218] *Brackeen*, 994 F.3d at 415 (opinion of Duncan, J.).
[219] 994 F.3d at 319 (opinion of Dennis, J.).
[220] Again, there are other, separate provisions of ICWA that do create federal substantive rights, such as the right to have certain documents provided in a parent's language. *See* 25 U.S.C. § 1913(a).
[221] 25 U.S.C. § 1915(a), (b). "Good cause" has never been adequately defined in the cases. Notably, most state courts have concluded that the best interest of the child is *not* a legitimate consideration in this good cause

substantive result or benefit, or substantively restrict official discretion. Thus the preferences are more analogous to sentencing guidelines, which are procedural in nature,[222] or to the requirement of a hearing, which creates no substantive right,[223] than like the kind of substantive federal cause of action that Congress can require state courts to implement.

The substance-procedure distinction is complicated, of course, but the Court has held that procedural rules "regulate secondary rather than primary conduct,"[224] meaning that they control *how* courts do business rather than the ends or goals they must attain. It has also said that a rule is substantive if it determines "the range of conduct or the class of persons that the law [controls]," and procedural if it "regulate[s] only the *manner of determining*" the rights or liabilities of parties.[225] A clearer distinction is that a law qualifies as "substantive" if it establishes an entitlement to relief.[226] But ICWA's placement preferences do not create a legal entitlement to relief.[227] On the contrary—while section 1914 gives children, parents, and tribes a right to petition a state court for invalidation of a nonconforming placement decision, ICWA *does not* allow this in the event that a state court fails to comply with the placement preferences.[228] Thus, rather than creating an entitlement to relief, those placement preferences are best characterized as regulating "only the *manner of determining*" placement of an Indian

determination. *See, e.g.,* In re C.H., 997 P.2d 776, 782 (Mont. 2000). Also, the BIA has determined by regulation that "good cause" to depart from the placement preferences may *not* be established based on the child's emotional attachment to his or her foster parents. 25 C.F.R. § 23.132(e). As a result, the emotional trauma inflicted on a child by removing her from the foster family with whom she has spent two thirds of her life is not grounds for departing from the placement preferences. *See, e.g.,* In re Alexandria P., 204 Cal.Rptr.3d 617 (Cal. Ct. App. 2016) (six year old taken from the family with whom she had lived for four years, due to her ancestry).

[222] Gall v. United States, 552 U.S. 38, 51 (2007).

[223] *Cf.* Shango v. Jurich, 681 F.2d 1091, 1100–01 (7th Cir. 1982).

[224] Landgraf v. USI Film Prod., 511 U.S. 244, 275 (1994).

[225] Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

[226] *See, e.g.,* Lindh v. Murphy, 521 U.S. 320, 327 (1997).

[227] Navajo Nation v. Superior Ct. of State of Wash. for Yakima Cty., 47 F. Supp. 2d 1233, 1242 (E.D. Wash. 1999), *aff'd sub nom.* Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041 (9th Cir. 2003).

[228] Section 1914 entitles parties to petition for the invalidation of a placement that violates Sections 1911, 1912, or 1913, but not 1915, which contains the placement preferences.

child,[229] not as establishing a federal right which can be enforced in state court. ICWA dictates to state judges the tests they must use when applying *state* laws relating to child welfare. They do not create an independent federal right state courts must enforce.

Another important step in deciding whether the placement preferences violate the anti-commandeering rule relates to the principle of "even-handedness." This principle holds that no commandeering occurs when Congress passes a law regulating an activity in which both state and private actors happen to engage, even if that law requires state agencies to undertake costly compliance activities, because any such effect is only incidental, and does not represent an effort by Congress to treat the state as its own instrumentality.[230] Judge Dennis concluded that ICWA "evenhandedly" regulates both state and private actors,[231] because ICWA's mandates apply both to state child welfare agencies and to private individuals seeking TPR or seeking to adopt Indian children.

But although this theory has an initial plausibility, it fails upon closer examination. True, ICWA's findings section does say the Act was intended to apply to "public and private agencies,"[232] and some provisions of ICWA can arguably apply to both. This is disturbing, because it is a truly extraordinary expansion of federal law to say that Congress can adopt a statute governing private intra-family disputes about child custody[233]—matters that are quintessentially matters of state law and far beyond the traditional limits of federal power.[234] This is why it remains a matter of considerable dispute whether ICWA actually does apply to

[229] *Schriro*, 542 U.S. at 353.
[230] *See, e.g.,* Reno v. Condon, 528 U.S. 141 (2000).
[231] *Brackeen*, 994 F.3d at 323 (opinion of Dennis, J.).
[232] 25 U.S.C. § 1901(4).
[233] *See* Sandefur, *Recent Developments, supra* note 155 at 448–52.
[234] *Cf.* United States v. Windsor, 570 U.S. 744, 770 (2013).

cases involving no public entities.[235] But even assuming that it does, Judge Dennis's conclusion suffers from a fallacy, because ICWA's *placement preferences* do *not* regulate the activities of private parties. They regulate *placements,* which are effectuated exclusively by state actors. Private entities cannot effectuate a placement without state authorization, and it is the state action that is controlled by the placement preferences.[236] Adoption requires a court order, as does foster care. And while state child welfare agencies can make temporary placements without a court order, they, too, must eventually obtain court orders. It is these state actions—court-ordered placements and temporary agency placements—that Section 1915 of ICWA governs.[237] The preferences therefore apply only to states, not to private parties. As the en banc majority explained in rejecting Judge Dennis's "even-handedness" argument, ICWA "is not regulation of an 'activity' states engage in alongside private actors, like bond issuance or data sharing."[238] Instead, it "directly regulates state 'child custody proceeding[s]'….in service of a federal regulatory goal," which is quintessential commandeering.[239] The typical "even-handed" statute is one that affects states in their capacity as market participants or property owners (say, a regulation of employment benefits[240]). But ICWA dictates to states how they may or must treat

[235] *See, e.g.,* In re Sengstock, 477 N.W.2d 310, 313 (Wis. App. 1991) (ICWA "does not apply" to "an intrafamily dispute."); Comanche Nation v. Fox, 128 S.W.3d 745, 753 (Tex. App. 2004) (ICWA applies "only to situations involving the attempts of public and private agencies to remove children from their Indian families, not to inter-family disputes.); In re ARW, 343 P.3d 407, 410–12 (Wyo. 2015) (ICWA did not apply to a TPR case in which no "breakup" of an Indian family was implicated). *But see* S.S. v. Stephanie H., 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied sub nom.* S.S. v. Colorado River Indian Tribes, 138 S.Ct. 380 (2017) (ICWA applied to intra-family dispute); *T.A.W., supra* note 211 (same). *See also* Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119, 1153–54 (2010) ("The applicability of ICWA may be uncertain when a non-parent files a private action that is called something other than a guardianship or adoption.").

[236] The only exceptions appear to be those which would already be consistent with ICWA's placement mandates. For example, Wisconsin law allows a birth parent to place a child for adoption in the home of a relative without a court order. Wis. Stat. § 48.835(2). But such a placement would automatically satisfy ICWA's placement preferences anyway, and is therefore not to the contrary.

[237] *See* 25 U.S.C. §1915(c) (referring to "the agency or court effecting the placement").

[238] *Brackeen*, 994 F.3d at 412 (en banc).

[239] *Id.* (quoting 25 U.S.C. § 1903(1)).

[240] *See, e.g.,* Ohio v. United States, 154 F. Supp. 3d 621, 662 (S.D. Ohio 2016), *aff'd*, 849 F.3d 313 (6th Cir. 2017)

their own citizens.[241] In fact, as the en banc court pointed out, Judge Dennis's theory of "even-handedness" would allow Congress to commandeer states into any federal program so long as Congress also requires private entities to participate.[242] It could, for example, require state officials to conduct background checks of firearms purchasers, so long as it also required private gun sellers to do so—an outcome plainly barred by *Printz*.

Although the en banc court rejected the "even-handedness" theory, it nevertheless failed to agree as to whether the placement preferences, the notification requirement, or the record-keeping requirement commandeered. Most disappointing is the court's failure to grasp the unique way in which ICWA conscripts state judges. The majority correctly determined that ICWA "creates no federal cause of action state courts must enforce,"[243] but incorrectly concluded that it does not impose procedural rules for state-law claims—despite the fact that the placement preferences expressly declare that they apply to "placement[s]…*under State law*,"[244] and that the evidentiary standards ICWA requires apply expressly to proceedings "*under State law*."[245] ICWA's plain text directly contradicts the conclusion that the Act does not impose procedural rules for state courts to follow when applying their own statutes.

IV
NONDELEGATION

ICWA contains a provision that allows tribal governments to supersede the placement preferences established in the Act by adopting a different set of preferences which state courts

[241] *Brackeen*, 994 F.3d at 410 (en banc).
[242] *Id.*
[243] *Id*. at 417 (en banc).
[244] 25 U.S.C. § 1915(a) (emphasis added); *see also* 25 U.S.C. § 1915(e),
[245] 25 U.S.C. § 1912(d) (emphasis added); *see also* 25 U.S.C. § 1912(e), (f) (referring to "such proceeding[s]," which are the proceedings "under state law" referred to in subsection (d)).

are then required to follow.[246] The District Court found that this violated the non-delegation doctrine, but the Court of Appeals reversed, upholding this provision of ICWA on the grounds that it is merely "a prospective incorporation of tribal law [and] an express delegation by Congress under its Indian affairs authority."[247] But as this combination of incorporation and delegation suggests, ICWA's grant of authority to tribes is highly unusual. It does not fit within longstanding principles of delegation and is difficult to square with constitutional rules.

The distinction between incorporation and delegation is a fine one.[248] Delegation empowers an entity to write rules. Incorporation adopts, or rubber-stamps, the rules established by some independent entity. Thus incorporation is delegation "viewed from the other direction."[249] The non-delegation doctrine holds that Congress cannot give away its power to legislate. Lawmakers must set the rules, and although they may empower the executive branch or another entity to interpret or apply those rules, they cannot place some other entity in the position of actually *making* the rules. Or, as John Locke put it, the people have given the legislature the power to make laws, not to make legislators.[250] Congress may not delegate lawmaking authority to a private entity at all.[251] But it can give agencies broad authority, and leave those agencies with power to "fill any gap left."[252] When it does this, however, it must provide a statutory "intelligible principle" to cabin the delegatee's discretion.[253]

---

[246] 25 U.S.C. §1915(c).
[247] *Brackeen*, 994 F.3d at 352 (en banc).
[248] Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 104 (2008); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337 (2015).
[249] Larkin, *supra* note 246 at 360.
[250] Locke, *Second Treatise of Civil Government* § 141, *supra* note 62 at 408-09.
[251] Ass'n of Am. Railroads v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *rev'd on other grounds*, 575 U.S. 43 (2015). Congress can allow private parties to participate in regulation, however, so long as the ultimate regulating entity is the government. *See, e.g., Currin v Wallace*, 306 U.S. 1 (1939).
[252] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (quoting Morton v. Ruiz, 515 U.S. 199, 231 (1974)).
[253] Mistretta v. United States, 488 U.S. 361, 372 (1989).

Congress has also incorporated law from other sources, and has sometimes done so on an ongoing basis, meaning that as a foreign entity changes its law, the domestic law automatically changes with it. For example the Lacey Act[254] makes it a crime to import into the United States any flora or fauna taken in violation of foreign law, which means that if a foreign government prohibits or permits the taking of some item in the future, that prohibition or permission will also be automatically incorporated into the Lacey Act, without any action on the part of Congress.[255]

Whether viewed as incorporation or delegation, the constitutional problem with this provision of ICWA is the same: it hands federal lawmaking authority to entities that are not answerable in any way to the people of the United States or of the states—entities, moreover, that are likely to use that authority to benefit themselves, without meaningful checks or balances.

The typical delegation establishes a general rule and authorizes an enforcement agency to define important terms or otherwise to fill in the gaps. But ICWA does not do this. It sets forth a schedule of placement preferences for adoption or foster care, and then allows tribes to "establish a different order of preference by resolution," which state agencies and courts must then follow, so long as that new order is "the least restrictive setting appropriate to the particular needs of the child, as provided in [Section 1915(b)]." (Section 1915(b) itself requires that a foster care placement be "in the least restrictive setting which most approximates a family and in which [the Indian child's special needs, if any, may be met."[256]).

Thus ICWA's preferences provision does not establish a rule and then delegate authority to explain that rule or resolve ambiguities in it. Instead, it creates a rule which tribes may then

[254] 15 U.S.C. §§ 1371 et seq.
[255] *See* Larkin, *supra* note 246 at 347–54.
[256] The odd phrase "least restrictive setting" was written to conform to the Adoption Assistance and Child Welfare Act, which defines the phrase as "most family like." 42 U.S.C. § 675 (5)(A). *See* H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

override with new rules that state and federal entities must obey. This extremely unusual arrangement is less like delegation (or incorporation) and more akin to the type of unilateral veto power held invalid in *INS v. Chadha*,[257] or *Clinton v. New York*.[258] In the typical delegation—say, a statute that prohibits pollution and then empowers the Environmental Protection Agency to determine what qualifies as a "pollutant"—the agency adopts a regulation that specifies the circumstances under which the executive branch will take action to enforce the statute.[259] It would be unlawful for the agency to write a rule that *contravenes* the statute (by, for example, declaring that pollutants may be emitted without punishment[260]). That would substitute the will of the agency for the will of Congress entirely. But ICWA permits something like this: it allows tribes to write their own schedule of preferences which, as a function of federal law, supersede both the state's own laws and ICWA itself. Ordinary delegation contemplates the delegatee acting as an agent of the delegator; it contemplates the legislature acting as the principal, simply copying what another entity does. But ICWA contemplates tribes being the principals. It empowers them to nullify provisions of state and federal law, and substitute their own.[261]

Chadha involved a statute whereby the Attorney General could suspend deportation of an unlawfully admitted alien, but then allowed one house of Congress to pass a resolution overruling the Attorney General's determination. The Court found this invalid because such a

[257] 462 U.S. 919 (1983).
[258] 524 U.S. 417 (1998).
[259] *See, e.g.,* 42 U.S.C. §§ 7475(a)(2), (a)(7).
[260] *Cf.* Massachusetts v. E.P.A., 549 U.S. 497, 521 (2007) (parties have standing to challenge EPA's refusal to define pollutants to include Greenhouse Gas emissions).
[261] Moreover, it contemplates them doing so as a function of tribal autonomy. Delegation or incorporation do not give the delegatee or the body whose laws are being incorporated power for *their own* reasons—Congress does not give the EPA power to write environmental regulations *for the EPA's sake*, or prohibit importation of species taken illegally in Canada *as a means of empowering Canada.* Quite the contrary, delegation or incorporation are used as mere conveniences for the sake of serving *Congress's* role as lawmaker. With ICWA, however, the power to substitute placement preferences is aimed to empower tribes for their own sake. This may be a legitimate government interest in the abstract, but it reveals that what is going on is not delegation or incorporation, but instead the authorization of a non-state entity to write law for its own purposes—something the delegation doctrine has long regarded with suspicion. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

resolution was "essentially legislative."[262] It "had the purpose and effect of altering the legal rights, duties and relations of persons…outside the legislative branch," and it "supplant[ed]" what would otherwise have been the outcome of existing law.[263] But for the one-house veto at issue in that case, the overriding of the Attorney General's determination "could have been achieved, if at all, only by legislation requiring deportation."[264] That meant the one-house veto constituted a form of lawmaking unauthorized by the Constitution. In precisely the same way, the tribal-veto privilege in ICWA has the purpose and effect of altering the legal rights, duties, and relations of state child welfare agencies, courts, and Indian children and their foster parents or prospective adoptive parents. Where a tribe passes a resolution superseding the statutory placement preferences, the consequence is something that otherwise could only have been achieved by legislation—that is, the effective amending of ICWA without any congressional action.

In fact, ICWA goes beyond the relatively simple one-house veto authority invalidated in *Chadha,* and empowers tribal officials—that is, persons who exercise no authority in state or federal government—to write substantive law that, by virtue of the Supremacy Clause, becomes the law of the land. Such a scheme is akin to the line-item veto at issue in *Clinton*, which the Court found invalid because it "authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7" of the Constitution.[265] The *Clinton* Court reasoned that Article I section 7 specifies how a bill becomes a law, and that procedure includes no provision authorizing a line-item veto. When the president exercised a line item veto, what "emerged" was a "truncated version[]" of the legislation that had

[262] *Chadha*, 462 U.S. at 952.
[263] *Id.*
[264] *Id.* at 953–54.
[265] 524 U.S. at 445.

passed through Congress—a version that was "not the product of the 'finely wrought' [lawmaking] procedure that the Framers designed."[266] Because the line-item veto occurred "*after* the bill becomes law," the President was not engaged merely in the deliberative, legislative process, but was instead exercising "unilateral power to change the text of duly enacted statutes."[267] In the same way, ICWA empowers tribes to unilaterally change the text of a duly enacted statute (that is, Section 1915 of ICWA) and then force states to follow the new rule, even though that new rule was never subjected to the lawmaking procedure specified in the Constitution.[268] This roving supremacy commission is unique in federal law.

The *Brackeen* court, however, asserted that ICWA simply "set[s] a default standard that applies unless another party chooses to act," and likened this provision to statutes that empower agencies to create exemptions from environmental laws, or allow states to change a statute of limitations.[269] But none of these examples are analogous to ICWA, which allows an independent third party to override both state and federal law, and then to compel enforcement of the new and different rule. Moreover, the "waivable default" schemes the court had in mind work well enough when they involve two sovereignties—the state and federal governments—or situations in which one entity overrides the default in favor of a new rule that *it will enforce.* The "waivable default" model was not fashioned for instances involving three sovereignties—state,

[266] *Id*. at 440.
[267] *Id*. at 439, 447.
[268] Section 1903(c) thus contravenes longstanding principles of Full Faith and Credit, which have never been held to require states to implement foreign statutes or judgments, *see* Millar v. Hall, 1 Dall. (1 U.S.) 229, 231 (Pa. 1788) ("[T]he laws of a particular country have in themselves no extra-territorial force, no coercive operation."); Anderson v. Poindexter, 6 Ohio St. 622, 631 (1856) ("Kentucky can not, by the law of comity, demand of this state an abrogation of its constitution and municipal laws, to promote any of its own peculiar institutions"), and which have previously been viewed as requiring federal courts to yield to states, not the other way around. *See* Shimon v. Sewerage & Water Bd. of New Orleans, 565 F.3d 195, 199 (5th Cir. 2009) (federal courts may not apply their own judgment in determining whether to give full faith and credit to state court judgments).
[269] *Brackeen*, 994 F.3d at 350 (en banc).

federal, and tribal—or situations in which the third sovereignty can force the first two to implement its preferred rule.

True, Congress has adopted statutes allowing even private entities to participate in rulemaking in ways that arguably involved the overriding of federal default rules. For example, in *Currin v. Wallace*[270] and *United States v. Rock Royal Co-op.*,[271]—both of which the *Brackeen* majority cited[272]—the Supreme Court upheld statutes that empowered private entities to create cartel schemes which were then given the full force of federal law. But the Court distinguished between situations in which Congress gives a private entity power to enforce its will (which is forbidden), and situations in which Congress imposes a national regulation, and then makes its application depend on certain conditions, which might include the actions of private entities.[273] In the latter case, "the power has already been exercised legislatively by [Congress]," and "the condition of its legislation going into effect" is "made dependent" on private action.[274] This is constitutional because the private action works like an on/off switch; the regulatory scheme is triggered by the determination of a private entity.[275] ICWA, by contrast, does not simply allow tribes to flip an on/off switch; it is not a set of rules the enforcement of which is triggered by private action. Instead, it authorizes tribes to write entirely new preferences which are then given the force of law going forward.[276]

---

[270] 306 U.S. 1 (1939).
[271] 307 U.S. 533, 577–78 (1939).
[272] *Brackeen*, 994 F.3d at 352 n.63 (en banc).
[273] *Currin,* 306 U.S. at 15–16.
[274] *Id.* at 16.
[275] As Judge Duncan observed, ICWA does not simply entitle tribal governments to *waive* an existing statute, but to "'alter the text of [state] statute,'" and mandate the implementation of substantively new (state) law in its place. *Brackeen*, 994 F.3d at 422 n.136 (opinion of Duncan, J.) (quoting Def. of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 124 (D.D.C. 2007)).
[276] For the same reason, ICWA is unlike, say, the Webb-Kenyon Act, which made it a violation of federal law to import liquor into a state in violation of that state's laws. Under that Act, the Court said in *James Clark Distilling Co. v. W. Maryland R. Co*., 242 U.S. 311, 326 (1917), "the will which causes the prohibitions to be applicable is that of Congress." ICWA does not, however, impose express prohibitions; it imposes a schedule of preferences which can be altered at the will of a tribal government.

A closer analogy to ICWA might be found in the Federal Arbitration Act, which enables private parties to agree by contract to resolve disputes by arbitration, superseding state law to the contrary.[277] But even that Act respects the primary regulatory authority of the states by ensuring that enforcement of arbitration agreements is decided according to ordinary *state law* contract principles as interpreted and applied by state courts.[278] ICWA, by contrast, allows a tribal government to command states to apply the state's foster care law and adoption statutes differently than they otherwise would.[279]

Even if this provision of ICWA were viewed as incorporation rather than delegation, it is nothing like what has been approved in previous cases. The *Brackeen* court pointed to *United States v. Sharpnack*,[280] in which a federal statute imposed on unincorporated federal territories the laws of neighboring states. The *Sharpnack* Court said this was not an unconstitutional delegation of federal lawmaking authority to the neighboring state legislatures, but was a "deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government."[281] That bears no resemblance to ICWA, which allows a non-state, non-federal entity (i.e., a tribal government) to override state laws *within* state borders that govern the citizens of that state. *Sharpnack* involved federal territories not governed by a state, so the

[277] *See, e.g.,* Volt Info. Scis., Inc. v. Bd. of Trustees of Stanford University, 489 U.S. 468, 472 (1989).
[278] *See id.* at 474–75.
[279] Likewise, ERISA—which *Brackeen*, 994 F.3d at 417 (en banc), pointed to as an analogy to ICWA—does not authorize private parties to dictate the substance of welfare-benefit plans that must be given preemptive effect over state law, and is for that reason not an unconstitutional delegation. *See* Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund, 25 F.3d 509, 513 (7th Cir. 1994). ICWA, by contrast, expressly authorizes tribal governments to dictate the substance of state child welfare law—or, more precisely, the rules state courts must follow when implementing their own state laws.
[280] 355 U.S. 286 (1958).
[281] *Sharpnack*, 355 U.S. at 294. Dorf, *supra* note 246 at 105, wrote that he was not aware of any attempt by Congress "to make the law of a single state applicable, on a dynamic basis, to the nation as a whole," *id.* at 111, but ICWA does this, by allowing a tribal government authority to dictate placement preferences applicable in all state courts. As Dorf writes, such a law "prompt[s] serious misgivings." *Id.* at 112.

federalism concerns raised by ICWA were not present. And the statute involved there did not purport to veto any existing law, let alone to command state officials to disregard their own state laws and follow another sovereign's law instead, as ICWA does. Finally, the statute in *Sharpnack* gave Congress power to block the application of any particular state law within such territory,[282] which is not true of ICWA.

Finally, the *Brackeen* court also cited two purported examples of Congress delegating authority to tribes to make federal law (or incorporating tribal law as a matter of federal law): a statute allowing tribal governments to authorize the introduction of liquor onto Indian lands, when that would otherwise be federally prohibited,[283] and the 1988 Hoopa–Yurok Settlement Act,[284] which authorized tribal governments to regulate logging on privately owned land within reservation boundaries. But those valid delegations of authority were wholly different from ICWA. In *United States v. Mazurie*,[285] the Court upheld the delegation of authority over liquor control because the power being delegated was limited to tribal land. The non-delegation doctrine, the Court said, is "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter."[286] But ICWA does not govern tribal land—it applies to states—and tribal governments have no independent authority over foster care and adoption proceedings in state court, relating to children who are not tribal members, and do not reside on reservation.[287] *Mazurie* would be more analogous if the statute at

[282] *See id.*
[283] 18 U.S.C. § 1161.
[284] Pub. Law 100-580 § 8, 102 Stat. 2924, 2932 (Oct. 31, 1988).
[285] 419 U.S. 544 (1975).
[286] *Id.* at 556–57.
[287] Tribal governments asserted that ICWA does not grant them authority over child welfare proceedings but recognizes their "inherent sovereignty over Indian children," *Brackeen*, 994 F.3d at 346 (en banc), but no such inherent sovereignty exists. Tribal governments have inherent sovereignty over tribal members but not non-members who are merely eligible for membership. *See* Sandefur, *Recent Developments, supra* note 155 at 459–60. In any event, the *Brackeen* court concluded that it was unnecessary to address this question.

issue there had, for instance, authorized tribal governments to change a state's drinking age, outside of Indian country, for persons who, due to their ancestry, could someday become tribal members. Such a statute would obviously exceed any delegation the courts have ever authorized.

The Hoopa–Yurok Settlement Act is even less analogous. In *Bugenig v. Hoopa Valley Tribe*,[288] the Ninth Circuit found it constitutional for Congress to authorize a tribal government to regulate land use by private parties within a reservation, because Congress had retained jurisdiction over the land (despite its being allotted to private parties at one point), and because the delegation related to "a non-Indian's conduct on land owned by a non-Indian wholly within the boundaries of a reservation."[289] While tribal authority certainly extends beyond reservation boundaries in some instances, neither *Mazurie* nor *Bugenig,* nor any other case, has ever said that Congress can give tribes power to dictate how state courts apply state laws with respect to non-members living *outside* of Indian country—indeed, with no geographical boundaries whatever—as ICWA does.

ICWA's delegation of authority is closer to the situation that the Supreme Court, in *Medellin v. Texas*,[290] called an "extraordinary" departure from the ordinary constitutional scheme. In that case, the defendant's argument would have meant that judgments by the International Court of Justice were "automatically enforceable domestic law," overriding state law without any intercessory act by federal or state officials.[291] This, the Court said, would be "the equivalent of writing a blank check" to foreign entities to govern American citizens within

[288] Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001).
[289] *Id.* at 1221-22.
[290] 552 U.S. 491, 523 (2008).
[291] *Id.* at 510-11.

state boundaries.[292] Such a delegation of authority raises serious concerns about democratic accountability and state autonomy.[293]

Of course, there are circumstances in which Congress can delegate authority to fill in the blanks of a statute. But ICWA does not delegate this normal regulatory authority to tribes. Regulations for the implementation of ICWA are written by the BIA, not tribes. And notwithstanding the *Brackeen* Court's implication that ICWA simply "looks to the law of other sovereigns to fill in important…aspects" of the Act,[294] ICWA contains no gaps, and does not enable tribal governments to fill them in. Instead, it contains rules, and allows tribes to automatically *override* substantive federal and state law—much like the state of affairs the *Medellin* Court found difficult to credit.[295]

The incorporation/delegation question in *Brackeen* is complex enough that it can be easily lost in abstractions. Imagine, therefore, that Congress adopted something akin to ICWA that related to a state or federal government, instead, and related not to family law but to something equally within the state's autonomous jurisdiction. For instance, one might imagine Congress adopting a statute requiring all state courts, in tort cases involving absentee property owners who reside in Maine, to employ a rule of contributory negligence instead of comparative

---

[292] *Id*. at 511, 515.

[293] As Dorf explains, *supra* note 246 at 115-24, dynamic incorporation of foreign law threatens democratic accountability more, the more irrevocable the delegation of authority. Dorf distinguishes between "formal" and "functional" irrevocability, holding that "formal" irrevocability is rarely sufficient to protect democratic values. *Id.* at 153–56. ICWA's delegation to tribes is only formally revocable, and only by some future act of Congress; nothing in ICWA permits a state to decline to follow a tribe's substitute order of placement preferences. *See also* Larkin, *supra* note 246 at 346 ("delegating substantive lawmaking authority to a party that is neither legally nor politically accountable for its actions to supervisory federal officials or to the public" is unconstitutional).

[294] *Brackeen*, 994 F.3d at 351 (en banc).

[295] Nor is ICWA analogous to other kinds of dynamic incorporation. For example, the Lacey Act prohibits the importation into the United States of flora or fauna taken in violation of foreign law. On the face of it, this seems to raise serious delegation concerns, *See generally* Larkin, *supra* note 246, but courts have resolved this concern with a saving construction: the Act simply uses the fact of foreign illegality as an element of the substantive federal offense. United States v. Bryant, 716 F.2d 1091, 1094–95 (6th Cir. 1983); United States v. Molt, 599 F.2d 1217, 1219, n.1 (3d Cir. 1979). Whatever one thinks of this interpretation of the Lacey Act, no such interpretation can apply to ICWA.

negligence—but allowing Maine's legislature, if it chose, to substitute any other rule of tort law it desired, and which all other state courts would then be obligated to enforce. The constitutional flaws would be plain. Such a combination of incorporation and delegation would obviously intrude on the sovereignty of the other states.[296] It will not do to wave away such a hypothetical as "ridiculous,"[297] given that it is essentially what ICWA does—indeed, it is less extreme than what ICWA does, given that ICWA applies not only to tribal citizens, but to people who are merely eligible for, but may never obtain, tribal membership.

ICWA's delegation/incorporation provision is unique in federal law. It combines delegation/incorporation, preemption, and commandeering so as to allow a non-governmental entity to override the method of application of existing state law, and mandate a new method in its place, without any intervening act by federal or state governments—and to do so with respect to people who are not tribal members and who are not domiciled on tribal land. This is a conception wholly alien to the Constitution.

CONCLUSION

The fact that the Indian Child Welfare Act is triggered by a child's biological ancestry has engendered much controversy. But even setting those concerns aside, the Act represents an unprecedented and unique assault on constitutional principles of federalism. It forces states to take actions that harm "Indian children," deprives states of authority necessary to discharge their

[296] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."); *see also* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1576 (2004) (describing situations in which Canada sought to challenge the legality of a state statute under NAFTA in an international forum).
[297] *Brackeen*, 994 F.3d at 331 n.47 (opinion of Dennis, J.).

responsibilities to their citizens, and expands federal authority beyond anything authorized by the Constitution's text. ICWA was certainly enacted with good intentions, but as President Joe Biden once noted, our "ultimate responsibility to future generations" is to defend the Constitution against the "perversions of its language and its spirit that may make their way, often with the best of intentions…into the policies and programs of government."[298]

[298] Joseph R. Biden, Jr., *Shared Power Under the Constitution: The Independent Counsel*, 65 N.C. L. REV. 881, 888 (1987) (punctuation altered).