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Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty

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Congress enacted the Indian Child Welfare Act (“ICWA”) in 1978 to address abuses by state and private child welfare agencies that resulted in the forced removal of roughly one-third of all Indian children from their families. However, four decades after the passage of the law, opponents of ICWA make the novel argument that it impermissibly commandeers the States, in violation of the Tenth Amendment. In Brackeen v. Bernhardt—a 2018 decision that contradicted much of modern anti-commandeering doctrine—the U.S. District Court for the Northern District of Texas became the first court to declare ICWA unconstitutional. The anti-commandeering challenge to ICWA threatens to upend much of federal Indian law and to disrupt the delicate balance of power among states, tribes, and the federal government. This Note refutes the claim that ICWA commandeers the States. The commandeering claims advanced against ICWA contradict settled Supreme Court doctrine and

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misconstrue the practical application of the statute. Under a proper reading of modern anti-commandeering jurisprudence and an informed understanding of how state child custody proceedings work, it is clear that ICWA falls well within the bounds of the Tenth Amendment.

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They too know all too well that some cracks were built just for us to fall through. We live in a world that tries to steal spirits each day; they steal ours by taking us away.

– Tanaya Winder, Duckwater Shoshone Tribe¹

INTRODUCTION

When Alvetta James, the daughter of a Navajo medicine woman, attempted to adopt her great-nephew, baby A.L.M., she stepped directly into the crosshairs of a powerfully organized movement working to dismantle tribal sovereignty.² The story of her foiled adoption started when the State of Texas began proceedings to terminate the parental rights of A.L.M.’s biological parents, both enrolled members of federally recognized Indian tribes.³ Pursuant to the Indian Child Welfare Act of 1978 (ICWA)⁴—a federal statute regulating child custody proceedings involving “Indian children” as defined by the law—a Texas social worker notified the Navajo Nation of the case.⁵ The Navajo Nation, the tribe of A.L.M.’s biological mother, then began the search for a Navajo adoptive placement.⁶ In the interim, the Texas Department of Family and Protective Services temporarily placed A.L.M. with a white evangelical foster family, the Brackeens.⁷

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1. Tanaya Winder, *Love Lessons in a Time of Settler Colonialism*, POETRY MAG. (Jun. 2018), <https://www.poetryfoundation.org/poetrymagazine/poems/146709/love-lessons-in-a-time-of-settler-colonialism> [<https://perma.cc/T9UC-WVUF>].
 2. See Jan Hoffman, *Who Can Adopt a Native American Child? A Texas Couple vs. 573 Tribes*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/health/navajo-children-custody-fight.html> [<https://perma.cc/CV6R-558L>].
 3. See *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 525 (N.D. Tex. 2018), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (A.L.M.’s mother is an enrolled member of the Navajo Nation, and A.L.M.’s father is an enrolled member of the Cherokee Nation).
 4. 25 U.S.C. §§ 1901-1963 (2018).
 5. *Brackeen*, 338 F. Supp. 3d at 525.
 6. *Id.*; Brief in Support of the Navajo Nation’s Motion to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19 [hereinafter Navajo Brief] at 1, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O, Doc. 78), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).
 7. *Brackeen v. Zinke*, 338 F. Supp. 3d at 525; Hoffman, *supra* note 2.

The Navajo Nation found Ms. James ready and willing to adopt.⁸ She already had close relationships with A.L.M.’s four siblings, who came to visit twice a week and were eager to have A.L.M. back in their lives.⁹ Ms. James drove sixteen hours to a family court hearing in Fort Worth, Texas, to obtain custody of A.L.M.¹⁰ The State of New Mexico, where she lived, arranged a baby shower for her in anticipation.¹¹

But as Ms. James prepared to reunite her family, the Brackeens filed for adoption.¹² At first, the Brackeens lost. The Texas family court found that the Brackeens had not shown good cause to depart from ICWA, which prioritizes adoptive placements of Indian children with members of their tribes.¹³ But the Brackeens—now represented by Gibson Dunn & Crutcher LLP¹⁴ and backed by the Goldwater Institute—appealed the decision and obtained an emergency stay.¹⁵ When Ms. James learned that the appeals process could take years to complete, she worried that the delay would

8. Hoffman, *supra* note 2.

9. *Id.*

10. *Id.*

11. Opposed Motion of Navajo Nation to Intervene or to File Brief as Amicus Curiae [hereinafter Navajo Opposed Motion] at 11, Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479); Navajo Brief, *supra* note 6, at 3.

12. See Brackeen v. Zinke, 338 F. Supp. 3d at 525; Navajo Opposed Motion, *supra* note 11, at 11.

13. Navajo Opposed Motion, *supra* note 11, at 11; see also 25 U.S.C. § 1915(a) (2018) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”).

14. See Brief of Amicus Curiae Goldwater Institute in Support of Appellants C.E.B. and J.K.B. [hereinafter Goldwater Amicus Brief] at 26, *In re Interest of A.L.M.-F.*, 564 S.W.3d 441 (Tex. App. 2017) (Nos. 323-103401-16 & 323-105593-17), <https://goldwaterinstitute.org/wp-content/uploads/2017/10/Amicus-brief-of-the-Goldwater-Institute.pdf> [<https://perma.cc/AN42-Y3BJ>]. While child custody briefs are generally unavailable to the public, the certificate of service in Goldwater’s amicus brief shows that appellants were represented by Matthew McGill at Gibson, Dunn & Crutcher LLP. *Id.*; see also Scott Edelman & Katie Marquart, *Pro Bono Newsletter*, GIBSON DUNN (Fall 2018), <https://www.gibsondunn.com/wp-content/uploads/2018/10/ProBonoNewsletter-1018.html> [<https://perma.cc/9EXR-HCQX>].

15. Navajo Brief, *supra* note 6, at 3; Navajo Opposed Motion, *supra* note 11, at 11.

ultimately make A.L.M.'s transition harder.¹⁶ Out of concern for her great-nephew, she withdrew her petition for adoption.¹⁷

The Brackeens did not stop at obtaining custody of A.L.M. Claiming mental anguish due to ICWA's collateral attack provision—which allows the parents of Indian children to petition to withdraw their consent from adoptions obtained by fraud or duress within two years after the adoption¹⁸—the Brackeens initiated a lawsuit to dismantle ICWA itself.¹⁹ Their case, *Brackeen v. Bernhardt*,²⁰ has already made history. In 2018, the U.S. District Court for the Northern District of Texas became the first federal court to declare ICWA unconstitutional on the basis of impermissible commandeering of the States, impermissible race-based discrimination, and impermissible delegation of federal legislative power to Indian tribes.²¹ After the historic lower court ruling, a three-judge panel of the Fifth Circuit reversed, upholding ICWA's constitutionality.²² Plaintiffs moved for rehearing, which the Fifth Circuit granted, vacating the panel's decision and sitting *en banc* for argument on January 22, 2020; as of this writing, a decision was pending.²³ If the Fifth Circuit holds ICWA unconstitutional, it is likely that the Supreme Court will review the case.²⁴ In recent cycles, the

16. Navajo Brief, *supra* note 6, at 3.

17. See Navajo Opposed Motion, *supra* note 11, at 4; Navajo Brief, *supra* note 6, at 3.

18. 25 U.S.C. § 1913(d) (2018).

19. See Complaint and Prayer for Declaratory and Injunctive Relief at 2, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868-O), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (alleging that ICWA “commandeers state agencies and courts to become investigative and executive actors carrying out federal policy” and to “make child custody decisions based on racial preferences”).

20. 937 F.3d 406 (5th Cir. 2019).

21. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536, 538, 541 (N.D. Tex. 2018).

22. *Brackeen v. Bernhardt*, 937 F.3d 406, 441 (5th Cir. 2019).

23. See *Chad Brackeen v. David Bernhardt (11-11479)*, COURTLISTENER <https://www.courtlistener.com/docket/8345738/chad-brackeen-v-david-bernhardt> [<https://perma.cc/9NQR-BN5Z>].

24. See Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 439-41 (2012) (stating that a lower court's decision to invalidate an act of Congress constitutes a “high-stakes domain” meaning that “the Supreme Court feels strongly compelled to grant review”).

Court has also demonstrated a considerable interest in reviewing cases that directly impact Indian tribes.²⁵

A Supreme Court ruling overturning ICWA would be disastrous for the 574 federally recognized Indian tribes²⁶ that rely on its safeguards. Following decades of widespread abuses by state child welfare agencies and private entities,²⁷ ICWA established “minimum Federal standards” for all child custody proceedings involving Indian children.²⁸ Dismantling it would undo these critical protections and place Indian children at risk.

Even more fundamentally, because of the nature of some of the Plaintiffs’ arguments, a ruling in their favor could jeopardize the “entire corpus of federal law that governs Indian affairs today.”²⁹ There are two primary dangers. The first—the implications of which have been widely discussed³⁰—comes from the claim that ICWA, by singling out Indians for differential treatment, violates the Equal Protection Clause.³¹ As the Supreme Court notes, if legislation applying differential treatment to

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25. See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (reviewing whether Oklahoma can exercise criminal jurisdiction over an Indian defendant); *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (same); *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), *cert. granted*, No. 19-1414 (U.S. Nov. 20, 2020) (Mem.) (reviewing the scope of a tribe’s authority to temporarily detain and search non-Indians on a public right-of-way within a reservation), https://www.supremecourt.gov/orders/courtorders/112020zr1_q861.pdf [<https://perma.cc/KRU3-XTSE>].
26. See *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462 (Jan. 30, 2020). For an explanation of “federal recognition” of tribes, see Bureau of Indian Affairs, *Frequently Asked Questions*, U.S. DEP’T INTERIOR, <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/9FGP-NETJ>].
27. See *infra* Section I.A.
28. 25 U.S.C. § 1902 (2018).
29. See Leah Litman & Mathew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167> [<https://perma.cc/WM9X-GS4V>].
30. See, e.g., Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Allison Krause Elder, “Indian” As a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 N.W. L. REV. 417 (2018); Gregory Ablavsky, “With the Indian Tribes”: Race, Citizenship and the Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018).
31. U.S. CONST. amend. XIV, § 1.

Indians “were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”³² The second—which has not yet been addressed in the scholarly literature—comes from the Brackeens’ novel claim that ICWA impermissibly commandeers state courts and executive agencies by forcing them to apply federal standards in child custody proceedings involving Indian children. If ICWA were to be held unconstitutional based on impermissible commandeering, the entire scheme of federal law governing the relationship between states and tribes would be thrown into question. Pursuant to its trust obligation, the federal government has protected tribal sovereignty from the encroachment of the States.³³ Without the power to prevent state legislatures, agencies, and courts from chipping away at tribal sovereignty, the federal government would be unable to play this crucial role.

This Note argues that ICWA does not commandeer the States. Part I grounds the discussion in the history of genocide and colonization of Indian peoples. This historical context is crucial to understanding the passage of ICWA and the current reactionary effort to dismantle it. Part II provides a brief overview of the anti-commandeering doctrine and lays out the commandeering claims that opponents have leveled against ICWA. Additionally, this Part argues that ICWA fully aligns with modern anti-commandeering doctrine for four reasons. First, it is settled doctrine that state courts must enforce federal law. As such, anti-commandeering doctrine does not apply to state courts in the same way as it applies to the state political branches. Second, Congress may impose federal procedures on state courts to vindicate federal rights, federal causes of action, and—we argue—vital federal interests, including the protection of the federal trust obligation to Indian tribes. The procedural requirements imposed by ICWA on state courts fall within all three of these categories. Third, it is established doctrine that Congress may impose record-keeping requirements on the States, including the record-keeping required by ICWA. Fourth, contrary to the claims of its opponents, ICWA even-handedly regulates states and private entities, consistent with the Constitution’s anti-commandeering requirements. Part III explains the dangerous implications of the anti-commandeering argument for tribal sovereignty, demonstrating the high stakes of ICWA litigation for federal Indian law more broadly. The Note concludes with an exploration of how attacks on ICWA based on anti-

32. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

33. For a discussion of the federal trust obligation, see *infra* Sec. III.A.

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commandeering doctrine threaten the very structure of federalism in the United States.

I. BACKGROUND

A. *Historical Context*

The crisis of forced child removals from Indian communities in the United States reaches back to the genocide and forced displacement of Indians by early settlers and later, by the federal government.³⁴ After the Indian population was nearly annihilated by disease, forced relocation, massacre, and sterilization,³⁵ the United States enacted a policy of assimilation to culturally eradicate remaining Indian communities.³⁶ In 1867, the U.S. Commissioner of Indian Affairs reported to Congress that “the only successful way to deal with the ‘Indian problem’ was to separate the Indian children completely from their tribes.”³⁷ At around the same time, government and private agencies began to steal thousands of Indian children from their tribes, forcing them to attend abusive boarding schools for white cultural indoctrination.³⁸ The explicit philosophy of this offensive was to “kill the Indian . . . , and save the man.”³⁹ In these boarding schools funded by federal “civilization fund[s],”⁴⁰ Indian children were beaten, starved, denied adequate healthcare, and punished for any attempts to

34. See generally JEFFREY OSTLER, *SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS* (2019).

35. See Russell Thornton, *Native American Demographic and Tribal Survival into the Twenty-First Century*, 46 *AM. STUD.* 23, 24 (2005).

36. See generally KATHERINE ELLINGHAUS, *BLOOD WILL TELL: NATIVE AMERICANS AND ASSIMILATION POLICY* (2017).

37. H.R. REP. NO. 104-808, at 15 (1996) (reporting the history of forced assimilation).

38. See generally BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900-1940* (1998).

39. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION* 46 (Isabel C. Barrows ed., 1892).

40. H.R. REP. NO. 104-808, at 15 (1996).

practice their religions, speak their languages, or maintain their cultures.⁴¹ At the infamous Carlisle Indian Industrial School in Pennsylvania, the bodies of abused and neglected Indian children lie in 186 graves.⁴²

In the early twentieth century, religious groups and state child welfare agencies across the country began to use mass adoption of Indian children as an assimilation tactic.⁴³ State child welfare workers removed thousands of children from their families without due process,⁴⁴ frequently alleging neglect or abandonment when none existed.⁴⁵ For example, while it is customary practice for Indian parents to leave their children in the care of extended families, state social workers labeled this communal childcare model as abuse.⁴⁶ Or, in a particularly sweeping case, state child welfare workers on the Rosebud Sioux Reservation removed Indian children from their families on the basis of their very existence on a reservation, which—according to state social workers—was an inherently unacceptable environment for children.⁴⁷

The results were cataclysmic for Indian communities. By the mid-1970s, roughly one third of all Indian children had been removed from their families by either state child welfare agencies or private entities.⁴⁸ Of those removed, eighty-five percent were placed outside of their communities.⁴⁹ Terry Cross, founding director of the National Indian Child Welfare

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41. See Mathew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 929-30 (2017); Brenda J. Child, *The Boarding School as Metaphor*, 57 J. AM. INDIAN ED. 37, 38, 44-45 (2018).
 42. Jacqueline Fear-Segal, *Institutional Death and Ceremonial Healing Far from Home: The Carlisle Indian School Cemetery*, 33 MUSEUM ANTH. 157, 157 (2010).
 43. See Fletcher & Singel, *supra* note 41, at 952-55.
 44. H.R. REP. NO. 95-1386, at 11 (1978).
 45. *Id.* at 10.
 46. *Id.*
 47. See *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 215-16 (1974) [hereinafter *1974 Hearings*] (statement of William Byler, Executive Director, Association on American Indian Affairs).
 48. See H.R. REP. NO. 95-1386, at 9 (1978).
 49. *Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N 1 (2018), <https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf> [<https://perma.cc/536E-U3AC>].

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Association, hauntingly recounts, “There were literally American Indian communities where there were no children.”⁵⁰

Indian communities fought for their children. In a series of historic congressional hearings, Native people shared the devastating impact of forced child removals. Cheryl DeCoteau, a member of the Sisseton-Wahpeton Sioux Tribe, testified that a South Dakota child welfare worker had removed her children to foster care without any process.⁵¹ She recounted,

The [child welfare worker] said that I wasn’t a very good mother and everything, and that my children were better off being in a white home where they were adopted out, or in this home, wherever they were. They could buy all this stuff that I couldn’t give them and give them all the love that I couldn’t give them.⁵²

After recording countless testimonies and collecting exhaustive statistical research, a congressionally appointed commission found that the “removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis.”⁵³ The commission further found that the U.S. government had “failed to protect the most valuable resource of any tribe – its children,” and that the “policy of the United States should be to do all within its power to ensure that Indian children remain in Indian homes.”⁵⁴

In a watershed moment, Congress responded by enacting the Indian Child Welfare Act (“ICWA”) of 1978.⁵⁵ The law established “minimum federal standards” for all child custody proceedings involving Indian children,⁵⁶ defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in

50. Kathryn Joyce, *The Adoption Crunch, the Christian Right, and the Challenge to Indian Sovereignty*, PUB. EYE (Feb. 23, 2014), <https://www.politicalresearch.org/2014/02/23/adoption-crunch-christian-right-and-challenge-indian-sovereignty> [<https://perma.cc/5AYW-VRK3>].

51. *1974 Hearings*, *supra* note 47, at 64-71 (statement of Cheryl DeCoteau, Sisseton, South Dakota).

52. *Id.* at 66.

53. S. REP. NO. 77-J892-4, at 87 (1978).

54. *Id.*

55. 25 U.S.C. §§ 1901-1963 (2018).

56. 25 U.S.C. § 1902 (2018).

an Indian tribe and is the biological child of a member of an Indian tribe.”⁵⁷ The law provided Indian tribes with exclusive jurisdiction over any child custody proceeding involving Indian children domiciled on their reservations.⁵⁸ While state courts retained jurisdiction (concurrent with the tribes’ jurisdiction) over child custody proceedings for Indian children outside the reservations, the law required state courts to transfer such proceedings to tribal jurisdiction in the absence of good cause to the contrary.⁵⁹ When state courts retained jurisdiction, the law gave Indian tribes, parents, and custodians the right to intervene.⁶⁰

In addition to its jurisdictional provisions, ICWA introduced a placement preference for any adoptive placement of an Indian child.⁶¹ The law required that preference be given, in the absence of good cause to the contrary, to (1) a member of the child’s extended family; (2) other members of the Indian child’s Tribe; or (3) other Indian families.⁶² The law required similar placement preferences for foster care,⁶³ maximizing the opportunities for Indian children to remain in their communities.

ICWA further instituted a series of procedural safeguards for Indian parents and custodians. Perhaps most important is the requirement that any party seeking to remove an Indian child from their home first make “active efforts” to provide “remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.”⁶⁴ Other safeguards include the right to appointed counsel for indigent Indian parents and custodians⁶⁵ and informed consent rules for voluntary foster care or voluntary termination of parental rights proceedings.⁶⁶ Furthermore, neither foster care placements nor termination of parental rights may be ordered without proof that the parent or Indian custodian’s continued

57. 25 U.S.C. § 1903 (2018).

58. 25 U.S.C. § 1911 (2018).

59. *Id.*

60. *Id.*; see also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989) (deciding that ICWA applies to Indian children living both on and off reservations).

61. 25 U.S.C. § 1915(a) (2018).

62. *Id.*

63. 25 U.S.C. § 1915(b) (2018).

64. 25 U.S.C. § 1912(d) (2018).

65. 25 U.S.C. § 1912(b) (2018).

66. 25 U.S.C. § 1913 (2018).

custody “would result in serious emotional or physical damage to the child.”⁶⁷ Finally, in the event that a foster care placement or termination of parental rights is completed in violation of ICWA, the statute provides both state and federal causes of action for Indian children, parents, custodians, and tribes to invalidate the proceeding.⁶⁸

Since the passage of ICWA, national child welfare organizations have called it the “gold standard for child welfare policies and practices that should be afforded to all children.”⁶⁹ Indian children are removed from their homes at a lower rate than they were before ICWA.⁷⁰ However, compliance is inconsistent and implementation data is scarce.⁷¹ Indian children are still three times more likely to be removed by state child welfare systems than non-Indian children.⁷² In Maine, widespread noncompliance with ICWA led to the formation of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission in 2013.⁷³ The Commission’s final report, signed by the governor of Maine and five tribal chiefs, found that even after the passage of ICWA, Indian children in Maine entered foster care at 5.1 times the rate of non-Native children.⁷⁴ In 2013, the Oglala Sioux Tribe and

67. 25 U.S.C. § 1912(e)-(f) (2018).

68. 25 U.S.C. § 1914 (2018).

69. See Brief for Casey Family Programs et al., at 2, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).

70. See Jason R. Williams et al., *A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act*, CASEY FAMILY PROGRAMS 6 (2015), <https://www.casey.org/media/measuring-compliance-icwa.pdf> [<https://perma.cc/YRD2-WR22>] (referring to “overall decreases in rates of out-of-home placements” since ICWA’s enactment).

71. See *id.*

72. NAT’L INDIAN CHILD WELFARE ASS’N, *supra* note 49, at 1.

73. See generally Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, *Beyond the Mandate: Continuing the Conversation* (2015), https://d3n8a8pro7vhmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047 [<https://perma.cc/C72Z-8J2Q>].

74. See *id.* at 64. For a listing of the federally recognized tribes in Maine, see Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020). While the U.S. recognizes the Passamaquoddy as a single tribe with reservations at both Indian Township and Pleasant Point, the Passamaquoddy recognize substantial autonomy in each community, each with its own chief. See

Rosebud Sioux Tribe brought a class action lawsuit against South Dakota state officials claiming widespread defiance of ICWA.⁷⁵ At that time, Indians comprised less than nine percent of South Dakota's population but fifty-two percent of the children in the state's foster care system.⁷⁶

In 2016, the Department of Interior for the first time promulgated a rule to support increased compliance with ICWA, including a national data collection scheme.⁷⁷ This is an important step toward fulfilling the law's promise to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families."⁷⁸ Tribes' very existences depend on it.

B. *The Conservative Agenda Driving Attempts to Dismantle ICWA*

It is only in the past decade that concerted attacks on ICWA have begun in earnest. In 2013, anti-ICWA lawyer Lori Alvino McGill⁷⁹ represented a non-Indian couple seeking to adopt an infant citizen of the Cherokee nation in the infamous Supreme Court case known as "Baby Veronica," formally called *Adoptive Couple v. Baby Girl*.⁸⁰ At the time, Ms. McGill was a partner at the corporate law firm Latham & Watkins, which characterized her work on

Government, PASSAMAQUODDY TRIBE, https://www.passamaquoddy.com/?page_id=9 [<https://perma.cc/WJ5B-MU4P>]; *Pleasant Point Tribal Government*, PASSAMAQUODDY AT SIPAYIK, http://www.wabanaki.com/wabanaki_new/chief_council.html [<https://perma.cc/NG9Q-ZSRK>].

75. See Class Action Complaint for Declaratory and Injunctive Relief at 2, *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017 (D.S.D. 2014) (No. 13-cv-05020-JLV), *rev'd sub. nom.* *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018).
76. See Stephen Pevar, *In South Dakota, Officials Defied a Federal Judge and Took Indian Kids Away from Their Parents in Rigged Proceedings*, ACLU (Feb. 22, 2017, 5:00 PM), <https://www.aclu.org/blog/racial-justice/american-indian-rights/south-dakota-officials-defied-federal-judge-and-took> [<https://perma.cc/PT8Z-MVJQ>].
77. See 25 C.F.R. § 23.140-42 (2020).
78. 25 U.S.C. § 1902 (2018).
79. *Wilkinson Walsh Partner Lori Alvino McGill Featured on Legal Talk Network and Radiolab*, WILKINSON WALSH (June 17, 2016), <https://www.wilkinsonwalsh.com/lori-alvino-mcgill-featured-on-legal-talk-network-and-radiolab> [<https://perma.cc/S646-SP7S>].
80. 570 U.S. 637 (2013). The non-Native couple prevailed. See *id.* at 642.

the case as “pro bono.”⁸¹ Powerful interests in the adoption industry, the Christian adoption movement, and the anti-tribal sovereignty lobby filed amicus briefs on behalf of the non-Indian couple, who ultimately won custody of the Cherokee infant.⁸² The majority’s reference to unspecified “equal protection concerns” suggest that the Court might be receptive to future claims that ICWA violates the Equal Protection Clause.⁸³

On the heels of the blockbuster Baby Veronica case, the Goldwater Institute launched a coordinated attack on ICWA.⁸⁴ Despite never having worked to improve the educational, economic, or health circumstances of Indian children, Goldwater created a subsidiary organization misleadingly called “Equal Protection for Native Children.”⁸⁵ The organization’s core objective is to dismantle ICWA.⁸⁶ Since 2015, Goldwater has litigated at least eight cases⁸⁷ against ICWA and filed amicus briefs in support of at least four

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81. *Doing Good, Hour by Hour: 2013 Pro Bono Annual Review*, LATHAM & WATKINS 21 (2013), <https://www.lw.com/content/AnnualReport2013/2013ProBonoAnnualReview/files/assets/basic-html/page21.html> [<https://perma.cc/5CWP-CSQ3>].
 82. *See* Briefs of Amici Curiae Nat’l Council for Adoption; Am. Acad. Adoption Attorneys; Adoptive Parents Comm., Inc.; Christian Alliance for Indian Child Welfare; and Citizens Equal Rights Fund., *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).
 83. *Adoptive Couple*, 570 U.S. at 656; *see also* Bethany Berger, *In the Name of the Child*, 67 FLA. L. REV. 296, 297-98 (2015) (quoting *Adoptive Couple v. Baby Girl*, 570 U.S. at 666 n.3).
 84. *Ensuring Equal Protection for Native American Children – Challenging the Indian Child Welfare Act* [hereinafter *Ensuring Equal Protection*], GOLDWATER INSTITUTE, <https://goldwaterinstitute.org/indian-child-welfare-act> [<https://perma.cc/4DQJ-BE7S>]. The Goldwater Institute is a libertarian think tank based in Arizona. *See About the Goldwater Institute*, GOLDWATER INSTITUTE, <https://goldwaterinstitute.org/about> [<https://perma.cc/22QU-3SFX>].
 85. *See* Mary Annette Pember, *The New War on the Indian Child Welfare Act*, POLITICAL RESEARCH ASSOCIATES (Nov. 11, 2019), <https://www.politicalresearch.org/2019/11/11/new-war-indian-child-welfare-act> [<https://perma.cc/YY5Q-7Z4R>]; *see also* *Ensuring Equal Protection*, *supra* note 84.
 86. *See* Pember, *supra* note 85; *Ensuring Equal Protection*, *supra* note 84 (listing ICWA’s “many constitutional problems”).
 87. *See* A.D. by Carter v. Washburn, No. CV-15-01259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), *vacated as moot sub. nom.* Carter v. Tahsuda, 743 Fed. App. 823 (9th Cir. 2018); *Gila River Indian Community v. Dep’t of*

more.⁸⁸ These equal protection claims are part of a much larger strategy to undermine tribal sovereignty.⁸⁹

As part of this ramped up campaign to dismantle ICWA, Matthew McGill—husband of Lori Alvino McGill—filed a lawsuit in 2015 on behalf of the National Council for Adoption, alleging that the issuance of new ICWA guidelines by the Bureau of Indian Affairs (BIA) violated the Administrative Procedure Act.⁹⁰ In 2017, Lori Alvino McGill represented another non-

Child Safety, No. CV-16-0220-PR, 2016 WL 4249676 (Ariz. Ct. App. June 13, 2017); *In re C.J. Jr.*, 2019 Ohio 1863 (Ohio Ct. App. 10d 2019); *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); *Renteria v. Cuellar*, No. 2:16-CV-01685-MCE-AC, 2016 WL 7159233 (E.D. Cal. Dec. 8, 2016); *In the Matter of J.P.C.*, No. 2 CA-SA 2017-0061 (Ariz. Ct. App. 2017); *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019); *Fisher v. Cook*, No. 2:19-CV-02034, 2019 WL 1787338 (W.D. Ark. Apr. 24, 2019).

88. See Brief Amicus Curiae of Goldwater Institute in Support of Objectors/Appellants R.P., et. al., *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016) (No. B270775); Letter Amicus Curiae 1, *Matter of A.P.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016), *petition for review denied* 1 Cal. App. 5th 331 (Cal. Sept. 14, 2016) (No. S233216); Letter Amicus Curiae 2, *Matter of A.P.*, *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016), *petition for review denied* 1 Cal. App. 5th 331 (Cal. Sept. 14, 2016) (No. S233216); Motion for Leave to File and Brief Amicus Curiae of Goldwater Institute and the Cato Institute in Support of Petitioners, R.P. and S.P. v. L.A. County Dep't of Children & Family Services, 137 S. Ct. 713 (2017) (No. 16-500); Amicus Brief in Support of Discretionary Review, *In re Welfare of T.A.W.*, 383 P.3d 492, 503 (Wash. 2016) (No. 92127-0); Brief of the Goldwater Institute as Amicus Curiae On Petition for Review, *In the Interest of Y.J., A Child*, 2019 WL 6904728 (Tex. App. Dec. 19, 2019), *petition for review filed*, No. 20-0081 (Tex. Mar. 24, 2020); Goldwater Amicus Brief, *supra* note 14.
89. See Carole Goldberg, *American Indians and "Preferential" Treatment*, 48 UCLA L. REV. 943, 944-55 (2001) (providing a history of non-Indian groups using rhetoric of "equality" and "equal rights" to attack Indians, Indian tribes, and Indian law).
90. See *Nat'l Council for Adoption v. Jewell*, No. 15-cv-00675, 2015 WL 12765872, at *1 (E.D. Va. Dec. 9, 2015), *vacated as moot*, 2017 WL 9440666 (4th Cir. Jan. 30, 2017). The district court upheld the BIA guidance. *Id.*; see also Memorandum in Support of Plaintiff Nat'l Council for Adoption's Motion for Summary Judgment on APA Claim at 14, *Nat'l Council for Adoption v. Jewell*, 2015 WL 12765872 (E.D. Va. Dec. 9, 2015) (No. 15-cv-00675) (listing Matthew McGill among plaintiffs' counsel).

Indian couple seeking to adopt an Indian child eligible for enrollment in the Choctaw Nation.⁹¹ In 2018, Matthew McGill represented yet another non-Indian couple—the Brackeens—in the case at issue in this Note and currently pending in the Fifth Circuit.⁹²

The assortment of groups working together to dismantle ICWA bring diverse motivations to the fight. First, the Christian adoption movement is a powerful force. Practicing Christians are more than twice as likely to adopt than the general population in the United States.⁹³ For tens of millions of evangelicals, the movement presents a way to enact anti-abortion ideals while also evangelizing the Gospel to the children of the world.⁹⁴ The adoption agency involved in the Baby Veronica case—Nightlight Christian Adoptions—publicly states that adoption fulfills the Bible’s Great Commission to “make disciples of all nations.”⁹⁵ Similarly, the Brackeens attend the evangelical Church of Christ twice a week and view adoption as a way to “rectify [their] blessings.”⁹⁶

Colonial ideology is inherent to the Christian adoption movement, implicitly (and often explicitly) assuming that the third world and Indian communities are inherently unfit to properly raise their children. The Brackeens oppose A.L.M. returning to the custody of her great-aunt and member of the Navajo Nation, Alvetta James, not because of concerns about abuse or neglect, but rather because of the stereotypes they hold regarding life in the Navajo Nation. Chad Brackeen, who lives in a large brick home on an acre with a pool,⁹⁷ stated that he worries about A.L.M.,

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91. See *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016).
92. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev’d sub nom. Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).
93. See *5 Things You Need to Know About Adoption*, BARNAs (Nov. 4, 2013), <https://www.barna.com/research/5-things-you-need-to-know-about-adoption> [<https://perma.cc/WY8A-RYAT>].
94. For more on the Christian adoption movement, see generally KATHERINE JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* (2013). See also Joanne Barker, *Self-Determination*, 1 CRIT. ETHNIC STUD. 11 (2015); Joyce, *supra* note 50.
95. See Pember, *supra* note 85 (citing *Statement of Faith*, NIGHTLIGHT CHRISTIAN ADOPTIONS, <https://nightlight.org/statement-faith> [<https://perma.cc/PFG8-S69Q>]).
96. Hoffman, *supra* note 2.
97. *Id.*

not as an infant living in a room with a great-aunt but maybe as an adolescent in smaller, confined homes . . . I don't know what that looks like—if she needs space, if she needs privacy. I'm a little bit concerned with the limited financial resources possibly to care for this child, should an emergency come up.⁹⁸

These are the exact class-based and white cultural ideas of a “good childhood” that the architects of ICWA hoped to protect against.⁹⁹ But for Nicole Adams of the Colville Confederated Tribes and advisor for the Partnership for Native Children: “There is nothing original about some of the evangelical Christian adoption movements to focus on Native children and take it upon themselves to decide what's best for Native families.”¹⁰⁰

Second, the private adoption industry is a lucrative business with an interest in Indian children.¹⁰¹ Private adoption attorneys routinely charge between \$10,000 and \$40,000 in fees.¹⁰² As Bethany Berger explains, the business model of the adoption industry “depends on two things: adoptable infants and completed adoptions.”¹⁰³ In order to maximize profits, the industry pushed for deregulation, resulting in lax adoption practices that fail to properly consider the interests of biological parents, children, and adoptive parents.¹⁰⁴ Further, as obstacles to international adoption have grown, prospective adoptive parents—predominantly white¹⁰⁵—have turned their attention to Indian children.¹⁰⁶ The stringent placement preference in ICWA, designed to protect Indian communities, make the process more burdensome and costly for private adoption agencies. Given the economic interests at stake, it is no surprise that the private adoption industry turned its full force on ICWA.

98. *Id.*

99. See H.R. REP. NO. 95-1386, Appendix 1, ICWA Legislative History, at 24 (Nov. 4, 1977) (finding that “[a]ll too often, state public and private agencies, in determining whether or not an Indian family is fit for foster care of adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family”).

100. Pember, *supra* note 85.

101. See Berger, *supra* note 83, at 353-356.

102. *Id.*

103. *Id.* at 355.

104. See *id.*

105. See BARN, *supra* note 93.

106. See Joyce, *supra* note 50.

Third, the extractive oil and gas industry has an interest in the dismantling of ICWA. At the heart of this legal battle is the very existence of tribal sovereignty.¹⁰⁷ If the Supreme Court declares ICWA unconstitutional, the “entire corpus of federal law that governs Indian affairs today”¹⁰⁸ could be overturned, opening up Indian reservations for extractive exploitation. Reservations hold up to twenty percent of the country’s known oil and gas reserves as well as thirty percent of the country’s coal reserves.¹⁰⁹ President Trump’s “Native American Affairs Coalition” has put forth plans to privatize tribal lands to pave a path to “deregulated drilling.”¹¹⁰ Koch Industries—amongst the Goldwater Institute’s major donors—operate many businesses involved in the petroleum industry, and have already been found by a Senate investigative committee to have stolen at least \$31 million of oil from Indian reservations.¹¹¹ Koch Industries would profit greatly from the destruction of tribal sovereignty through the dismantling of ICWA.

Fourth, right-wing think-tanks like the Goldwater Institute are using efforts to dismantle ICWA as an opportune pretext to expand states’ rights and thereby advance discriminatory policies beyond the reach of the federal government.¹¹² States’ rights have been invoked to oppose racial equality in

107. See *supra* Introduction, *infra* Section II.

108. Litman & Fletcher, *supra* note 29.

109. Mora Grogan et al., *Native American Lands and Natural Resource Development*, REVENUE WATCH INST. 7 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf [<https://perma.cc/7QGK-83TW>].

110. Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, POLITICO (Dec. 5, 2016), <https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1> [<https://perma.cc/T2VL-WZPE>].

111. See S. REP. NO. 101-216, at 107 (1989); see also Christopher Leonard, *How an Oil Theft Investigation Laid the Groundwork for the Koch Playbook*, POLITICO (July 22, 2019), <https://www.politico.com/magazine/story/2019/07/22/kochland-excerpt-senate-investigation-oil-theft-native-american-tribes-227412> [<https://perma.cc/M7CB-FXNE>].

112. See, e.g., Lynn Adelman, *Laundering Racism Through the Court: The Scandal of States’ Rights*, DISSENT (Summer 2018), <https://www.dissentmagazine.org/article/laundering-racism-through-court-scandal-states-rights-federalism> [<https://perma.cc/EGE9-42JP>]; *States’ Rights, Civil Rights, and the Rights of Transgender Americans*, HARV. C.R.-C.L. L. REV. (Mar. 6, 2017), <https://harvardcrcl.org/states-rights-civil-rights-and-the-rights-of-transgender-americans> [<https://perma.cc/U5X3-836B>].

public accommodations,¹¹³ civil rights,¹¹⁴ the Affordable Care Act,¹¹⁵ the Voting Rights Act,¹¹⁶ and LGBTQ rights.¹¹⁷ The fight against ICWA provides another vehicle to champion states' rights by arguing that the law improperly commandeers state courts and executive agencies.¹¹⁸ It is no coincidence that Matthew McGill, currently litigating the *Brackeen* case, also litigated the 2018 case *Murphy v. National Collegiate Athletic Association*,¹¹⁹ in which the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA) unconstitutionally commandeered the States.¹²⁰ McGill successfully convinced the Court to strike down federal legislation on the basis of impermissible commandeering for only the third time in its history,¹²¹ ultimately laying the groundwork for anti-commandeering challenges to ICWA. In fact, when the District Court for the Northern District of Texas declared ICWA unconstitutional in the *Brackeen* case, it did so on the basis of the "Murphy Standard."¹²² If ICWA is overturned on commandeering grounds, conservative states' rights advocates will have even more ammunition to challenge federal protections of marginalized communities.

Fifth and finally, right-wing groups have long been invested in whittling away at equal protection doctrine. Due to their efforts, the Equal Protection Clause of the Fourteenth Amendment¹²³—passed in the wake of the Civil War to protect the rights of formerly enslaved Black people vis-à-vis the

113. See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883).

114. See, e.g., Jeff Nilsson, *The Civil Rights Act vs. States' Rights*, SAT. EVENING POST (July 2, 2014), <https://www.saturdayeveningpost.com/2014/07/the-civil-rights-act-vs-states-rights> [<https://perma.cc/BCJ9-Y52F>].

115. See, e.g., Adelman, *supra* note 112 (citing *NFIB v. Sebelius*, 567 U.S. 519 (2012)).

116. See, e.g., *id.* (citing *Shelby County v. Holder*, 570 U.S. 529 (2013)).

117. See, e.g., *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020); see also *States' Rights, Civil Rights, and the Rights of Transgender Americans*, *supra* note 112.

118. See *infra* Section III.B.

119. 138 S. Ct. 1461 (2018).

120. *Id.* at 1481.

121. See *infra* Section III.A.

122. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 539 (N.D. Tex. 2018), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

123. U.S. CONST. amend. XIV, § 1.

States—has been narrowed to nearly a nullity.¹²⁴ For example, in *Personnel Administrator of Massachusetts v. Feeney*,¹²⁵ the Supreme Court held that in order to prove discriminatory state action, a plaintiff would have to demonstrate that the government acted “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹²⁶ This intent-based standard is so detached from the realities of structural discrimination as to make it nearly impossible for a plaintiff to prevail.¹²⁷ Furthermore, while the Fourteenth Amendment was passed specifically to rectify the racial subordination of Black people under a system of white supremacy, courts have twisted the doctrine to accommodate lawsuits brought by white people claiming that they have been harmed by anti-discrimination policies.¹²⁸ Challenges to ICWA follow a similar pattern, with white couples seeking to adopt Indian children and claiming that they have been harmed by the law’s burdensome procedural requirements.¹²⁹ In fact, the Goldwater Institute first began to work against ICWA when its former CEO and President, Darcy Olsen, learned about the law while training to become a foster parent.¹³⁰ Challenges to ICWA offer right-wing groups yet another opportunity to subvert equal protection doctrine, this time using it to uphold the interests of non-Indian people seeking to adopt Indian children.

124. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755-758 (2011) (surveying the judicial narrowing of the Equal Protection Clause over time).

125. 442 U.S. 256 (1979).

126. *Id.* at 279 (citation omitted).

127. See Yoshino, *supra* note 124, at 764.

128. See, e.g., *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2014) (involving a white student—Abigail Fisher—claiming she was rejected for admission to University of Texas at Austin due to its affirmative action policy).

129. See, e.g., Complaint at 25, A.D. by Carter v. Washburn, No. 15-cv-01259-DKD, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), *vacating as moot sub. nom.* Carter v. Tahsuda, 743 Fed. App. 823 (9th Cir. 2018) (“But under ICWA, these families are subjected to procedural and substantive provisions that are based solely on the race of the children and the adults involved, which lead to severe disruption in their lives contrary to the children’s best interests.”).

130. See Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, NATION (Apr. 6, 2017), <https://www.thenation.com/article/archive/a-right-wing-think-tank-is-trying-to-bring-down-the-indian-child-welfare-act-why> [<https://perma.cc/6USD-3JSR>].

C. *The Equal Protection Challenge to ICWA*

The classic attack on ICWA is that it creates a racial classification, violating the Equal Protection Clause of the U.S. Constitution.¹³¹ In 2015, the Goldwater Institute filed a suit alleging that “[c]hildren with Indian ancestry . . . are still living in the era of *Plessy v. Ferguson*.”¹³² The Goldwater theory is that ICWA’s standards, prioritizing the placement of Indian children with their families, tribes, and broader Indian communities, create an impermissible classification based on race.¹³³ While the Supreme Court in *Adoptive Couple*¹³⁴ declined to review this constitutional issue, it signaled its willingness to engage this issue if the right case arose.¹³⁵

The problem with the Goldwater theory is that it flies in the face of fundamental federal Indian law doctrine. Indian tribes are quasi-sovereign entities, with tribal membership functioning as a political status.¹³⁶ This is why the Supreme Court in *Morton v. Mancari* unanimously upheld a provision of the Indian Reorganization Act that established a hiring

131. U.S. CONST. amend. XIV, § 1. The equal protection doctrine, rooted in the Fifth and Fourteenth Amendments, has evolved into a framework of “tiered scrutiny.” Yoshino, *supra* note 124, at 755. The Supreme Court applies “strict scrutiny” to policies that make classifications on the basis of race, requiring that such policies serve a compelling government interest and that they be narrowly tailored to achieve such interest. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (1967). When the Court decides to apply strict scrutiny to a governmental policy, it is usually “fatal in fact.” *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

132. Complaint at 2, A.D. by Carter v. Washburn, No. 2:15-cv-01259-DKD, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017), *vacated as moot sub. nom. Carter v. Tahsuda*, 743 Fed. App. 823 (9th Cir. 2018) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the doctrine of “separate but equal,” ultimately overturned by *Brown v. Board of Education*, 347 U.S. 483, 495 (1954))).

133. *See* Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017). Sandefur is the Vice President for Litigation at the Goldwater Institute. *Id.*

134. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

135. *Id.* at 637 (misleadingly classifying the Native infant involved in the case as “1.2% Cherokee,” using a biological racial analysis, rather than properly using ICWA’s statutory definition of “Indian child,” which uses a political analysis relating to the child’s eligibility for tribal enrollment).

136. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

preference for Indian employees in the Bureau of Indian Affairs.¹³⁷ The Court stated that the hiring preference was not a “‘racial’ preference,”¹³⁸ holding that legislation relating to Indians would be upheld if it was rationally related to “Congress’ unique obligation toward the Indians.”¹³⁹ This understanding of Indian identity is foundational to the corpus of federal Indian law. Supreme Court doctrine consistently recognizes tribes as distinct political entities protected by the federal trust relationship.¹⁴⁰ Moreover, the Constitution itself singles out Indians in the Indian Commerce Clause.¹⁴¹ Asserting that equal protection prohibits the differential treatment of Indian tribes would lead to the absurd result of rendering the Constitution unconstitutional. The late professor Philip Frickey described the tendency to try to fit federal Indian law into other doctrines as “the seduction of coherence.”¹⁴² But seductive as it is, we must not ignore the history and realities of Indian tribes for the sake of illusory doctrinal coherence.

In line with settled doctrine viewing Indian tribes as quasi-sovereign political entities, the statutory language of ICWA defines “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”¹⁴³ The text explicitly refers to eligibility for tribal membership, which is defined differently from tribe to tribe. ICWA advances tribal self-government, pursuant to the trust relationship, by giving tribes the right to intervene in child placement proceedings that could result in the removal of their children. Chuck Hoskin Jr., Principal Chief of the Cherokee Nation, says: “A

137. *Id.*; see also Indian Reorganization Act § 12, 25 U.S.C. § 472 (2018).

138. *Id.* at 553 (explaining that the preference was not racial, but rather for “members of ‘federally recognized’ tribes”).

139. *Id.* at 555.

140. See *infra* note 298 and associated text.

141. U.S. CONST. art. I, § 8, cl. 3.

142. Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 435-36 (2005); see also Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1166 (2010) (arguing that the “seduction of coherence” is at its most powerful and problematic in the equal protection context).

143. 25 U.S.C. § 1903(4) (2018).

very basic act of sovereignty is the tribe's ability under law to protect their children."¹⁴⁴

While much has been written about equal protection challenges to ICWA,¹⁴⁵ such challenges have thus far failed to invalidate the law.¹⁴⁶ In the most recent case, *Brackeen v. Bernhardt*,¹⁴⁷ the Fifth Circuit's three-judge panel rejected an equal protection challenge to ICWA, concluding that "ICWA's definition of Indian child is a political classification"¹⁴⁸ and emphasizing the quasi-sovereign nature of Indian tribes.¹⁴⁹ However, it is possible that the Supreme Court would reverse, especially given the Court's track record on Indian affairs.¹⁵⁰ The addition of three new conservative justices appointed by President Trump—Justice Gorsuch, Justice Kavanaugh, and Justice Barrett—is of uncertain meaning. Gorsuch has often

144. See Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, Vox (Feb. 20, 2020), <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care> [https://perma.cc/JL8N-LT9F].

145. See, e.g., Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Allison Krause Elder, "Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act, 13 NW. J. L. & SOC. POL'Y 417 (2018); Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship and the Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018).

146. See *Brackeen v. Bernhardt*, 937 F.3d 406, 430 (5th Cir. 2019) ("ICWA's definition of Indian child is a political classification that does not violate equal protection."); see also, e.g., *In re A.B.*, 663 N.W.2d 625, 635-36 (N.D. 2003) (applying rational basis analysis to ICWA, explaining, "The United States Supreme Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection."); *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004) ("[T]he different treatment of Indians and non-Indians under the Act is based on the political status of the parents and children and the sovereign nature of the tribe.").

147. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

148. *Id.* at 428 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)).

149. *Id.* at 427.

150. See, e.g., David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001); Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009).

COMMANDEERING CONFRONTATION

been supportive of tribal sovereignty,¹⁵¹ Kavanaugh has been hostile to tribes;¹⁵² and Barrett has a very limited record on federal Indian law altogether.¹⁵³ Leading advocates for ICWA have called for deeper scrutiny into the details of Barrett's adoption of two children from Haiti, which could inform her perspective on the law.¹⁵⁴

II. THE ANTI-COMMANDEERING CHALLENGE TO ICWA AND WHY IT FAILS

Following failed attempts to invalidate ICWA on the basis of equal protection claims, challengers have moved on to a strategy centered on anti-commandeering arguments. This Part describes how this rarely invoked doctrine is being weaponized to attack crucial protections for Indian families and rebuts the claim that ICWA commandeers the States.

A. *Anti-Commandeering Doctrine and Its Limits*

The allegation that ICWA commandeers the States mounts a serious constitutional challenge. The Supreme Court's anti-commandeering

151. See Mark Joseph Stern, *Why Gorsuch Keeps Joining the Liberals to Affirm Tribal Rights*, SLATE (May 20, 2019), <https://slate.com/news-and-politics/2019/05/neil-gorsuch-supreme-court-tribal-rights-sonia-sotomayor.html> [<https://perma.cc/QF4K-N6U2>].

152. See Daniel Perle, *'Lack of Understanding of Tribes:' Brett Kavanaugh Deemed Unfriendly to Indian Country*, CRONKITE NEWS (Sept. 21, 2018), <https://www.indianz.com/News/2018/09/19/lack-of-understanding-of-tribes-brett-ka.asp> [<https://perma.cc/F5VX-MFGT>] ("Tribal and legal officials . . . said his writings as a lawyer and his rulings in environmental and voting rights cases give them pause."); Anna V. Smith, *Justice Kavanaugh's Impact on Indian Country*, HIGH COUNTRY NEWS (Oct. 12, 2018), <https://www.hcn.org/articles/tribal-affairs-justice-brett-kavanaughs-impact-on-indian-country> [<https://perma.cc/Q22L-GJ9R>].

153. See Memorandum from Joel West Williams, Senior Staff Att'y, Native Am. Rts. Fund, to Tribal Leaders and the Nat'l Cong. of Am. Indians – Project on the Judiciary 1 (Oct. 6, 2020), https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf?_ga=2.69893779.2039589800.1605242458-1769127978.1603935973 [<https://perma.cc/B9CF-XHYL>].

154. See Mary Annette Pember, *Amy Coney Barrett and the Fate of Native Adoption Law*, INDIAN COUNTRY TODAY (Oct. 12, 2020), <https://www.indianz.com/News/2020/10/12/indian-country-today-fate-of-indian-child-welfare-act-up-to-federal-courts> [<https://perma.cc/QSP7-GCCN>].

doctrine provides that the “Federal Government may not compel the states to enact or administer a federal regulatory program.”¹⁵⁵ This doctrine—“one of the Court’s more popular federalism interventions”¹⁵⁶—is rooted in the Tenth Amendment¹⁵⁷ and has evolved to preserve a healthy balance of power between the states and the federal government.

But anti-commandeering doctrine is limited. The Court has invoked commandeering only three times to invalidate federal legislation.¹⁵⁸ The first two cases—*New York v. United States* and *Printz v. United States*—were widely watched, dramatic cases under the Rehnquist Court. But while many believed Chief Justice Rehnquist was on a mission to fundamentally reshape federalism doctrine,¹⁵⁹ the so-called “federalism revolution” turned out to be a flash in the pan.¹⁶⁰ In its wake, commandeering remains a narrow doctrine.¹⁶¹

B. *Why ICWA Does Not Commandeer the States*

Despite the limits of anti-commandeering doctrine, two federal judges have now found that ICWA impermissibly commandeers the states. In

155. *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

156. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1296 (2009).

157. U.S. CONST. amend X.

158. See *New York v. United States*, 505 U.S. 144 (1992) (invalidating a federal provision requiring states to either regulate according to a congressional scheme or take title to the nuclear waste within their boundaries); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal provisions requiring local chief law enforcement officers to conduct background checks on prospective gun purchasers); *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (holding that a federal law prohibiting states from authorizing sports gambling was impermissible commandeering of state legislatures). This list excludes *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

159. See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 14-15 (2006).

160. See generally Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799 (2006).

161. See *id.*

Brackeen v. Zinke (N.D. Tex.),¹⁶² Judge O'Connor invalidated Subchapter I of ICWA, which contains jurisdictional and procedural rules for state courts adjudicating child placement proceedings involving Indian children,¹⁶³ as well as substantive standards on the best interests of Indian children in such proceedings.¹⁶⁴ In a novel move, Judge O'Connor held that such provisions were unconstitutional because they "command[] States to impose federal standards in state created causes of action."¹⁶⁵

In *Brackeen v. Bernhardt* (5th Cir.), Judge Owen did not go so far as to invalidate all of Subchapter I, but focused instead on sections 1912(d), 1912(e), and 1915(e).¹⁶⁶ In her view, these provisions—which impose precautionary measures to ensure that Indian children are not improperly removed from their families—impermissibly burden the States.

In holding that ICWA unconstitutionally commandeers the States, Judges O'Connor and Owen overlooked the substantial corpus of anti-commandeering jurisprudence on the precise issues at play. They also mistakenly assumed that ICWA regulates only state agencies, when in fact, the law regulates the full range of public and private entities involved in the process of placing Indian children in foster care or adoptive homes. A deeper dive into anti-commandeering doctrine and the realities of child custody proceedings under the terms of the statute reveals that there is nothing in ICWA that commandeers the States.

1. State Courts Must Enforce Federal Law

It is settled law that state courts must enforce federal law. The foundational precedent for this proposition is *Testa v. Katt*,¹⁶⁷ which held

162. 338 F. Supp. 3d 514, 539 (N.D. TX 2018), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

163. *Id.*

164. 25 U.S.C. §§ 1911-23 (2018).

165. *Brackeen*, 338 F. Supp. 3d at 539.

166. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (Owen, J., concurring in part and dissenting in part). For further discussion of Judge Owen's arguments, see *infra* Sections III.C.2-3.

167. 330 U.S. 386 (1947). See also Anthony J. Bellia, Jr., *Federal Regulation of State Courts*, 110 YALE L.J. 947, 958 (2010) ("The Supreme Court has long held that Congress may require state courts of competent jurisdiction to enforce federal causes of action. The primary authority for this principle is, of course, *Testa v. Katt*.")

that the Supremacy Clause¹⁶⁸ requires state courts to enforce federal claims.¹⁶⁹ This principle has woven its way through anti-commandeering doctrine for decades.¹⁷⁰ In *New York*, the Supreme Court acknowledged that “[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”¹⁷¹

Indeed, the Supreme Court has never invoked commandeering to invalidate congressional directives to state courts. Authoring the majority opinion in *Printz*, Justice Scalia distinguished congressional regulation of state courts from congressional regulation of the state political branches, noting that “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions.”¹⁷² Scalia goes on to say: “It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.”¹⁷³

In *National Adoption Council*¹⁷⁴ and the three-judge panel decision in *Brackeen v. Bernhardt*,¹⁷⁵ this was the end of the analysis as to state courts. ICWA is fundamentally an exercise of congressional power under the Supremacy Clause requiring state courts to enforce federal law. There is nothing new or suspect in this. In fact, it is mundane.

168. U.S. CONST. art. VI, cl. 2.

169. *Testa*, 330 U.S. at 394.

170. The Supreme Court cites to *Testa* in thirty subsequent cases, most recently in 2019. *See Testa v. Katt*, 330 U.S. 386, Citing References, WESTLAW, <https://westlaw.com>; *see also Bellia, supra* note 167, at 958.

171. *New York v. U.S.*, 505 U.S. 144, 178-79 (1992); *see also Felder v. Casey*, 487 U.S. 131 (1988) (noting that “the Supremacy Clause imposes on state courts a constitutional duty ‘to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected’” (quoting *Garrett v. Moore-McCormack, Co.*, 317 U.S. 239, 245 (1942))).

172. 521 U.S. 898, 907 (1997).

173. *Id.*

174. *See Nat’l Council for Adoption v. Jewell*, 2015 WL 12765872 at *7 (E.D. Va. Dec. 9, 2015), *vacated as moot*, 2017 WL 9440666 (4th Cir. 2017) (“Congress passed the ICWA pursuant to congressional authority expressly granted in the Constitution. Just as Congress may pass laws enforceable in state courts, Congress may direct state judges to enforce those laws.”).

175. *See Brackeen v. Bernhardt*, 937 F.3d 406, 431 (5th Cir. 2019) (“[T]o the extent provisions of ICWA . . . require state courts to enforce federal law, the anticommandeering doctrine does not apply.”)

2. Congress May Impose Federal Procedures on State Courts

Unsatisfied with the *Testa* doctrine, Judge O'Connor invalidated Subchapter I of ICWA in its entirety because it "[commands] States to impose federal standards in *state created* causes of action."¹⁷⁶ But Judge O'Connor disregarded the fact that ICWA confers federal rights on Indian tribes and creates a federal cause of action. Additionally, anti-commandeering doctrine tells us that Congress may indeed impose federal procedures on state courts, in both federal and state causes of action.

a. Federal Causes of Action

ICWA begins with a Congressional declaration of policy characterizing the statute as "the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes."¹⁷⁷ These "minimum Federal standards"¹⁷⁸ are federal rights conferred on Indian tribes, parents, and custodians.

The language of "rights" is present throughout the statute. For example, section 1911(c) provides, "[T]he Indian custodian of the child and the Indian child's tribe shall have a *right* to intervene at any point in the proceeding."¹⁷⁹ But federal laws need not use the explicit language of "rights" to create them. For example, section 1912(a) requires parties seeking foster care placement or termination of parental rights regarding Indian children to notify Indian parents, custodians, and tribes.¹⁸⁰ This provision creates a federal right on behalf of said parties to receive said notice.

In addition to creating a scheme of federal rights conferred on Indian tribes, parents, and custodians in the context of child welfare, ICWA creates a federal cause of action allowing these parties to seek redress if their rights

176. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 539 (N.D. Tex. 2018) (emphasis added).

177. 25 U.S.C. § 1902 (2018).

178. *Id.*

179. 25 U.S.C. § 1911(c) (2018) (emphasis added).

180. 25 U.S.C. § 1912(a) (2018).

are violated.¹⁸¹ Several federal courts have assumed jurisdiction over section 1914 claims based on federal question jurisdiction.¹⁸²

It is settled law that Congress may impose procedural rules on state courts to vindicate federal rights.¹⁸³ The Supreme Court has affirmed this doctrine in a line of cases regarding the Federal Employer's Liability Act (FELA) [hereinafter "FELA Cases"], a statute that includes federal rules of procedure that govern enforcement of its own claims in state court.¹⁸⁴ In *Central Vermont Railway v. White*,¹⁸⁵ the Court held that state courts must enforce the federal rule placing the burden of proof to disprove contributory negligence on the defendant in FELA cases.¹⁸⁶ In *Dice v. Akron, Canton & Youngstown Railroad*,¹⁸⁷ the Court held that state courts must enforce the federal rule allowing a jury, rather than a judge, to resolve certain factual questions of fraud in FELA cases.¹⁸⁸ In *Brown v. Western Railway*,¹⁸⁹ the Court held that state courts must apply a more flexible pleading standard to claims arising under FELA.¹⁹⁰ The Court also famously affirmed this principle in the context of 42 U.S.C. § 1983, which creates a federal cause of action for violations of constitutional rights.¹⁹¹ In *Felder v. Casey*,¹⁹² the Court held that Wisconsin's "notice-of-claim" statute was preempted by the federal procedure required in claims arising under section 1983.¹⁹³

181. See 25 U.S.C. § 1914 (2018).

182. See, e.g., *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005); *Roman-Nose v. New Mexico Dep't of Human Servs.*, 967 F.2d 435 (10th Cir. 1992); *Eagle v. Warren*, 2019 WL 4572790 (D.S.D. Sept. 19, 2019); *Parkell v. South Carolina*, 687 F. Supp. 2d 576 (F.D.S.C. 2009). But see, e.g., *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996) (abstaining from adjudicating a section 1914 collateral attack due to ongoing adoption proceedings in a state court).

183. See generally *Bellia*, *supra* note 167.

184. 45 U.S.C. § 51 et seq. (1908).

185. 238 U.S. 507 (1915).

186. *Id.* at 512.

187. 342 U.S. 359 (1952).

188. *Id.* at 363-64.

189. 338 U.S. 294 (1949).

190. *Id.* at 296, 299.

191. See *Felder v. Casey*, 487 U.S. 131 (1988).

192. *Id.*

193. *Id.* at 138.

The rationale for this principle is that federally mandated procedures are often “part and parcel” of federally created rights.¹⁹⁴ In *Dice v. Akron*, the Court asserted that to deprive railroad workers of the jury trial rule laid out in FELA would “take away a goodly portion of the relief which Congress has afforded them,” concluding that the rule was “too substantial a part of the rights accorded by the Act” to permit it to be denied by a state court.¹⁹⁵ Similarly, in *Brown*, the Court stated that “[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.”¹⁹⁶

The Court in *Felder* explicitly linked federal procedural rights to the Supremacy Clause, explaining that “enforcement of the notice-of-claim statute in section 1983 actions brought in state court so interferes with and frustrates the substantive right Congress created that, under the Supremacy Clause, it must yield to the federal interest.”¹⁹⁷ Indeed, if states courts were able to deploy procedural rules to frustrate federal objectives enacted by Congress, the Supremacy Clause would be rendered a nullity. As the Court insists in *Howlett v. Rose*,¹⁹⁸ “[t]he Supremacy Clause requires more than that.”¹⁹⁹

Related to this rationale is the concern for uniformity. In *Brown v. Western Railway*, the Court explained: “Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements . . . desirable uniformity in adjudication of federally created rights could not be achieved.”²⁰⁰ The *Felder* Court even warned of the potential for inconsistent application of federal law within an individual state, holding that “a [state] law that predictably alters the outcome of section 1983 claims depending solely on whether they are brought in state

194. *Dice v. Akron*, 342 U.S. 359, 363 (1952) (quoting *Bailey v. Cent. Vermont Ry. Inc.*, 319 U.S. 350, 354 (1943)).

195. *Id.*

196. *Brown v. W. Ry. of Alabama*, 338 U.S. 294 (1949). The Court went on to hold: “Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Id.* at 298-99 (quoting *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)).

197. *See Felder*, 487 U.S. at 151.

198. 496 U.S. 356 (1990).

199. *Id.* at 383.

200. *Brown*, 338 U.S. at 299 (citing *Brady v. S. Ry. Co.*, 320 U.S. 476, 479 (1943)); accord. *Felder*, 487 U.S. at 153.

or federal court within the same State is obviously inconsistent with [the] federal interest in intrastate uniformity.”²⁰¹

In summary, Congress can impose federal procedural rules on state courts if such rules are in order to protect the vindication of federal rights. State court procedural rules that unnecessarily burden federal rights are preempted under the Supremacy Clause. This means, to the extent that ICWA requires federal courts to abide by specific procedures, such procedures are “part and parcel” of the federal rights they are designed to serve.²⁰² Even Judge Owen, in her partial dissent, accepted this analysis as to most of the statute’s provisions.²⁰³ The procedural requirements set forth in ICWA were designed to protect Indian tribes, parents, and custodians from further state abuses. Without these procedural rules, these federal rights would be no rights at all.

b. State Causes of Action

Judge O’Connor of the District Court for the Northern District of Texas would object that regardless of whether ICWA creates federal rights, the commandeering problem is that “Congress directs state courts to implement the ICWA by incorporating federal standards that modify *state created* causes of action.”²⁰⁴ This is because child custody proceedings arise under state law, against a backdrop of federal rights and regulations.²⁰⁵ For example, the Brackeens brought their petition to adopt A.L.M. under the applicable provisions of the Texas Family Code.²⁰⁶ However, the fact that ICWA modifies state causes of action is not in itself unconstitutional. The

201. *Felder*, 487 U.S. at 133.

202. *Dice v. Akron*, 342 U.S. 359, 363.

203. *Brackeen v. Bernhardt*, 937 F.3d 406, 446 (5th Cir. 2019) (Owen, J., concurring in part and dissenting in part) (“States cannot override or ignore those private actors’ federal rights by failing to give notice to interested or affected parties or by failing to follow the placement preferences expressed in the ICWA. If a State desires to place an Indian child with an individual or individuals other than the child’s birth parents, the State must respect the federal rights of those upon whom the ICWA confers an interest in the placement of the Indian child or Indian children more generally.”).

204. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 539 (N.D. Tex. 2018).

205. *See* LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 1:1 (updated Feb. 2020).

206. *See* TEX. FAM. CODE § 162.

robust set of Supreme Court doctrines in this area affirm the power of Congress to modify state causes of action to promote tribal rights.

i. Applying the FELA Cases/*Felder* Doctrine to State Causes of Action

Suppose we take this objection on its face. If we set aside the analysis that ICWA creates federal rights and a federal cause of action, focusing only on the fact that it “modifies” state causes of action, the underlying constitutional principles of the FELA Cases²⁰⁷ and *Felder* should still apply. In those cases, the Court held that Congress must be able to impose federal rules of procedure in order to vindicate vital federal interests. In the FELA Cases, the federal interest was properly compensating railroad workers injured on the job.²⁰⁸ In *Felder*, the federal interest was ensuring the vindication of federal civil rights in state courts.²⁰⁹ In both, the Court found a federal interest in promoting the uniform application of federal law across the country.²¹⁰

There should be no federal interest more vital than upholding the federal trust obligation to Indian tribes.²¹¹ Congress enacted ICWA as part of this trust obligation. The first line of the statute recognizes “the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people.”²¹² Congress further found:

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting

207. See *Dice v. Akron*, 342 U.S. 359 (1952); *Brown v. W. Ry.*, 338 U.S. 294 (1949); *Cent. Vermont Ry. v. White*, 238 U.S. 507, 512 (1915).

208. See, e.g., *Dice*, 342 U.S. at 362.

209. See *Felder*, 487 U.S. at 139.

210. See, e.g., *Dice*, 342 U.S. at 361-62; *Felder*, 487 U.S. at 133.

211. For a discussion of the federal trust obligation, see *infra* Section III.A.

212. 25 U.S.C. § 1901 (2018).

Indian children who are members of or are eligible for membership in an Indian tribe.²¹³

Given the vital interest of the federal government in promoting the self-determination of Indian tribes, Congress should be able to impose federal procedures on state courts in order to vindicate this interest. If this were not the case, state courts—the very courts whose hostility to the rights of Indian tribes precipitated ICWA—would be able to use local procedures to “interfer[e] with and frustrat[e]”²¹⁴ efforts by Congress to honor its trust obligation. Two centuries of federal Indian law demand more than that.

Principles of federalism caution that this doctrine should be applied narrowly. Congress should only be permitted to impose federal procedures on state courts to uphold federal rights, federal causes of action, and vital federal interests. This Note identifies upholding the federal trust obligation as one such vital federal interest. There is no need to expand here on which other federal interests might be included.²¹⁵

ii. The *Jinks* Doctrine

In the alternative, the Supreme Court produced a doctrine that, under certain circumstances, permits Congress to modify state causes of action. ICWA falls neatly into these circumstances.

The classic case laying out the contours of Congress’ power to impose federal procedural requirements on state causes of action is *Jinks v. Richland County*.²¹⁶ The case upheld the constitutionality of 28 U.S.C. § 1367(d), a federal provision pre-empting state court procedural rules in state causes of action.²¹⁷ In its analysis, the *Jinks* Court provided two rationales for Congressional authority to impose federal procedures on state causes of action. First, the Court invoked the Necessary and Proper Clause,²¹⁸ noting

213. *Id.* at § 1901(2)-(3).

214. *Felder*, 487 U.S. at 151.

215. It is worth addressing the possibility that vital federal interests should be assumed in the areas where Congress has plenary power, including federal Indian law, the law of the U.S. territories, and immigration law. For a discussion of plenary power in these areas, see generally Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97 (2014).

216. 538 U.S. 456 (2003).

217. *See id.* at 465.

218. U.S. CONST. art. 1, § 8, cl. 18.

that section 1367(d) was necessary for Congress to ensure that the lower courts “fairly and efficiently exercise ‘[t]he judicial Power of the United States.’”²¹⁹ The Court noted that the appropriate test for “necessity” is whether a statute is “conducive to the due administration of justice’ in federal court and ‘plainly adapted’ to that end.”²²⁰ Second, the Court problematized a bright-line distinction between “procedure” and “substance,” concluding, for purposes of the case, that the state-law procedure in question was more substantive than procedural.²²¹

In line with the first rationale in *Jinks*, the state procedural requirements outlined in ICWA are “conducive to the due administration of justice” in federal courts and “plainly adapted to that end.” While ICWA cases are not exclusively federal, the procedural requirements on both state and federal courts are necessary to protect the substantive rights of Indians. If these requirements did not exist, the statute would consist instead of general federal rights that might (or might not) be vindicated in state courts. In light of the very state abuses that prompted the enactment of ICWA, it is likely that the myriad state court proceedings involving Indian children would then be subject to section 1914 enforcement actions, which can be adjudicated in federal court.²²² It would be inefficient to overwhelm the federal courts with a flood of section 1914 claims when the federal rights created in ICWA could just as easily be vindicated earlier in the process by modifying state court procedural rules.

In line with the second rationale in *Jinks*, the federal standards that ICWA imposes on state courts in child custody proceedings involving Indian children are more substantive than procedural. These standards are the safeguards that Congress put in place to protect the federal rights of Indians to raise their children without undue removals by state and private child welfare agencies. The *Jinks* Court expressed doubt that “a principled dichotomy can be drawn” between substance and procedure.²²³ In the context of ICWA, the dichotomy does not exist.

219. *Jinks*, 538 U.S. at 462 (citations omitted). To support this analysis, the Court cited to *Stewart v. Kahn*, which upheld a federal statute that tolled limitations periods for state cases during the Civil War. *Id.* at 461-62 (citing *Stewart v. Kahn*, 78 U.S. 493 (1871)). In *Stewart*, the provision was also deemed “necessary and proper” for the fair and efficient administration of justice. 78 U.S. at 506-07.

220. *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 417, 421 (1819)).

221. *Jinks*, 538 U.S. at 464-65.

222. *See supra* Section II.B.2.a.

223. *Jinks*, 538 U.S. at 464-65 (2003).

Jinks is Supreme Court precedent. Further, the Fifth Circuit favorably summarized the holding of *Jinks* in 2004.²²⁴ It is curious that the U.S. District Court for the Northern District of Texas, in holding ICWA unconstitutional, failed to mention it.

iii. Conflict Preemption

The Supreme Court also applies conflict preemption²²⁵ in certain spheres to uphold federal laws that modify state causes of action. For our purposes, the Court has held that “federal law may modify the relief available under state law causes of action” specifically in the area of family law.²²⁶ For example, in *Hisquierdo v. Hisquierdo*,²²⁷ the Court held that the federal Railroad Retirement Act preempted California community property rights in the event of divorce because the California law did “major damage” to “clear and substantial” federal interests.²²⁸ Similarly, in *McCarty v.*

224. See *Arbaugh v. Y&H Corp.*, 380 F.3d 219, 223 n.3 (5th Cir. 2004).

225. Under certain circumstances, when a federal law impliedly conflicts with state law, it can preempt the state law. “Impossibility preemption” occurs where “compliance with both federal and state regulations is a physical impossibility.” *Florida Lime & Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 142-43 (1963). “Obstacle preemption” occurs where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).

226. Brief of Admin. Law and Constitutional Law Scholars as Amici Curiae in Support of Defendants-Appellants at 7, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479). More generally:

[F]ederal statutes governing income tax, pensions, and bankruptcy significantly affect divorce practice. Supreme Court decisions have altered many of the ground rules for adoption and inheritance when non-marital children are involved. Many of the most complex problems addressed in family law courses concern the intersection of federal and state statutes governing such matters as child support and child custody jurisdiction.

Id. (citing Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 541 (1998)).

227. 439 U.S. 572 (1975).

228. *Id.* at 581 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

McCarty,²²⁹ the Court held that a federal military retirement scheme preempted California property rights in the event of divorce because “the consequences sufficiently injure the objectives of the federal program.”²³⁰ Congress enacted ICWA in order to promote its clear and substantial federal interest in protecting Indian tribes. The state laws that conflict with ICWA’s procedural requirements “sufficiently injure the objectives of the federal program” and are pre-empted.²³¹

3. Congress May Impose Record-Keeping Requirements on the States

In her partial dissent, Judge Owen further argued that ICWA’s record-keeping requirement improperly applies only to states, rather than evenhandedly to private actors and states.²³² Section 1915(e)²³³ of ICWA requires the States to maintain records of adoptive placements of Indian children, including evidence of the efforts made to comply with the ICWA placement preference.²³⁴ Judge Owen acknowledged that the Supreme Court expressly distinguished impermissible commandeering from record-keeping laws “which require only the provision of information to the Federal government.”²³⁵ However, she asserted that ICWA’s record-keeping requirement is different because “it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty.”²³⁶

The Supreme Court has never invalidated a federal statute on the basis of mere reporting requirements imposed on the States. In *Printz*, Justice Scalia noted that federal laws requiring “only the provision of information to the Federal Government” do not involve “the forced participation of the

229. 453 U.S. 210 (1981).

230. *Id.* at 221 (quoting *Hisquierdo*, 439 U.S. at 583).

231. *Id.*

232. *Brackeen v. Bernhardt*, 937 F.3d 406, 445 (5th Cir. 2019) (Owen, J., concurring in part and dissenting in part).

233. 25 U.S.C.A. § 1915(e).

234. *Id.*

235. *Brackeen*, 937 F.3d at 444-45 (quoting *Printz v. United States*, 521 U.S. 898, 918 (1997)).

236. *Id.* at 445 (quoting *Printz*, 521 U.S. at 932).

States' executive in the actual administration of a federal program,"²³⁷ and in concurrence, Justice O'Connor similarly distinguished "purely ministerial reporting requirements" from the provisions invalidated in that case.²³⁸ Furthermore, in *F.E.R.C. v. Mississippi*,²³⁹ the Court upheld a far more intrusive command to the States, holding that Congress can impose "mandatory consideration" of federal standards on the States, including mandatory reporting procedures for such considerations.²⁴⁰

ICWA's record-keeping requirement—like the many other federal provisions requiring states to keep records²⁴¹—falls squarely within the bounds of this doctrine. In fact, it is less intrusive than the requirement upheld in *F.E.R.C.*, where the statute in question required state agencies to report extensive records to the Secretary of Energy every ten years.²⁴² ICWA requires only that states maintain records of where Indian children are placed and the efforts taken to comply with the statute's placement preference, and to produce such records if requested by the Secretary of Interior or the child's tribe.²⁴³

As a practical matter, the record-keeping requirements in ICWA align with existing requirements in the federal Adoption and Foster Care Analysis and Reporting System (AFCARS).²⁴⁴ AFCARS—part of the federally funded child welfare scheme under Title IV-E of the Social Security Act²⁴⁵—has

237. *Printz*, 521 U.S. at 917-18.

238. *Id.* at 936 (O'Connor, J., concurring).

239. 456 U.S. 742 (1982).

240. *Id.* at 761-70. In this case, the Court also held that Congress can compel state administrative tribunals to hear cases arising under a federal statute, provided that such adjudications are "the very type of activity customarily engaged in" by the state agency. *Id.* at 760.

241. *See, e.g.*, 15 U.S.C. § 2224 (2018) (requiring States to submit to FEMA and periodically update a list of covered public accommodations); 20 U.S.C. § 4013 (2018) (requiring States to maintain records regarding the presence of asbestos in school buildings and to annually submit a list of candidates for asbestos abatement activities); 34 U.S.C. § 41307 (2018) (requiring State law enforcement agencies to report missing children to the DOJ); 42 U.S.C. 11133(b) (2018) (requiring State medical examination boards to report certain information to the federal government).

242. *F.E.R.C.*, 456 U.S. at 749.

243. 25 U.S.C. § 1915(e) (2018).

244. *See* 45 C.F.R. § 1335 *et seq.* (2016).

245. 42 U.S.C. §§ 670-79 (2018).

been adopted by every state in the country.²⁴⁶ It includes an extensive list of state record-keeping requirements and directs the States to produce reports twice a year.²⁴⁷ AFCARS already requires states to report the demographic information of any child adopted or placed in foster care, including whether the child is “American Indian or Alaska Native.”²⁴⁸ It also already requires states to report case plan goals for every child placed in foster care.²⁴⁹ By comparison, the only additional record ICWA requires is evidence that the child welfare agency attempted to comply with the ICWA’s placement preference.²⁵⁰ In light of the existing AFCARS reporting requirements, the additional requirement imposed by ICWA is, at most, an extra sentence.

One might object that unlike ICWA, AFCARS is a federally funded program authorized under the Tax and Spend Clause.²⁵¹ Technically, a state would be free to reject federal funding and organize its own child welfare system. But in reality, no state could feasibly reject Title IV-E funding. The States depend on the federal government for the daily workings of their child welfare programs; in 2016, the federal government spent \$7.5 billion in Title IV-E funds, representing fifty-five percent of funds spent by state child welfare agencies that year.²⁵² In Texas, the Brackeen family’s state of residence, federal funding constituted forty-seven percent of child welfare funding in 2016, including nearly \$320 million in Title IV-E funds.²⁵³ Consequently, in practice, the AFCARS requirements are mandatory.

246. *See Child Welfare Financing*, NAT. CONFERENCE OF STATE LEGISLATURES (May 30, 2019), <https://www.ncsl.org/research/human-services/child-welfare-financing-101.aspx> [<https://perma.cc/A3YK-RZ7L>].

247. 45 C.F.R. § 1355.40 (2020).

248. 45 C.F.R. § 1355 app. A (2020); 45 C.F.R. § 1355 app. B (2020).

249. 45 C.F.R. § 1355 app. A. (2020).

250. 25 U.S.C. § 1915(e) (2018).

251. U.S. CONST. art. 1, § 8, cl. 1.

252. *Title IV-E Spending by Child Welfare Agencies*, CHILD TRENDS (2018), https://www.childtrends.org/wp-content/uploads/2018/12/TitleIVESFY2016_ChildTrends_December2018.pdf [<https://perma.cc/VC8X-E4CR>].

253. *Child Welfare Financing Survey SFY 2016*, CHILD TRENDS, <https://www.childtrends.org/research/research-by-topic/child-welfare-financing-survey-sfy-2016> [<https://perma.cc/QL5N-HV8R>] (percentage calculated by author.)

To be clear, even if ICWA did impose extensive reporting requirements, such provisions would be constitutional.²⁵⁴ Even Judge Owen cannot offer concrete precedent or textual evidence invalidating such requirements, relying instead on the “principles set forth in *Printz*,” which she does not define.²⁵⁵ Her approach, focusing specifically on the object of section 1915(e) as opposed to the statute as a whole, actually departs from *Printz*²⁵⁶ and would ultimately nullify all federal statutes with record-keeping requirements. Moreover, “[w]ith respect, directing state executives is not the ‘whole object’ of ICWA.”²⁵⁷ The object is to protect Indian children and tribal sovereignty.

4. ICWA Even-Handedly Regulates States and Private Parties

In her partial dissent, Judge Owen asserted that sections 1912(d) and (e) run afoul of the requirement that federal regulations even-handedly apply to states and private parties.²⁵⁸ Section 1912(d) of ICWA provides that any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child must make “active efforts” to provide remedial services “to prevent the breakup of the Indian family.”²⁵⁹ Section 1912(e) provides that foster care placements for Indian children can only be made after a “qualified expert witness” testifies that continued custody by the Indian custodian “is likely to result in serious emotional or physical damage to the child.”²⁶⁰ Judge Owen concluded that while sections 1912(d) and (e) are “superficially” applicable to states and private entities alike, they

254. See *supra* notes 237-240 and accompanying text.

255. *Brackeen v. Bernhardt*, 937 F.3d 406, 445 (5th Cir. 2019) (Owen, J., concurring in part and dissenting in part (quoting *Printz v. United States*, 521 U.S. 898, 918 (1997))).

256. See *Printz*, 521 U.S. at 932 (considering the object of the Brady Act as a whole, rather than the object of the specific provisions requiring state chief law enforcement offices to conduct background checks).

257. Supplemental En Banc Brief of Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians at 45, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

258. *Brackeen*, 937 F.3d at 443 (Owen, J. concurring in part and dissenting in part).

259. 25 U.S.C. § 1912(d) (2018).

260. 25 U.S.C. § 1912(e) (2018).

apply only to the States in practice because “[f]oster care placement is not undertaken by private individuals or private actors.”²⁶¹

This is incorrect. ICWA regulates the universe of entities that participate in the removal of Indian children from their biological parents, including both states and private entities. The statutory language is clear on this point. Sections 1912(d) and (e) refer explicitly to “[a]ny party” seeking to effect a foster care placement of, or termination of parental rights to, an Indian child. The statute also defines “foster care placement” to include any action placing an Indian child in “the home of a guardian or conservator”²⁶²—typically private actions.²⁶³

A plethora of private entities are subject to ICWA’s regulatory scheme. Most tellingly, the only two Supreme Court cases addressing custody disputes under ICWA—*Adoptive Couple* and *Mississippi Band of Choctaw Indians*—applied ICWA’s requirements in the context of private adoption.²⁶⁴ Additionally, in a case litigated by the Goldwater Institute, the Supreme Court of Washington found that ICWA’s active efforts provisions apply to both state and privately initiated parental terminations.²⁶⁵

261. *Brackeen*, 937 F.3d at 443-44 (Owen, J., concurring in part and dissenting in part).

262. 24 U.S.C. § 1903(1)(i) (2018).

263. *See Cherokee Nation Supplemental Brief*, *supra* note 257, at 43 (citing, e.g., *J.W. v. R.J.*, 951 P.2d 1206, 1212-13 (Alaska 1998)); *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799 (Mich. Ct. App. 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. Ct. App. 1993); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 649 (S.D. 2004)); *see also* *Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 453 (N.M. Ct. App.); *In re Custody of S.B.R.*, 719 P.2d 154, 155-56 (Wash. Ct. App. 1986).

264. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 644 (2013); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 39 (1989).

265. *See In re T.A.W.*, 383 P.3d 492, 503 (Wash. 2016); *see also* *S.S. v. Stephanie H.*, 241 Ariz. 419, 423-24 (Ariz. Ct. App. 2017) (holding that ICWA applies to a private termination of parental rights proceeding; also litigated by Goldwater); *see also, e.g., DJ v. P.C.*, 36 P.3d 663, 671 (Alaska 2001) (applying ICWA to a private adoption proceeding brought by an Indian guardian (grandmother) seeking termination of parental rights of an Indian biological parent); *Matter of Adoption of a Child of Indian Heritage*, 111 N.J. 155 (N.J. 1988) (applying ICWA to a privately initiated termination of parental rights by an Indian biological parent); *In re Adoption of Micah H.*, 295 Neb. 213 (Neb. 2016) (applying ICWA to a private adoption proceeding brought by an Indian guardian (grandparents) seeking termination of parental rights of an Indian

Similarly, the Supreme Court of Nebraska recently held that ICWA applied in a private guardianship proceeding where a child's grandmother brought an action against the child's mother petitioning for temporary guardianship.²⁶⁶ In order to properly assume guardianship, the grandmother—not the state—was first required to use “active efforts” to prevent the breakup of the Indian parent and child.²⁶⁷

Private adoption agencies across the country endeavor to meet their regulatory requirements under ICWA, including American Adoptions, one of the largest private adoption agencies in the United States.²⁶⁸ American Adoptions, which operates several offices in the Brackeens' home state of Texas,²⁶⁹ provides ICWA guidance to prospective caregivers and adoptive parents,²⁷⁰ screens biological parents and prospective adoptive parents for Indian heritage to verify ICWA eligibility,²⁷¹ and asserts that their “social work staff receive ICWA training from . . . one of the country's foremost Indian Child Welfare experts.”²⁷²

Many private adoption agencies are also required to understand and comply with ICWA as a condition of state licensing.²⁷³ In Texas—the home

biological parent); *A.B.M. v. M.H.*, 651 P.2d 1172, 1172-74 (Alaska 1982) (applying ICWA to a privately initiated termination of parental rights by an Indian biological parent); *Bruce L. v. W.E.*, 247 P.3d 966, 976 (Alaska 2011) (applying ICWA to a privately initiated termination of parental rights by an Indian parent).

266. See *In re Guardianship of Eliza W.*, 938 N.W. 2d 207 (Neb. 2020).

267. *Id.* at 1006-07.

268. See *The Indian Child Welfare Act (ICWA) and Adoption*, AM. ADOPTIONS, https://www.americanadoptions.com/state_adoption/indian_child_welfare_act [<https://perma.cc/8P8T-V8VP>].

269. See *Texas Adoption Information and Resources*, AM. ADOPTIONS, <https://www.americanadoptions.com/texas-adoption> [<https://perma.cc/8KMP-ATD7>] (listing six Texas offices).

270. See *The Indian Child Welfare Act (ICWA) and Adoption*, *supra* note 268.

271. See *Free Adoption Information*, AM. ADOPTIONS, https://www.americanadoptions.com/pregnant/free_info [<https://perma.cc/KG58-75ZQ>].

272. See *The Indian Child Welfare Act (ICWA) and Adoption*, *supra* note 268.

273. See, e.g., *Community-Based Care Authority and Requirements Reference Guide*, FLA. DEP'T OF CHILDREN & FAMILIES (2016), <https://myflfamilies.com/service-programs/community-based-care/docs/CBC%20Authority%20and%20Requirements%20Reference%20Guide.PDF> [<https://perma.cc/Q5RG->

state of the Brackeens—private adoption and foster care agencies, known as Child Placement Agencies, play an outsized role in child custody proceedings. There are 150 licensed private Child Placement Agencies operating in Texas,²⁷⁴ and the Texas Department of Family and Protective Services asserts that “most foster care services are currently provided by the private sector.”²⁷⁵ With few exceptions, all private entities seeking to provide child placement services in Texas must operate under a designated Administrator’s license.²⁷⁶ The licensure process requires prospective Administrators to pass an exam that covers a set of minimum standards,²⁷⁷ including compliance “with all state and federal laws regarding termination of parental rights.”²⁷⁸ Therefore, the Child Placement Agency Administrator

MLQR] (requiring private providers to “be knowledgeable of and fully comply with all state and federal laws, rules, and regulations” relating to ICWA); *Child Welfare Case Management Provider Roles and Responsibilities*, KAN. DEP’T OF CHILDREN & FAMILIES, http://content.dcf.ks.gov/pps/robohelp/ppmgenerate/pps_policies/5000_child_welfare_case_management/5212_child_welfare_case_management_provider_roles_and_responsibilities.htm [https://perma.cc/KG6T-GFA5] (requiring private providers to “work with tribes to . . . ensure compliance with the Indian Child Welfare Act.”).

274. See *Active and Open Contracts*, TEX. DEP’T OF FAMILY & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Doing_Business/Purchased_Client_Services/Residential_Child_Care_Contracts/active_contracts.asp [https://perma.cc/H2UA-ULB6].
275. *Community-Based Care FAQs*, TEX. DEP’T OF FAMILY & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/FAQ.asp#cbc [https://perma.cc/2XR6-R8TE]. Texas is well on its way toward complete privatization of the child welfare system. See Katy Vine, *As Texas Privatizes Child Protective Services, Will the Horror Go Unheard?*, TEX. MONTHLY (Mar. 6, 2019), <https://www.texasmonthly.com/news/texas-privatizes-child-protective-services-will-horror-stories-go-unheard> [https://perma.cc/D6SW-QGGH] (discussing the recently passed Texas Senate Bill 11, which vastly privatized Texas’s child welfare system).
276. See 26 TEX. ADMIN. CODE § 745.37 (2020).
277. See *Licensed Child-Care or Licensed Child Placing Administrator*, TEX. DEP’T OF HEALTH & HUMAN SERVS., <https://hhs.texas.gov/doing-business-hhs/provider-portals/protective-services-providers/child-care-licensing/licensed-child-care-or-licensed-child-placing-administrator> [https://perma.cc/Y5CE-5X49].
278. Tex. Health & Human Servs. Commission, *Minimum Standards for Child-Placing Agencies* § 749.3521, TEX. DEP’T OF HEALTH & HUMAN SERVS. (2018),

overseeing Nightlight Christian Adoptions²⁷⁹—the Brackeens’ adoption agency—would have been required to understand the relevant federal and state standards in order to obtain a license.

The Supreme Court has consistently held that congressional regulation that applies even-handedly to both states and private entities is constitutional. In the case most analogous to the context of ICWA, *Reno v. Condon*,²⁸⁰ the Court held that the Driver’s Privacy Protection Act (DPPA), restricting the disclosure of drivers’ personal information, did not commandeer the States.²⁸¹ The plaintiff, South Carolina, argued that the DPPA violated the Tenth Amendment because it “regulate[d] the States exclusively,”²⁸² contending that states were the sole holders of drivers’ personal information. The Court flatly rejected this argument, stating that “the DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information” including the States and private entities.²⁸³ In its reasoning, the Court looked to the statutory language of the DPPA, noting the many provisions that explicitly regulate “private persons.”²⁸⁴ The Court also relied on congressional factual findings that many states sell personal information obtained by Departments of Motor Vehicles to private entities.²⁸⁵

Once the Court finds that a congressional enactment generally applies to both states and private individuals, it is willing to uphold even the most onerous compliance requirements. In *Condon*, the Court upheld the DPPA even in the face of South Carolina’s contention that it would “[require] the State’s employees to learn and apply the Act’s substantive restrictions . . .” which would “consume the employees’ time and thus the States’

<https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/protective-services/ccl/min-standards/chapter-749-cpa.pdf> [<https://perma.cc/37W6-MSK2>].

279. See Tex. Dep’t of Family & Protective Servs., *Child-Placing Agency Administrators for Region 7*, TEX. DEP’T OF HEALTH & HUMAN SERVS., https://www.dfps.state.tx.us/Child_Care/Licensed_Administrators/Administrators_Results.asp?r=7&admttype=LCPA [<https://perma.cc/P7QJ-X4XX>].

280. 528 U.S. 141 (2000).

281. *Id.* at 151.

282. *Id.*

283. *Id.*

284. *Id.* at 146-47.

285. See *id.* at 143.

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resources.”²⁸⁶ Similarly, in *South Carolina v. Baker*,²⁸⁷ the Court upheld a federal financial regulatory scheme even though “many state legislatures had to amend a substantial number of statutes” and “state officials had to devote substantial effort” in order to comply.²⁸⁸ Responding to a complaint by the National Governor’s Association, the Court firmly countered: “Such ‘commandeering’ is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance.”²⁸⁹

III. THE DANGERS OF THE ANTI-COMMANDEERING ARGUMENT TO TRIBAL SOVEREIGNTY

Having established that ICWA does not commandeer the States, this Note now turns to the broader implications of the anti-commandeering argument for tribal sovereignty. The stakes to Indian children and families are clear; without federal protections in place to prevent abuses by state child welfare agencies and private adoption entities, Indian communities are at risk of a renewed crisis of child removals from their families and tribes. This form of forced assimilation and cultural genocide, on its own, strikes at the heart of tribal sovereignty.²⁹⁰ Additionally, as discussed above, if ICWA is overturned on the basis of equal protection, the ruling would threaten the status of Indian tribes as quasi-sovereign political entities.²⁹¹ However, the anti-commandeering argument also poses an additional insidious threat to tribal sovereignty by endangering many of the existing federal policies designed to protect the tribes from state encroachment. This Section elaborates on how the federal government imposes requirements and restrictions on states with regards to their relationships with tribes and explores how the anti-commandeering argument could disrupt the balance among the three sovereigns: the States, the tribes, and the federal government.

286. *Id.* at 149.

287. 485 U.S. 505 (1988).

288. *Id.* at 514-15.

289. *Id.*

290. For a discussion of the practice of removing Indian children from their families by state child welfare agencies as cultural genocide, see Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, *supra* note 73, at 64-65.

291. *See supra* Section II.

A. *The Trust Doctrine as a Defense to State Encroachment*

Since the founding of the United States, state governments have persistently and aggressively sought to extend their laws and jurisdiction over Indian country.²⁹² Indeed, state encroachment gave rise to one of the foundational cases of federal Indian law, *Cherokee Nation v. Georgia*.²⁹³ In that case, the State of Georgia sought to forcibly remove the Creek and Cherokee Indians from the western portion of the state, particularly upon the discovery of gold on the Indians' land, going so far as to threaten civil war if the federal government blocked its efforts.²⁹⁴ As part of this standoff, Georgia enacted a series of laws to extend state jurisdiction over Indian territory, annul Cherokee laws, and direct the seizure of all Cherokee lands.²⁹⁵ *Cherokee Nation* arrived on the doorstep of the Supreme Court when the State of Georgia actually prosecuted and convicted a Cherokee Indian named George Tassel, who ordinarily would have been subject to the jurisdiction of the Cherokee Nation.²⁹⁶ While the Supreme Court dismissed the case, Chief Justice Marshall's opinion laid the groundwork for the federal trust obligation to Indian tribes, characterizing them as "domestic dependent nations" requiring federal protection.²⁹⁷

The trust doctrine is foundational to federal Indian law. Rooted in the "Marshall Trilogy"²⁹⁸—a series of federal Indian law cases, including *Cherokee Nation*, decided in the early 1800s—it sets up the relationship of Indian tribes to the United States as "that of a ward to his guardian."²⁹⁹ Over the past two centuries, the doctrine developed to impose an exacting

292. For an extensive treatment of this history, see Clifford M. Lyttle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65 (1980).

293. 30 U.S. 1 (1831).

294. See Lyttle, *supra* note 292, at 67.

295. *Id.*

296. *Id.*

297. *Id.*; see also *Cherokee Nation*, 30 U.S. at 16. For an overview of the trust doctrine, see Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200 (2017); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

298. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

299. *Cherokee Nation*, 30 U.S. at 1.

fiduciary duty on the part of the federal government to protect tribal treaty rights, funds, and natural resources,³⁰⁰ as well as a duty to promote tribal self-governance and economic development.³⁰¹ The trust obligation also gave rise to “clear statement rules when Congress acts against the interest of Native nations, forcing political accountability for colonial action,” and “canons of interpretation that recognize the imbalance of power and that read agreements in favor of Native nations.”³⁰²

The anti-commandeering challenge to ICWA threatens to constrain the federal government’s ability to uphold its trust obligation to Indian tribes. In order to fully protect the self-determination and economic prosperity of tribes, the federal government must be able to guard against state threats to tribal sovereignty. Indeed, recent Supreme Court decisions reflect the Court’s willingness to side with tribes over states in cases involving the trust responsibility. In *McGirt v. Oklahoma*,³⁰³ a recent case involving a jurisdictional dispute between the Muskogee (Creek) Nation and the State of Oklahoma, the Supreme Court sided with tribes—finding that the State of Oklahoma lacked criminal jurisdiction over an Indian defendant and over the Muskogee (Creek) Reservation.³⁰⁴ While the central question before the Court focused on whether Congress had abrogated the Muskogee (Creek) Nation’s 1833 reservation borders, the Court’s underlying task was to balance state sovereignty against the federal government’s trust obligation to honor past treaties.

The Court’s decision also hinted at a potentially favorable outcome for tribes if *Brackeen* were to be reviewed by the Court. The Court in *McGirt*

300. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (“Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”).

301. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (“The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.”) (internal quotation and citation omitted).

302. Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1825 (2019).

303. 140 S. Ct. 2452 (2020).

304. *Id.*

contemplated the potential impact of their decision over civil disputes and on Indian child welfare in particular, as it was raised in the amicus briefs³⁰⁵ and in oral argument.³⁰⁶ The decision in favor of tribes in *McGirt* serves as a legal basis to challenge past adoptions and custody disputes involving Indian children residing or domiciled within Muskogee reservations.³⁰⁷ It also lays a foundation for the Muscogee (Creek) Nation to assume original jurisdiction over future child custody disputes within their now-recognized reservation boundary, as state courts are not free to exercise jurisdiction over civil suits in actions involving Indians in Indian reservations.³⁰⁸ Despite the potential disruptions to states such as Oklahoma, the Court nonetheless ruled in favor of tribes, signaling a commitment to the trust obligation in custody disputes as well. Perhaps most importantly, it affirmed the Court's interest in upholding the balance of power among the states, federal government, and tribes.

B. Federal Schemes Governing State-Tribe Relationships

As a central part of its trust obligation, the federal government has enacted an extensive scheme of laws, regulations, and legal precedent governing the States' relationship with Indian tribes. If ICWA were to be held unconstitutional on the basis of commandeering, centuries of federal law would be thrown into question, as well as the viability of the trust obligation itself. While examples of federal requirements and restrictions on the States with regard to their relations with Indian tribes abound, the following examples are illustrative of the types of schemes that might be endangered.

305. Brief for the United States as Amicus Curiae Supporting Respondent at 40, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478583, at *40.

306. Transcript of Oral Argument at 40-41, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 2425717, at *40-41 (Justice Kagan asked Riyaz Kanji about the consequences, if any, of the decision on adoptions and foster care proceedings. Mr. Kanji discussed ICWA at length in his response.).

307. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 305, at 40 (citing 25 U.S.C. § 1911(a) (2018)).

308. *See Williams v. Lee*, 358 U.S. 217 (1959) (finding that state courts are not free to exercise jurisdiction over civil suits arising on Indian reservations and over Indians).

1. Economic Development Through Indian Gaming

In the late 1970s, several Indian tribes began to pursue gaming enterprises, such as casinos and bingo halls, as novel tools for reservation economic development.³⁰⁹ State governments immediately attempted to restrict tribal gaming operations, claiming that much of Indian gaming ran afoul of state regulations and would lead to an “infiltration of the tribal games by organized crime.”³¹⁰ In response to state challenges to Indian gaming, the Supreme Court held in *California v. Cabazon Band of Mission Indians* that unless a state prohibits a specific type of gambling altogether, it cannot regulate that type of gambling on an Indian reservation.³¹¹ In coming to its decision, the Court weighed Congress’ interest in promoting tribal self-determination and self-sufficiency with California’s stated interest in preventing organized crime,³¹² ultimately concluding that California’s interest was insufficient “to escape the pre-emptive force of federal and tribal interests apparent in this case.”³¹³

Soon after the *Cabazon* case was decided, Congress passed the Indian Gaming Regulatory Act (IGRA).³¹⁴ One of the Act’s stated purposes, in line with the federal trust obligation, was to “promote economic development, tribal self-sufficiency, and strong tribal governments.”³¹⁵ The Act gave

309. See Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAPMAN L. REV. 47 (2002) (citing STEPHEN CORNELL ET AL., AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 77 (1998)).

310. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987); see also Rand, *supra* note 309, at 48-51.

311. *Cabazon Band of Mission Indians*, 480 U.S. at 208-12.

312. See *id.* at 216-22.

313. *Id.* at 221.

314. 25 U.S.C. §§ 2701-721 (2018).

315. 25 U.S.C. § 2702. The other stated purposes of IGRA are:

- (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
- (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment

tribes the exclusive authority to regulate Class I gaming³¹⁶ and the authority to regulate Class II gaming subject to federal oversight.³¹⁷ But the Act required tribes to negotiate Tribal-State compacts in order to operate Class III, or casino-style, gaming.³¹⁸ To level the balance between the tribes and the States, the Act concurrently imposed a duty on the States to negotiate such compacts in good faith, creating a cause of action for tribes to sue states that declined to do so.³¹⁹

Almost a decade after the passage of IGRA, the Supreme Court held in *Seminole Tribe v. Florida*³²⁰ that State sovereign immunity, unless waived, precluded tribal lawsuits against states that refused to negotiate Tribal-State compacts in good faith.³²¹ However, by that time, many tribes had already successfully negotiated contracts under IGRA.³²² Indian gaming has been “the most successful economic venture ever to occur consistently across a wide range of American Indian reservations.”³²³ Gaming has allowed many tribes to strengthen education, medical services, and a wide range of other social services, and allowed them to marshal the resources to more effectively advocate in the halls of Congress and the courts.³²⁴

In addition to the complex jurisdictional disputes and regulatory tensions that would arise among states, tribes, and the federal government

of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Id.

316. *Id.* § 2710(a)(1). Class I gaming consists of social games and traditional tribal gambling. *Id.* § 2703(6).

317. *Id.* § 2710(b). Class II gaming consists of bingo and non-banking card games. *Id.* § 2703(7).

318. *Id.* § 2710(d). Class III gaming consists of “all forms of gaming that are not class I gaming or class II gaming,” *id.* § 2703(8), including banking card games, electronic facsimiles of games, and slot machines, *id.* § 2703(7)(B).

319. *Id.* § 2710(d)(7).

320. 517 U.S. 44 (1996).

321. *Id.* at 76.

322. *See* Rand, *supra* note 309, at 52.

323. Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919, 921 (2008).

324. *See id.* at 922 (citing Rand, *supra* note 309, at 53-54).

if ICWA were held unconstitutional, the scale of the economic impact cannot be understated. As of 2018, Indian Gaming revenues were in excess of \$33.7 billion dollars, and were found to be increasing with each coming year.³²⁵ The economic success of Indian gaming is also shared by states, localities, and the federal government. The total annual contribution of Indian gaming to the U.S. economy is roughly \$103 billion dollars and sustains at least 770,000 jobs.³²⁶ At least twenty-eight states rely on Indian Gaming revenues.³²⁷ A recent state-by-state economic analysis on the impact of tribal gaming found that each year Indian gaming contributes \$1.8 billion in direct payments to federal, state, and local governments, and \$10.5 billion in federal, state, and local taxes.³²⁸

If ICWA were to be held unconstitutional on the basis of commandeering, the ruling might cast doubt on the constitutionality of the complex legal scheme that Congress and the Supreme Court have developed to balance state interests, tribal interests, and federal interests in the area of tribal economic development through gaming. Further, if the federal government were no longer able to restrict states from encroaching on Indian gaming operations, a project that has vastly improved reservation life for many tribes³²⁹ might be endangered. It would also compromise the financial relationship among states, tribes, and the federal government, and upend entire communities that rely on Indian gaming and its interdependent markets.

325. *2018 Indian Gaming Revenues of \$22.7 Billion Show a 4.1% Increase*, NAT'L INDIAN GAMING COMMISSION (Sept. 12, 2018), <https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase> [<https://perma.cc/WMU5-W8VJ>].

326. Alan Meister, *Casino City's Indian Gaming Industry Report*, NATHAN ASSOCIATES 3 (2017), <https://www.nathaninc.com/wp-content/uploads/2017/04/IGIRSummary2017-reducedsize.pdf> [<https://perma.cc/HR4J-W74Z>].

327. Alan Meister & Nathan Associates, Inc., *The Economic Impact of Tribal Gaming: A State-by-State Analysis*, AM. GAMING ASS'N 1 (2017), <https://www.americangaming.org/sites/default/files/Economic%20Impact%20of%20Indian%20Gaming%20in%20the%20U.S.%20September%202017.pdf> [<https://perma.cc/RU7R-45SG>].

328. Meister, *supra* note 326, at 3.

329. See Rand, *supra* note 309, at 54.

2. Hunting and Fishing Rights

The Supreme Court has time and again imposed sometimes costly burdens on the States to ensure that Indian tribal hunting and fishing rights are honored, pursuant to treaties with the United States government. In *U.S. v. Winans*,³³⁰ the Supreme Court held that the State of Washington's licensing of fish wheels interfered with a federal treaty between the Yakama Indians and the United States,³³¹ giving the Tribe the right to "tak[e] fish at all usual and accustomed places."³³² While a subsequent Supreme Court decision gives the State of Washington the authority to regulate tribal fishing necessary for conservation purposes,³³³ the underlying Yakama Indian treaty fishing rights, affirmed in *Winans*, endure as a restriction on the regulatory power of the state.

Similarly, in *Herrera v. Wyoming*,³³⁴ the Supreme Court ruled in favor of Clayvin Herrera, a member of the Crow Tribe, who had been erroneously convicted of hunting in the Bighorn National Forest without a license and out of season.³³⁵ Pursuant to a federal treaty between the Crow Tribe of Indians and the United States,³³⁶ the Crow Tribe's hunting rights "survived Wyoming's statehood," and Wyoming could not impose its hunting regulations on members of the tribe.³³⁷

If the federal government's protections of Indian children and families under ICWA were to be held to unconstitutionally commandeer the States, the federal government's protection of Indian hunting and fishing rights would be thrown into question as well. ICWA rests on the plenary power of Congress to legislate in the domain of Indian affairs, while Indian hunting and fishing rights have largely been affirmed on the basis of treaties, which are likewise ratified by the Senate. If Congress' plenary power over Indian

330. 198 U.S. 371 (1905).

331. See Treaty with the Yakima, U.S.-Yakima, Mar. 8, 1859, 12 Stat. 951.

332. *Id.* at art. 3.

333. See *Tulee v. Washington*, 315 U.S. 681 (1942) (holding that while Washington could not require Indians to pay a fishing license fee, it could impose on Indians equally with others purely regulatory fishing restrictions necessary for conservation).

334. 139 S. Ct. 1686 (2019).

335. *Id.* at 1693, 1706.

336. Treaty of Fort Laramie with the Crow, Crow-U.S., art. 4, May 7, 1868, 15 Stat. 650.

337. *Herrera*, 139 S. Ct. at 1691-92.

affairs ceases to be axiomatic, the authority of treaties ratified by the Senate might be weakened as well.

3. Limitations on State Regulatory Authority Over Indian Country

Consistent with tribal sovereignty and the federal interest in promoting tribal self-government, the Supreme Court has severely limited the ability of the States to extend regulatory authority over Indian Country.³³⁸ In *Warren Trading Post Co. v. Arizona Tax Commission*,³³⁹ the Court prohibited the States from taxing or otherwise burdening trade with Indians on reservations due to field preemption by Congress. In a subsequent case, *White Mountain Apache Tribe v. Bracker*,³⁴⁰ the Court further laid out a balancing test to guide a “particularized inquiry” in adjudicating state attempts to regulate Indian Country when the regulations are not explicitly preempted by federal law.³⁴¹ The factors include the extent to which the tribe would be affected by the state’s regulation; the extent to which the federal government is already regulating the conduct that the state is seeking to regulate; the nature of the state’s interest in enforcing its law on the reservation; and whether the state is providing any benefits or services in exchange for the burdens the state is seeking to impose.³⁴² Tribal sovereignty plays a significant role in the analysis, given that the federal

338. “Indian Country” is defined as:

- a. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
- b. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and c. all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2018).

339. 380 U.S. 685 (1965).

340. 448 U.S. 136 (1980).

341. *Id.* at 145.

342. *Id.* at 145-53.

government always has an interest in encouraging tribal self-sufficiency and economic development.³⁴³

Similarly, in *Williams v. Lee*,³⁴⁴ the Supreme Court held that Arizona courts did not have jurisdiction over a non-Indian who operated a general store on the reservation bringing suit against a member of the Navajo Nation over transactions related to the store. The holding set out an infringement test regarding state regulation over Indian country, asking “whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”³⁴⁵ Justice Black further stated in the majority opinion that “Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”³⁴⁶

These rulings have been reaffirmed by subsequent cases in the Supreme Court, restricting the ability of the States to tax and otherwise regulate affairs in Indian Country absent Congressional authorization. If ICWA were to be declared unconstitutional on the basis of commandeering, the current federal restrictions on state regulatory authority over tribes might be threatened as well, jeopardizing the very essence of tribal sovereignty.

CONCLUSION

Four decades after the passage of the Indian Child Welfare Act, powerful forces have converged in a coordinated effort to overturn it. In *Brackeen*,³⁴⁷ ICWA’s opponents have gained traction through a novel anti-commandeering argument to draw the law into constitutional doubt. If the Supreme Court grants review in the case, ICWA could be dismantled along with the full corpus of federal Indian law and tribal sovereignty.

The implications of overturning ICWA on anti-commandeering grounds reach beyond the scope of federal Indian law into the basic structure of federalism itself. While scholarly discussions of federalism typically contemplate the appropriate distribution of sovereign authority between

343. *See, e.g., id.* at 143 (“As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.”).

344. 358 U.S. 217 (1959).

345. *Id.* at 220.

346. *Id.*

347. *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

only two parties—the national government and the States—the reality is that Indian tribes comprise a third and equally significant player in the federalist system.³⁴⁸ The “dynamic, flexible, ever-changing, and difficult-to-define relationship”³⁴⁹ between the federal government and the States, “defined through an ongoing evolutionary process of Supreme Court opinions, constitutional language, and actual practice,”³⁵⁰ has always developed in the context of quasi-sovereign Indian tribal governments, existing within state borders, subject to Congressional plenary power, and owed a trust obligation by the federal government. Debates over the treatment of Indian tribes by the States and the federal government inevitably shape and re-shape the balance of power between all three.

Holding ICWA unconstitutional on the basis of anti-commandeering doctrine would permit the States to disturb the longstanding trust relationship between the federal government and the Indian tribes. This would be a tectonic shift in the existing federalist structure, akin to authorizing the States to independently engage in foreign relations. Suddenly, the States may have vastly expanded power to regulate Indian affairs.

Additionally, applying commandeering doctrine to state courts could wreak havoc on the legal system. While anti-commandeering doctrine was developed in large part to promote political accountability,³⁵¹ an anti-commandeering decision limiting the extent to which the federal government can require state courts to enforce federal law would create widespread confusion as to the enforceability of many federal laws.

Invalidating ICWA’s record-keeping requirements might threaten other federal regulatory schemes that require state reporting, including the

348. For a deeper discussion of federalism as a dynamic between the federal government, the States, and Indian tribes, see generally Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

349. *Id.* at 313.

350. *Id.*

351. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”); *New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate.”).

Adoption and Foster Care Analysis and Reporting System (AFCARS),³⁵² the Every Student Succeeds Act (ESSA),³⁵³ and the Patient Protection and Affordable Care Act.³⁵⁴ Overturning a federal regulatory program that evenhandedly regulates the States and private entities would likewise disrupt similar existing schemes, such as the Driver's Privacy Protection Act (DPPA),³⁵⁵ which has already been upheld by the Supreme Court.³⁵⁶

These results seem absurd because they are based on an absurd reading of existing anti-commandeering doctrine. This Note demonstrates how the commandeering claims advanced against ICWA willfully ignore settled Supreme Court jurisprudence and misconstrue the practical application of the statute. ICWA does not commandeer the States. While conservative groups seeking to dismantle tribal sovereignty might cynically attempt to leverage anti-commandeering doctrine to advance their agenda, courts should see through the smokescreen and protect the integrity of Indian families. The very existence of Indian tribes, as well as the federalist structure as we know it, hangs in the balance.

352. *See supra* note 244 and accompanying text.

353. Pub. L. No. 114-95, 129 Stat. 1802 (2015).

354. Pub. L. No. 111-148, 124 Stat. 119 (2010).

355. 18 U.S.C. § 2721 (2000).

356. *See Reno v. Condon*, 528 U.S. 141 (2000).