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Matthew L.M. Fletcher

Michigan School of Law, nimrod@umich.edu

Randall F. Khalil

Michigan School of Law

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PREEMPTION, COMMANDEERING, AND THE INDIAN CHILD WELFARE ACT

MATTHEW L.M. FLETCHER* &
RANDALL F. KHALIL**

This year (2022), the Supreme Court agreed to review wide-ranging constitutional challenges to the Indian Child Welfare Act (ICWA) brought by the State of Texas and three non-Indian foster families in the October 2022 Term. The Fifth Circuit, sitting en banc, held that certain provisions of ICWA violated the anti-commandeering principle implied in the Tenth Amendment and the equal protection component of the Fifth Amendment’s Due Process Clause.

We argue that the anti-commandeering challenges against ICWA are unfounded because all provisions of ICWA provide a set of legal standards to be applied in states which validly and expressly preempt state law without unlawfully commandeering the states’ executive or legislative branches. Congress’s power to compel state courts to apply federal law is long established and beyond question.

Yet even if some ICWA provisions violated the Tenth Amendment, we argue that Section 5 of the Fourteenth Amendment sufficiently authorizes Congress’s enactment of ICWA so as to defeat the anti-commandeering concerns. Strangely, no party ever invoked Congress’s power under Section 5 of the Fourteenth Amendment to assess its constitutionality. ICWA seems like an obvious candidate for analysis under Congress’s Section 5 enforcement powers. States routinely discriminate against American Indian families on the basis of their race and ancestry (and their religion and culture), and ICWA is designed to remedy the abuses of state courts and agencies.

We further have no doubt that the state legislatures that adopted ICWA in whole, in part, or as modified also possessed the power to do so, even in the event the Supreme Court holds all or portions of ICWA unconstitutional.

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* Harry Burns Hutchins Collegiate Professor of Law and Professor of American Culture, University of Michigan. J.D., University of Michigan Law School, 1997.

** J.D., University of Michigan Law School, 2022. The authors thank the participants of the University of Wisconsin State Democracy Research Initiative symposium on Interpretation in the States for their insightful comments.

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INTRODUCTION

In the language of the Anishinaabe nations, the words for baby or young child are *binoojiinh* (Ojibwe and Odawa) and *penojé* (Bodewadmi), which means literally “a young spirit coming forth.”¹ For Anishinaabe people, children are supernatural creatures. They come into the world with powers of observation and learning far exceeding that of grown people.² They are treated with deference and respect. Anishinaabe people take their obligations to children seriously. Anishinaabe children “learn about governance, power, decision making and our political cultures” through their place in family.³ Anishinaabe people privilege connectivity over individuality, harmony over control, and deference to *Anishinaabewaki*, the world around us. *Aabawaadiziwin* means “togetherness,” a manifestation of the political philosophies rooted in Anishinaabe culture.⁴ Anishinaabe people hope to teach their children to “[m]aintain[] balance and harmony through good relationships.”⁵

In contrast, American political philosophy is rooted in dominion, hierarchy, and power.⁶ Life is compartmentalized, not interconnected. “At common law, children were treated as chattel.”⁷ First year law students learn in Torts that American courts valued children primarily by

1. *Putting Our Minds Together for Our Children*, THE PUNDIT (Dec. 20, 2017), <https://michildsupportpundit.blogspot.com/2017/12/putting-our-minds-together-for-our.html> [<https://perma.cc/LJ6P-TTFF>] (quoting Michael D. Petoskey, Chief Judge of the Pokagon Band of Potawatomi Indians and the Match-E-Be-Bash-She-Wish Band of Pottawatomi Indians); see also *Binoojiinh*, NISHNAABEMWIN WEB DICTIONARY, <https://dictionary.nishnaabemwin.atlas-ling.ca/#/entry/n72977545112n> [<https://perma.cc/M57A-6HXB>] (last visited Oct. 30, 2022).

2. LEANNE BETASAMOSAKE SIMPSON, *DANCING ON OUR TURTLE'S BACK: STORIES OF NISHNAABEG RE-CREATION, RESURGENCE AND A NEW EMERGENCE* 123 (2011).

3. *Id.* at 122.

4. *Id.*

5. Susan Chiblow (Ogamauh annag qwe), *Anishinabek Women's Nibi Giikendaaswin (Water Knowledge)*, 11 WATER 206, 214 (2019).

6. See generally C. Wright Mills, *The Structure of Power in American Society*, 9 BRIT. J. SOCIO. 29 (1958) (describing how education, religion, and family are shaped by political, military, and economic institutions).

7. Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 237 (2010).

the economic value of their labor; if children were lost, the cost could quickly be offset by the production of another child.⁸ Because the law presumed children's economic value declined as children stopped entering the workforce in great numbers, it makes sense that state governments did virtually nothing to establish governmental service programs for children in need at the Founding until well into the 20th century.⁹ Because child welfare services are expensive and, again, children generate little economic value as a matter of law, it makes further sense that child protective services that states eventually established were poorly designed and funded.¹⁰ And because these services are directed toward underprivileged persons, it was all too easy for states to weaponize those services against poor people and people of color.¹¹ If child welfare systems are microcosms of the government American children learn, then American children learn a very specific form of brutal government.

As any observer of American history realizes, the American government (and its colonial predecessors) focused policies of dominion, hierarchy, and power on Native families for centuries. A government rooted in dominion, hierarchy, and power still uses exactly those tools to remedy these harms. Only in the last half century or so has the United States government begun to take small steps to acknowledge and repair the intergenerational harms these policies caused.¹² One of Congress's key tools for this is Section 5 of the Fourteenth Amendment.

American Indian affairs and the Fourteenth Amendment have a strange, undertheorized relationship. It is well established that Congress possesses plenary power in Indian affairs by virtue of several Constitutional provisions, the structure of the Constitution, and treaties made with Indian tribes.¹³ The Supreme Court has pointed to the Commerce Clause, the Treaty Power, the Property and Territory Clause, and even the preconstitutional powers of the United States as sources of

8. Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 461 (2020).

9. See John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452 (2008) (“[I]n the nineteenth and early twentieth centuries, child protection agencies were nongovernmental.”).

10. See generally Dorothy Roberts, *Five Myths About the Child Welfare System*, WASH. POST (Apr. 15, 2022, 1:14 PM), <https://www.washingtonpost.com/outlook/2022/04/15/five-myths-child-welfare> [<https://perma.cc/TD9N-BKWW>] (describing structural problems with state child welfare systems).

11. See Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426, 426 (2014).

12. See, e.g., Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963.

13. RESTATEMENT OF THE L. OF AM. INDIANS § 7 (AM. L. INST. 2022) [hereinafter RESTATEMENT L. AM. INDIANS].

this power.¹⁴ The Court has also held that the relationship between Indian tribes and the United States, known since the Founding as the “duty of protection,” is also a source of Congressional power.¹⁵ Virtually all of federal Indian law—acts of Congress, executive orders, federal regulations, and Indian treaties—derive from these sources of authority.

What is almost always missing from listings of sources of Congressional power is Section 5 of the Fourteenth Amendment—the enforcement power. Remedial civil rights statutes constitute a healthy proportion of Congressional enactments in Indian affairs. Most obviously, there is the Indian Civil Rights Act, which requires tribal governments to guarantee certain civil rights to persons under tribal jurisdiction.¹⁶ There is a law extending American citizenship to all American Indians.¹⁷ There is a law authorizing the Interior Secretary to acquire land in trust to restore lost tribal lands.¹⁸ There is also a law authorizing tribal courts to issue personal protection orders and obligating state courts to give full faith and credit to those orders.¹⁹ Occasionally, federal courts are asked to assess the constitutionality of these statutes. The challenges almost always involve the scope of Congress’ power under the Commerce Clause or the Treaty Clause,²⁰ but we are aware of no challenge in which a party invoked Section 5.

One of the most important, most litigated, and most controversial Indian affairs-related civil rights statutes is the Indian Child Welfare Act (ICWA).²¹ ICWA partially strips state courts of jurisdiction over certain child welfare matters involving Indian children and imposes obligations on state governments as a means of remedying decades of horrific civil rights abuses perpetrated by states throughout the mid-twentieth

14. *United States v. Lara*, 541 U.S. 193, 200–01 (2004).

15. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581–82 (1832) (“By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self government, nor destroy their capacity to enter into treaties or compacts.”).

16. 25 U.S.C. § 1302.

17. 8 U.S.C. § 1401(b).

18. 25 U.S.C. § 5108.

19. 18 U.S.C. § 2265(a).

20. *E.g.*, *County of Charles Mix v. U.S. Dept. of the Interior*, 799 F. Supp. 2d 1027, 1037 (D.S.D. 2011) (rejecting claims under the Commerce Clause that the federal statute allowing the United States to acquire land in trust for Indians and tribes was beyond Congress’ authority).

21. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963.

century.²² Nine states have adopted portions of ICWA as state law or have adopted modified versions of ICWA even more protective of Indian families than ICWA itself.²³

Late in the October Term 2021, the Supreme Court agreed to review wide-ranging constitutional challenges to ICWA brought by the State of Texas and three non-Indian foster families in the October Term 2022.²⁴ The Fifth Circuit, sitting en banc, held that certain provisions within ICWA violated the anti-commandeering principle implied in the Tenth Amendment and the equal protection component implied in the Fifth Amendment's Due Process Clause.²⁵ Texas and the foster families also argued Congress does not possess the power to enact ICWA and that it violates the non-delegation doctrine.²⁶

This Essay focuses on the anti-commandeering challenges. We argue that the anti-commandeering challenges against ICWA are unfounded because all provisions of ICWA validly and expressly preempt state law. ICWA mostly provides a set of legal standards for state courts to apply in child status proceedings involving Indian children, and Congress's power to compel state courts to apply federal law is long established and beyond question. ICWA is a valid exercise of Congressional power. ICWA creates a set of rights under federal law protecting parents and Indian custodians of Indian children²⁷ and in no way directly regulates or commands the States.

We have no doubt that Congress's Indian affairs powers authorize the enactment of ICWA (a conclusion reached even by the Fifth Circuit). Yet strangely, no party has ever invoked Congress's power under Section 5 of the Fourteenth Amendment to assess its constitutionality. Perhaps the reason is that Congress itself implicitly claimed to invoke only its

22. See 25 U.S.C. § 1901(4) (finding that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions”); see also § 1901(5) (finding that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families”).

23. Oregon, Oklahoma, Washington, Iowa, Minnesota, Michigan, Nebraska, Wisconsin, and Louisiana have state ICWA statutes. Nancy Marie Spears, *ICWA Experts Say State Laws Could Protect Native Families*, INDIAN COUNTRY TODAY (Nov. 16, 2021), <https://indiancountrytoday.com/news/icwa-experts-say-state-laws-could-protect-native-families> [<https://perma.cc/4KQ6-3VQK>].

24. *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022) (granting certiorari).

25. *Brackeen v. Haaland*, 994 F.3d 249, 268–69 (5th Cir. 2021) (en banc) (per curiam).

26. *Id.* at 290.

27. See § 1921.

Indian affairs powers to enact ICWA, not Section 5.²⁸ ICWA seems like an obvious candidate for analysis under Congress's Section 5 enforcement powers. States routinely discriminated against American Indian families based on their race and ancestry (and religion and culture). Congress designed ICWA to remedy the abuses of state courts and agencies. We have no doubt that Section 5 provides Congress with power sufficient to defeat the anti-commandeering concerns. ICWA is valid federal law which state courts must apply. Finally, we conclude that states retain the power to comply with ICWA even if it is declared unconstitutional.

We begin in Part I with a description of the Indian Child Welfare Act and the attacks on its constitutionality. In Part II, we explain anti-commandeering and preemption doctrine and the distinction between them. In Part III, we argue that ICWA creates individual rights under federal law and validly preempts contrary state law without violating the Tenth Amendment's anti-commandeering principle. In Part IV, we provide a short description of the role (or lack thereof) of the Fourteenth Amendment in Indian affairs and argue that even if portions of ICWA violate the anti-commandeering principle, they are nonetheless constitutional because Congress possesses power under Section 5 of the Fourteenth Amendment to enact them using a theory of remedial commandeering.

I. THE INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) is the most successful Indian affairs-related civil rights statute in history.²⁹ ICWA required states to provide basic procedural protections to Indian parents and forced states to reform long-standing discriminatory laws and practices.³⁰ ICWA also helped to normalize child welfare laws at a time when many states failed to provide basic procedural protections to *all* families (not just Indian

28. 25 U.S.C. § 1901(1) (quoting U.S. CONST. art. I, § 8, cl. 3) (finding that “clause 3, section 8, article I of the United States Constitution provides that ‘[t]he Congress shall have Power . . . [t]o regulate Commerce . . . with Indian tribes’ and, through this and other constitutional authority, Congress has plenary power over Indian affairs”).

29. See generally Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATL. (Jan. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167> [<https://perma.cc/6BWZ-HSCD>] (invalidating the ICWA would undo doctrines that facilitate a tribe's ability to self-govern and prosecute individuals who victimize Native people).

30. See 25 U.S.C. § 1911(c) (right to intervene); see also § 1912(a) (notice); see also § 1912(b) (appointment of counsel).

families),³¹ which is why ICWA's advocates claim that ICWA is the "gold standard."³²

In this Part, we trace the history of the Indian Child Welfare Act. First, we explain ICWA's: (1) important provisions; (2) legislative history leading to enactment; and (3) impact. Then, we describe the constitutional challenges brought against ICWA.

A. Statutory Background

At its core, ICWA creates a set of federal rights for Native custodial parents. ICWA requires states to give notice to Indian parents and custodians at critical moments after the initiation of child welfare proceedings in state courts, and grants Indian parents and custodians the right to intervene in these proceedings along with a right to be appointed counsel in these proceedings.³³ ICWA requires initiating child welfare proceedings in state court and notifying Indian custodians at least ten days before a state court may initiate action.³⁴ Indian custodians are entitled to examine reports on the welfare of their children.³⁵ State courts must make a finding that the state agencies made "active efforts" to reunify Indian families.³⁶ State courts may not terminate an Indian custodian's parental rights or place an Indian child in foster care placement with a non-Indian family without the testimony of an "expert witness" qualified in Indian child-rearing practices.³⁷ State courts may not terminate parental rights absent evidence beyond a reasonable doubt that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."³⁸

To prevent states from coercing Indian custodians into "voluntarily" waiving their parental rights, ICWA also requires state courts to make a finding on the record in open court that an Indian custodian has consented to waiving parental rights, and never earlier than ten days after the birth

31. *E.g.*, Matthew L.M. Fletcher & Neoshia R. Roemer, *Procedure and Indian Children*, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 85, 89–91 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) (detailing Minnesota Indian Family Preservation Act, codified in 1985 in response to ICWA, and a Minnesota bill to extend ICWA-like protections to African-American families).

32. Brief of Casey Family Programs & Child Welfare League of America et al. as Amici Curiae in Support of Respondent Birth Father at 4, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).

33. § 1912(a) (notice and intervention); § 1912(b) (counsel).

34. § 1912(a).

35. § 1912(c).

36. § 1912(d). Active efforts are defined at 25 C.F.R. § 23.2 (2021).

37. § 1912(e). Qualifications to be an expert witness for this purpose are found at 25 C.F.R. § 23.122.

38. § 1912(f).

of an Indian child.³⁹ Indian custodians may withdraw consent to foster care at any time, and to adoption at any time before the entry of a final decree.⁴⁰ To address the states' discrimination against Indian foster parents on the basis of race, ICWA requires states to give preference to Indian foster and adoptive parents.⁴¹

In enacting ICWA, Congress found widespread civil rights violations rooted in race discrimination committed by states against Indian people.⁴² Congress found that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”⁴³ The House report accompanying the final bill concluded, “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”⁴⁴ The House report added that non-Indian state workers targeted Indian children for removal for neglect even where the Indian parents and custodians were understood in tribal communities as excellent parents.⁴⁵ State workers judged Indian families according to non-Indian norms and found neglect where there was none.⁴⁶ Even where removal of Indian children from their homes is necessary, state laws affirmatively discriminated against potential Indian foster families, leading state agencies to deny qualified and loving Indian families licensure to serve as foster parents.⁴⁷ Congress intended ICWA to remedy these civil rights violations inflicted upon Indian families and tribal nations.⁴⁸

While ICWA has forced states to reckon with their discriminatory practices, the disproportionate removal of Indian children from their homes remains a serious problem and continues to justify the need for ICWA. “According to 2018 data, American Indian/Alaska Native children didn't even account for 1% of the population, yet they made up

39. § 1913(a).

40. § 1913(b) (foster care); § 1913(c) (adoption).

41. § 1915(a) (adoption); § 1915(b) (foster care).

42. *See* H.R. REP. NO. 95-1386, at 9, 27 (1978).

43. § 1901(4).

44. H.R. REP. NO. 95-1386, at 9.

45. *Id.* at 10 (“Indian communities are often shocked to learn that parents they regarded as excellent care-givers have been judged unfit by non-Indian social workers.”).

46. *Id.* (“In judging the fitness of a particular [Indian] family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.”).

47. *See id.* at 11 (“Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values.”).

48. *See id.* at 19.

2.4% of children in foster care.”⁴⁹ In 1978, Congress depended on research by the Association on American Indian Affairs,⁵⁰ which at the time was likely the only group conducting research on Indian child welfare in the United States.⁵¹ Now, there is far more research and Indigenous people are often part of the research teams.⁵² The recent research confirms that structural racism is an inescapable part of state child welfare systems even now.⁵³

At the time Congress passed ICWA, state social services structures had created procedural inequities as well. State social services workers had enormous power over Indian families and could and did, for example, threaten to terminate the welfare benefits of Indian parents and custodians.⁵⁴ That led Indian parents to consent to their children’s

49. *Disproportionality and Race Equity in Child Welfare*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 26, 2021), <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx> [<https://perma.cc/B8L5-5C42>].

50. H.R. REP. 95-1386, at 9 (citing AAIA surveys from 1969 and 1974).

51. The Association’s executive director, Bill Byler, and counsel, Bert Hirsch, were the first witnesses in the first Congressional hearing on the Indian child welfare crisis, which took place in 1974. *Indian Child Welfare Program: Hearing on Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction Before the Subcomm. On Indian Affs. of the Comm. On Interior and Insular Affs. U.S. S.*, 93rd Cong. 3 (1974) [hereinafter *Indian Child Welfare Hearing*] (statement of William Byler, Executive Director, Association on American Indian Affairs; accompanied by Bert Hirsch, Staff Attorney). For more on the origins of the Indian Child Welfare Act, see generally Evelyn Lance Blanchard, *To Prevent the Breakup of the Indian Family: The Development of the Indian Child Welfare Act of 1978* (Sept. 10, 2010) (Ph.D. dissertation, The University of New Mexico) (on file with The University of New Mexico Digital Repository).

52. See, e.g., *Our Research Expertise*, NAT’L INDIAN CHILD WELFARE ASS’N, <https://www.nicwa.org/our-research-expertise> [<https://perma.cc/QZ2H-UB33>] (last visited Oct. 30, 2022).

53. See Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 CHILD. & YOUTH SERVS. REV. 1667 (2012) (finding that institutional racism and biases are the root cause of disproportionality in child removal rates); Terry L. Cross, *Child Welfare in Indian Country: A Story of Painful Removals*, 33 HEALTH AFFS. 2256, 2258 (2014) (describing how “unconscious bias” and “societal privileges” infect state child welfare decisions); Ann E. MacEachron & Nora Gustavsson, *Contemporary Policy Challenges for Indian Child Welfare*, 9 J. POVERTY 43 (2005) (describing how state workers use poverty as a proxy for neglect in child removal decisions). See generally Wendy Haight, Cary Waubanasum, David Glesener & Scott Marsalis, *A Scoping Study of Indigenous Child Welfare: The Long Emergency and Preparations for the Next Seven Generations*, 93 CHILD. & YOUTH SERVS. REV. 397, 403, 406–07 (2018) (aggregating results of thirty-seven empirical studies and concluding that overrepresentation of Indian children in state child welfare system is due to poverty and racism).

54. H.R. REP. NO. 95-1386, at 11 (“Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. . . . It is an

removal and, later, adoption.⁵⁵ There were economic incentives to remove Indian children, too. Then and now, federal money pays for, among other problematic incentives, foster care and provides incentives for some people to foster as many children as possible.⁵⁶

In short, when it comes to Indian parents and custodians, ICWA is primarily a civil rights statute designed to combat longstanding personal and institutional racism. Congress explicitly pointed to its powers under the Commerce Clause and the trust relationship (the duty of protection) as sources of its power to enact ICWA,⁵⁷ but Section 5 of the Fourteenth Amendment also is an important source of authority. ICWA is a rights-creating statute.

B. *Brackeen v. Haaland*

In *Brackeen v. Haaland*,⁵⁸ the Fifth Circuit held that portions of ICWA were unconstitutional for violating the Tenth Amendment's anti-commandeering principle and the equal protection component of the Fifth Amendment's Due Process Clause.⁵⁹ An en banc majority of the Fifth Circuit held that three provisions of ICWA unconstitutionally commandeer state actors:⁶⁰ (1) the active efforts requirement;⁶¹ (2) the qualified expert witness requirement;⁶² and (3) the record keeping provision.⁶³ The court divided equally on whether ICWA's placement preferences⁶⁴ and notice requirement⁶⁵ unconstitutionally commandeer state actors, affirming without precedential opinion the district court

unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.”).

55. *Id.* (“Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children.”).

56. On the financial pressures in place at the time of ICWA's enactment, see *id.* (“Indian community leaders charge that federally subsidized foster care programs encourage some non-Indian families to start ‘baby farms’ in order to supplement their meager farm income with foster care payments and to obtain extra hands for farmwork.”). On ongoing issues with financial incentives due to federal funding, see generally Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281 (2007).

57. 25 U.S.C. § 1901(1).

58. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022).

59. *Id.* at 268–69.

60. *Id.* at 268.

61. § 1912(d).

62. § 1912(e)–(f).

63. § 1915(e).

64. § 1915(a)–(b).

65. § 1912(a).

ruling striking down those provisions.⁶⁶ The State of Texas challenged virtually all of ICWA’s provisions as contrary to the Tenth Amendment’s anti-commandeering principle, but the Fifth Circuit let stand the remainder of ICWA.⁶⁷ The Supreme Court granted review.⁶⁸

On the equal protection front, the Fifth Circuit was equally divided on whether ICWA’s adoptive placement preference for “other Indian families”⁶⁹ and foster care placement preference for a licensed “Indian foster home”⁷⁰ violated the equal protection component of the Fifth Amendment’s Due Process Clause.⁷¹ Because the district court struck down those provisions, the lower court ruling was affirmed without a precedential opinion.⁷² The en banc majority did confirm the constitutionality of the remainder of ICWA,⁷³ most notably the “Indian child” classification.⁷⁴

At no point did the Fifth Circuit address whether Section 5 of the Fourteenth Amendment authorizes Congress to enact ICWA to remedy long-standing state discrimination against American Indian families on the basis of race.

II. COMMANDEERING VERSUS PREEMPTION

The line between commandeering and preemption can be difficult to discern. Nonetheless, the Supreme Court has articulated a relatively coherent set of principles for distinguishing between them. In this Part, we first lay out the general principles of the anti-commandeering and preemption doctrines. Then, we explain the distinctions that are important in tough cases.

A. Commandeering

The Court has held that by virtue of the Tenth Amendment, “Congress . . . lacks the power directly to compel the States to require or prohibit [certain] acts.”⁷⁵ The Federal Government may not command that “States’ officers, or those of their political subdivisions, . . .

66. *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam).

67. *Id.*

68. *Brackeen v. Haaland*, 142 S. Ct. 1205 (2022).

69. § 1915(a)(3).

70. § 1915(b)(iii).

71. *Brackeen*, 994 F.3d at 268.

72. *Id.*

73. *Id.* at 267–68.

74. *Id.*; § 1903(4).

75. *New York v. United States*, 505 U.S. 144, 166 (1992).

administer or enforce a federal regulatory program.”⁷⁶ But exceptions to this general principle have emerged since the Court first developed the modern anti-commandeering principle in the 1990s. First, Congress may validly issue commands to the states if it “evenhandedly regulates an activity in which both States and private actors engage.”⁷⁷ For example, in *Reno v. Condon*, the Court held that a federal law restricting the disclosure and dissemination of personal information provided in applications for driver’s licenses validly applies to states because the law regulated state and private actors equally.⁷⁸ The rationale for this exception is that generally applicable laws do not intrude on States’ sovereign authority to “regulate their own citizens.”⁷⁹

Second (and most importantly for our purposes), there is also an exception for when the Federal Government issues a command directed at state *courts* (as opposed to the State’s legislative or executive branches). Unlike state legislatures and executive branch agencies and officials, state courts are bound by the Supremacy Clause to faithfully apply federal law.⁸⁰ The federal government, therefore, may command state courts on how to apply federal law.⁸¹ State courts are distinct, the Court has explained, because “unlike [state] legislatures and executives, [courts] applied the law of other sovereigns all the time.”⁸² And it is well-established that Congress has the power to pass laws enforceable in state courts.⁸³

B. Preemption

When Congress creates individual rights under federal law, the federal law preempts conflicting state laws; it is not commandeering. The Supremacy Clause of the United States Constitution⁸⁴ specifies that

76. *Printz v. United States*, 521 U.S. 898, 935 (1997).

77. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478–79 (2018) (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000)).

78. *Reno*, 528 U.S. at 148.

79. *Id.* at 151; see also *García v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985) (holding that Congress may regulate state and local governments as employers through generally-applicable legislation).

80. *Printz*, 521 U.S. at 907 (“[T]he Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”).

81. See *New York v. United States*, 505 U.S. 144, 178–79 (1992). For more on the judicial commandeering exception, see Evan H. Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 212–17.

82. *Printz*, 521 U.S. at 907.

83. See *Testa v. Katt*, 330 U.S. 386, 388, 394 (1947); see also *Clafin v. Houseman*, 93 U.S. 130, 136–37, (1876).

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

“federal law is supreme in case of a conflict with state law.”⁸⁵ For federal law to validly preempt state law, (1) the federal law must be one which Congress may validly enact, and (2) it must regulate individuals, not states.⁸⁶

Federal law broadly recognizes three kinds of preemption (depending on how you count). Express preemption exists when Congress explicitly defines in a federal law the extent to which it preempts state laws.⁸⁷ When a federal law contains an express preemption clause, the Court “focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.”⁸⁸

Then, there are two kinds of implied preemption. Conflict preemption occurs when it is physically impossible to comply with both the federal and state law simultaneously, or when the state law stands in direct contradiction to federal law.⁸⁹ And lastly, field preemption occurs when Congress’s “intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’”⁹⁰

Sometimes, a federal law uses language that sounds like a command, but is, in effect, a valid preemption clause because it creates federal rights.⁹¹ In *Murphy v. NCAA*, the Court analyzed a statute providing that “no State or political subdivision thereof . . . shall enact or enforce any . . . provision . . . relating to rates, routes, or services of any air carrier [covered by the Airline Deregulation Act of 1978].”⁹² Justice Alito’s opinion for the Court explained that even “[t]hrough this language might appear to operate directly on the States . . . it is a mistake to be confused by the way in which a preemption provision is phrased.”⁹³ The Court emphasized that “it is clear that this provision operates just like any other federal law with preemptive effect” by conferring on private entities “a federal right to engage in certain conduct subject only to certain (federal) constraints.”⁹⁴

85. *Murphy v. NCAA*, 138 S.Ct. 1461, 1479 (2018).

86. *Id.*

87. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

88. *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

89. *See, e.g., Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 493 (2013).

90. *Arizona v. United States*, 567 U.S. 387, 399, 401 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

91. *Murphy*, 138 S. Ct. at 1480.

92. *Id.* (quoting 49 U.S.C. app. § 1305(a)(1) (1988)) (citing *Morales v. Trans World Airlines*, 504 U.S. 374 (1992)).

93. *Id.*

94. *Id.* (emphasis added).

III. ICWA'S RIGHTS CREATION IS PREEMPTION, NOT COMMANDEERING

Applying these principles, it is clear that ICWA involves the creation of individual rights in federal law and validly preempts contrary state law without running afoul of the Tenth Amendment's anti-commandeering principle.

ICWA involves express preemption. It contains an express preemption provision,⁹⁵ which reads as follows:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subsection, the State or Federal court shall apply the State or Federal standard.⁹⁶

As we explained, preemption is a question of Congressional intent, and the best evidence of Congress's preemptive intent is Congress's own words. used. The plain language of the preemption provision here suggests that Congress intended the substantive provisions of ICWA to provide a floor preempting all state laws with less protective standards, but not to displace state laws that provide a higher standard.

ICWA imparts Indian custodial parents with substantive rights under federal law without invalidly commanding state governments to take specific action. For federal law to validly preempt state law, the federal law must (1) represent the "exercise" of a valid Congressional power and (2) must regulate individuals, not States.⁹⁷ It is beyond dispute that ICWA is an exercise of valid Congressional power and imparts individual Indian parents with rights safeguarding their custodial relationships with their children.

A. ICWA is a Valid Exercise of Congressional Power

It is well established that Congress possesses plenary power in Indian affairs by virtue of numerous provisions of the Constitution, as well as the structure of the Constitution, and through treaties made with Indian tribes.⁹⁸ The Supreme Court has pointed to the Commerce Clause, the Treaty Power, the Property and Territory Clause, and even the preconstitutional powers of the United States as sources of this

95. See 25 U.S.C. § 1921.

96. *Id.*

97. *Murphy*, 138 S. Ct. at 1479.

98. RESTATEMENT L. AM. INDIANS, *supra* note 13, § 7.

Congressional power.⁹⁹ The Court has also held that the relationship between Indian tribes and the United States, known since the Founding as the “duty of protection,” is also a source of Congressional power.¹⁰⁰ When it enacted ICWA, Congress pointed to several constitutional provisions that form the basis for federal plenary power in Indian affairs, specifically naming the Commerce Clause, but also asserting “other constitutional authority.”¹⁰¹

The Supreme Court has repeatedly referred to Congress’s power over Indian Affairs as “plenary,”¹⁰² and has explained that the “central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs.”¹⁰³ This “plenary” and “broad” power—which the Court has said includes the power to take dramatic measures such as defining the scope or even extinguishing the sovereign powers of tribes—certainly includes the authority to enact ICWA, a modest set of procedural safeguards to protect Indian parents’ custodial rights over their children.

B. ICWA Creates Individual Federal Rights

All the provisions of ICWA challenged in *Brackeen* involve the creation of federal rights in individual Indian parents concerning their custodial relationships over their children. In *Brackeen*, the Fifth Circuit, sitting en banc, held that the active efforts requirement,¹⁰⁴ the qualified

99. *United States v. Lara*, 541 U.S. 193, 200–01, 203 (2004).

100. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581–82 (1832) (“By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self government, nor destroy their capacity to enter into treaties or compacts.”).

101. § 1901(1).

102. *Lara*, 541 U.S. at 200 (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470–71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993).

103. *Lara*, 541 U.S. at 200 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982) (referring to “broad power” under the Indian Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

104. § 1912(d) (requiring that any party seeking a change of status of an Indian child under State law show that active efforts have been made to provide remedial services and rehabilitative programs and that those efforts have proved unsuccessful).

expert witness requirements,¹⁰⁵ and the recordkeeping provision¹⁰⁶ of ICWA unconstitutionally commandeer state actors.¹⁰⁷ Additionally, an equally divided court affirmed without precedential opinion the district court's ruling that ICWA's placement preference requirements,¹⁰⁸ notice provision,¹⁰⁹ and adoption record reporting provision¹¹⁰ unconstitutionally commandeer state actors.¹¹¹

All these provisions are valid and do not violate the anti-commandeering principle. The active efforts requirement, § 1912 (d), operates as a legal standard on parties seeking to bring an action to change the status of an Indian child in state court: the state court must be satisfied that the party seeking the change of status of the Indian child has attempted to resolve the matter through specific out-of-court channels and that those efforts have proven unsuccessful.¹¹² The measure is consistent with ICWA's purpose of creating a federal right to protect Indian parents' custodial relationship with their children. Procedural burdens or exhaustion requirements such as the active efforts requirement are unremarkable and can be found throughout the United States Code.¹¹³ The provision supplies a legal standard for state courts to apply and in no way commands the states' legislative or executive branches to act in any specific manner. And if that were not enough, we also point out that

105. § 1912(e) (providing that no Indian child may be placed in foster care without a *determination* "supported by clear and convincing evidence, including testimony of qualified expert witnesses," that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child); § 1912 (f) (providing that a court may not terminate parental rights over an Indian child in the absence of "a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses," that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child).

106. § 1915(e) (requiring that a record of each adoptive placement of an Indian child made in state courts under State law be maintained by the State in which the placement was made and that such records be made available at any time upon the request of the Secretary of Interior or the Indian child's tribe).

107. *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021).

108. § 1915(a) (specifying a preferential order of placement in the event of an adoptive placement of an Indian child: (1) a member of the child's extended family; (2) other members of the child's tribe; and (3) other Indian families); § 1915 (b) (specifying a similar preferential order of placement in the event of a foster care placement).

109. § 1912(a) (requiring any party seeking the foster care placement of, or termination of parental rights to, an Indian child to notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and of their right of intervention).

110. § 1951(a) (requiring state courts entering final decrees or orders in Indian child adoptive placements to provide the Secretary of Interior with a copy of the decree).

111. *Brackeen*, 994 F.3d at 268.

112. § 1912(d).

113. *See, e.g.*, 28 U.S.C. § 2254(b)(1) (requiring federal habeas petitioners to exhaust all remedies available in state court before a federal court may adjudicate their claims on the merits).

the provision imposes an evenhanded burden on all parties who bring such suits, whether it be a state agency or a private individual. The provision by its own terms applies to “[a]ny party seeking” a change in status.¹¹⁴ So, it would fall within the exception to the anti-commandeering principle which permits Congress to validly issue commands to the states if it “evenhandedly regulates an activity in which both States and private actors engage.”¹¹⁵

The qualified expert witness requirements, § 1912(e)–(f), similarly provide unremarkable legal standards for state courts to apply and in no way command a state’s executive or legislative branches to do anything.¹¹⁶ Section 1912(e) requires that a state court make a specific finding supported by “clear and convincing evidence,” and requires specific evidence in the form of qualified expert witness testimony, before placing an Indian child in foster care.¹¹⁷ Similarly, § 1912(f) requires that a state court make a specific finding “beyond a reasonable doubt,” and requires specific evidence in the form of a qualified expert witness’s testimony, before terminating a custodian’s parental rights over an Indian child.¹¹⁸ “Clear and convincing evidence” and “beyond a reasonable doubt” are routine legal standards. Statutory rules requiring evidence be of a certain form are also common throughout the United States Code.¹¹⁹ Similarly, ICWA’s placement preference requirements, § 1915(a)–(b), specify a preferential order of placement in the event of an adoption or foster care placement.¹²⁰ This is another run-of-the-mill legal standard applied by the state courts and similarly does not impose any command on a state’s executive or legislative branches.

ICWA’s placement preference requirements, notice provision, and adoption recordkeeping provision also easily pass constitutional muster. The notice provision, § 1912(a), requires that “the party seeking the foster care placement of, or termination of parental rights to, an Indian child” notify the parent or Indian custodian and the Indian child’s tribe of the pending proceedings and of their right to intervene.¹²¹ Like the “active efforts” requirement, it is a valid, evenhanded regulation which applies to *any* party seeking to bring a child status action in state court, whether it is a state agency or a private party.¹²²

114. 25 U.S.C. § 1912(d) (emphasis added).

115. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478–79 (2018) (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000)).

116. *See* § 1921(e)–(f).

117. § 1912(e).

118. § 1912(f).

119. *See, e.g.*, 42 U.S.C. § 405(c)(F) (requiring evidence of social security account in a specific form before benefits may be paid).

120. 25 U.S.C. § 1912(a)–(b).

121. § 1912(a).

122. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478–79 (2018).

The adoption record reporting provision, § 1951(a), imposes a reporting obligation on state courts. It requires state courts entering final decrees or orders in Indian child adoptive placements to provide the Secretary of Interior with a copy of the decree.¹²³ *Printz v. United States* strongly suggested in dicta that federal statutes imposing reporting and administrative requirements on state courts do not violate the anti-commandeering principle and pointed to a long history of federal statutes imposing reporting requirements on state courts.¹²⁴ For example, *Printz* notes that the first Congresses required state courts to record applications for citizenship,¹²⁵ to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State,¹²⁶ and to register aliens seeking naturalization and issue certificates of registry.¹²⁷ A requirement that state courts report records of adoptions of Indian children to the Secretary of the Interior is in line with the types of reporting requirements Congress has imposed on state courts since 1790. It would be quite a radical step for today's Court to find such a requirement unconstitutional.

In our view, the state recordkeeping provision, § 1915(e), is the only ICWA provision where compliance with the anti-commandeering principle is not so clear-cut.¹²⁸ This provision requires that the State in which an adoption placement of an Indian child is made maintain records of the placement and that such records be made available at any time upon the request of the Secretary of Interior or the Indian child's tribe.¹²⁹ The plain language of the provision seems to impose a command, albeit a modest one, on state governments in requiring them to maintain such records. But the Court in *Murphy v. NCAA*¹³⁰ reminds us not "to be confused by the way in which a provision is framed," and instead to look to the way in which it operates,¹³¹ and the provision here does not specify which branch of the "state" is obligated. It could be plausibly interpreted as imposing a recordkeeping requirement on the state court system. Such a recordkeeping requirement would be consistent with the type of

123. § 1951(a).

124. *Printz v. United States*, 521 U.S. 898, 905–07 (1997).

125. *Id.* at 905 (citing Act of Mar. 26, 1790, ch. 3, sec. 1, 1 Stat. 103, 103–04).

126. *Id.* at 905–06 (citing Act of June 18, 1798, ch. 54, sec. 2, 1 Stat. 566, 567).

127. *Id.* at 906 (citing Act of Apr. 14, 1802, ch. 28, sec. 2, 2 Stat. 153, 154–55).

128. § 1915(e) (requiring that a record of each adoptive placement of an Indian child made in state courts under State law be maintained by the State in which the placement was made and that such records be made available at any time upon the request of the Secretary of Interior or the Indian child's tribe).

129. *Id.*

130. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

131. *Id.* at 1480.

administrative obligations Congress has imposed on state courts since the Founding¹³² and is incidental to Congress's power to obligate state courts to apply federal law.¹³³

Ultimately, the state recordkeeping provision is inconsequential. So long as the reporting requirement (that state courts provide record of adoption placements to the Secretary of the Interior) is in effect (and again, we believe it should easily pass constitutional muster), there is not a lot gained in requiring states to maintain the same records as well. But still—it is hard to imagine why a state would insist on *refusing* to maintain such records.

IV. EVEN IF IT'S COMMANDEERING, IT'S *REMEDIAL* COMMANDEERING

When it enacted ICWA, Congress pointed to several constitutional provisions that form the basis for federal plenary power in Indian affairs, specifically naming the Commerce Clause, but also asserting “other constitutional authority.”¹³⁴ It seems clear to us that one of those other sources is Section 5 of the Fourteenth Amendment.¹³⁵ We argue that even if that the provisions ICWA constituted impermissible commandeering, Section 5 of the Fourteenth Amendment is a potent source of Congressional authority that authorizes Congress to remedy state discrimination against American Indian people—potent enough to authorize the Indian Child Welfare Act.

The Fourteenth Amendment prohibits states from denying due process or equal protection of the law to any person.¹³⁶ Section 1 provides in relevant part, “No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹³⁷ Section 5 is an enforcement mechanism, authorizing Congress to enact legislation to ensure states comply: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”¹³⁸

Congressional power under Section 5 is sufficient to abrogate aspects of state sovereignty (and, we argue, override any anti-commandeering concern) so long as the federal legislation fulfills the Supreme Court's “congruence and proportionality” test. For Congress's

132. *See Printz v. United States*, 521 U.S. 898, 905–07 (1997).

133. *See Testa v. Katt*, 330 U.S. 386, 389–91 (1947).

134. 25 U.S.C. § 1901(1).

135. *Cf. Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726–27 & n.1 (2003) (upholding application of the Family and Medical Leave Act of 1993 to the state of Nevada under Section 5 of the Fourteenth Amendment even though Congress did not explicitly invoke Section 5).

136. U.S. CONST. amend. XIV, § 1.

137. *Id.*

138. *Id.* § 5.

action to fall within its Section 5 authority, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” and the remedies authorized by the Congressional action must sufficiently connect to conduct courts have held to be in violation of Section 1 of the Fourteenth Amendment.¹³⁹ We argue that so long as ICWA satisfies this test, it should override any anti-commandeering concern.

In Section IV.A, we describe the history of the Fourteenth Amendment in Indian Affairs. In Sections IV.B–C, we show how ICWA complies with Section 5 of the Fourteenth Amendment. In Section IV.B, we offer three theories of connections between the remedial measures within ICWA and violations of Constitutional rights. And in Section IV.C, we explain argue that ICWA’s remedial measures are congruent and proportional to the Constitutional injuries ICWA was meant to address.

A. *The Fourteenth Amendment in Indian Affairs*

At the time of its enactment, the primary thrust of the Fourteenth Amendment—to guarantee citizenship to all persons born in the United States¹⁴⁰ and to eliminate the “three-fifths of all other Persons” euphemism from the Constitution¹⁴¹—passed American Indian people by. In Section 2 of the Fourteenth Amendment, Congress retained the term of art, “Indians not taxed,” from the Enumeration Clause of Article I.¹⁴² In 1870, the Senate explicitly stated that Indian citizenship was unaffected by the amendment.¹⁴³ The Supreme Court agreed a few years later.¹⁴⁴ Only Congress could extend citizenship to Indians, via an Act of Congress.¹⁴⁵ Congress did extend citizenship to many Indian people, usually through the allotment process, from 1870 to 1924.¹⁴⁶ All remaining American Indians received their citizenship through the 1924 Citizenship Act.¹⁴⁷ The Fourteenth Amendment seemingly affirmed the understanding, wrongly, that Indian people did not possess individual rights except those established by Congress.

139. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

140. U.S. CONST. amend. XIV, § 1.

141. *Id.* § 2.

142. *Id.*

143. S. REP. NO. 41-268, at 1 (1870) (“That in the opinion of your committee the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States . . .”).

144. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

145. *See* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 3.8, at 95 (2016).

146. *Id.* at 96.

147. Indian Citizenship Act of 1924, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401).

Even so, the Fourteenth Amendment protects Indian people, regardless of citizenship, from discrimination by states. Section 1 forbids states from denying equal protection and due process to “any person,” which of course includes Indian people.¹⁴⁸ Courts have assessed whether states have violated the Equal Protection Clause in numerous contexts, for example, education,¹⁴⁹ religious freedom,¹⁵⁰ taxation,¹⁵¹ contracts,¹⁵² and voting rights.¹⁵³

The overwhelming majority of cases involving Indian people and the Fourteenth Amendment are brought, however, by non-Indians who claim that Indian affairs laws or their implementation violate the rights of the *non-Indians*. States and their citizens have argued that the rights of Indian people to hunt and fish (largely) free of state control, rights guaranteed by treaties, statutes, or other federal laws, violate the equal protection principle.¹⁵⁴ Non-Indian government employees have argued that employment preferences provided by statute to employees of agencies providing services to Indian people violate the equal protection principle.¹⁵⁵ The list goes on. In 2022, for example, non-Indians

148. *E.g.*, *Meyers ex rel. Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544, 1571 (D. Utah 1995) (“The District’s failure to provide education services [to Indian students] at Navajo Mountain may still violate the Equal Protection Clause.”).

149. *Id.* at 1544.

150. *E.g.*, *Reinert v. Haas*, 585 F. Supp. 477, 480 (S.D. Iowa 1984) (noting that discrimination against Native prisoners can violate the Fourteenth Amendment).

151. *E.g.*, *United States v. Ferry County*, 24 F. Supp. 399, 400 (E.D. Wash. 1938) (holding Indian tax immunity was vested property interest that could not be impaired by state action).

152. *E.g.*, *Bradley v. Ariz. Corp. Comm’n*, 141 P.2d 524, 524, 526 (Ariz. 1943) (holding that denial of a contract motor carrier permit to plaintiff, a “full blooded Navajo Indian” on the sole ground that plaintiff was an Indian and a “ward of the United States government” was a violation of the Equal Protection Clause).

153. *E.g.*, *Navajo Nation v. San Juan County*, 929 F.3d 1270, 1282, 1285 (10th Cir. 2019) (holding county’s districting for school board and county commission were racially discriminatory); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1019 (D.S.D. 2004) (“Here, there is substantial evidence that South Dakota officially excluded Indians from voting and holding office.”).

154. *E.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (“[T]he peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf . . .”).

155. *E.g.*, *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993) (affirming state Indian preference in employment for state school districts in Indian country and concluding that “[t]he trust doctrine also applies to state action. ‘State action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes’”) (cleaned up).

challenged tribal gaming compacts,¹⁵⁶ directly in the face of clear precedent favoring the constitutionality of the compacts.¹⁵⁷

These claims almost always fail, and rightfully so. The United States owes a duty of protection to Indian tribes and individual Indians, a duty acknowledged implicitly in the structure of the Constitution.¹⁵⁸ That duty requires and authorizes Congress and states to enact Indian affairs laws that treat Indians and tribes differently.¹⁵⁹ So long as an Indian affairs statute is rationally related to the fulfillment of the duty of protection, the law is constitutionally valid.¹⁶⁰

The challenges do not stop. American law is nothing if not effective at reproducing dominion, hierarchy, and power.¹⁶¹ American law also privileges compartmentalization. No suit challenging an Indian affairs statute begins with a recitation of the sorry history of the government's treatment of Indians and tribes. The challenges always start with an out-of-context, side-by-side description of Indian-versus-non-Indian treatment. The same Indian affairs principle that exists today that allows the government to privilege Indian and tribal interests also allowed the United States in years past to confiscate Indian lands,¹⁶² terminate Indian tribes,¹⁶³ and dominate Indian families.¹⁶⁴ Where were these civil rights crusaders then?

156. See Complaint ¶ 5, *Maverick Gaming LLC v. United States*, No. 1:22-cv-00068 (D.D.C. Jan. 11, 2022) (“Washington’s tribal monopoly is inconsistent with IGRA and federal criminal statutes, which prohibit class III gaming activity by tribal casinos on Indian lands unless a State permits the same activity by non-tribal entities. The tribal monopoly also violates the Constitution’s guarantee of equal protection of the laws by irrationally and impermissibly discriminating on the basis of race and ancestry.”).

157. *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003).

158. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”).

159. RESTATEMENT L. AM. INDIANS, *supra* note 13, § 9(a).

160. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”).

161. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 842–44 (1997) (explaining how the law reflects “dominant interests and fosters structural ‘oppression less by coercion than by offering people identifies contingent upon their acceptance of oppression as defining characteristics of their very selves’”).

162. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

163. *Cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (impliedly recognizing power of Congress to terminate its duty of protection to Indian tribes).

164. See generally Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 892–929

In the 1970s, the United States government finally began to take steps to remedy the ongoing harms it perpetrated against Indian people. One key statute, the Indian Child Welfare Act of 1978, is now the target of a concerted effort to undermine Indian affairs.

B. Sufficient Connection to Constitutional Violations

Remedial legislation enacted under Section 5 of the Fourteenth Amendment is valid “only if it sufficiently connects to conduct courts have held Section 1 [of the Fourteenth Amendment] to proscribe.”¹⁶⁵ To evaluate this, courts look to “the legislative record” Congress had before it showing evidence of a “constitutional wrong.”¹⁶⁶

Congress purported to enact ICWA to serve the following purposes:

(3) [T]here 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 Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.¹⁶⁷

There is ample evidence in ICWA’s legislative record to support three theories of enforcement of constitutional rights: (1) the procedural due process rights of Indian families in the way their children were separated; (2) the substantive due process rights of Indian families to raise their children as they saw fit in their cultures; and (3) violations of the equal protection clause in the ways in which states applied family laws against Indian families.

Procedural Due Process. Procedural due process imposes constraints on governmental decisions which deprive individuals of

(2017) (describing early American history of federal government intervention into Indian families’ lives).

165. *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) (citing *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 646 (1999)).

166. *Id.*

167. 25 U.S.C. § 1901(3)–(5).

“liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.¹⁶⁸ The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”¹⁶⁹ The specific dictates of due process requires the balancing of three factors, known as *Eldridge* factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷⁰ In the context of termination of parental rights, or parents facing the removal of their children the need for procedural protections is “critical.”¹⁷¹ As a per se rule based on a balancing of the *Eldridge* factors, the Court has held that the Due Process Clause requires the party seeking to alter or end parental rights prove their allegations by at least clear and convincing evidence.¹⁷²

The House and Senate Reports noted a pattern of Indian parents being deprived of their children in violation of their right to procedural due process. The Senate Report noted the following:

Studies by the Association on American Indian Affairs, State Welfare offices and private child welfare groups indicated that in some areas as high as 25 percent of all Indian children are being placed in institutions or in foster or adoptive homes, usually with non-Indian families. The studies also indicated that such family breakups frequently occur as a result of conditions which are temporary or remedial and where the Indian people involved do not understand the nature of the legal actions involved.¹⁷³

Similarly, the House Report found that states denied basic procedural rights to Indian parents by denying them access to counsel or expert witnesses.¹⁷⁴ The cultural disconnect between state workers who favored the nuclear family and the Indian families who culturally did not, plus power dynamics favoring the state, led to serious harms:

168. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

169. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

170. *Eldridge*, 424 U.S. at 335.

171. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

172. *See id.* at 764, 769 (basing analysis on the balancing of the three *Eldridge* factors).

173. S. REP. NO. 95-597, at 11 (1977).

174. H.R. REP. NO. 95-1386, at 11 (1978).

The conflict between Indian and non-Indian social systems operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.¹⁷⁵

Together, the Senate and House Report indicate thorough documentation of a pattern by which Indian children are removed from their families without due process. Although the Supreme Court decision that specified the procedural due process standard for deprivation of parental rights was not announced until 1982,¹⁷⁶ years after ICWA was passed in 1978, the legislative record shows ample evidence of a pattern of Indian families being deprived of their constitutional right to procedural due process in the ways in which their children were separated from them.

Substantive Due Process. The Supreme Court has long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.¹⁷⁷ In *Meyer v. Nebraska*¹⁷⁸ and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*,¹⁷⁹ the Supreme Court recognized “the liberty of parents and guardians to direct the upbringing and education of children under their control” to be a fundamental right protected by the Due Process Clause.¹⁸⁰ Although the

175. *Id.*

176. *Santosky v. Kramer*, 455 U.S. 745 (1982).

177. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that a parent's desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000).

178. 262 U.S. 390 (1923).

179. 268 U.S. 510 (1925).

180. *Pierce*, 268 U.S. at 534–35.

Court's recent decision in *Dobbs v. Jackson Women's Health*¹⁸¹ has called into question the future of substantive due process,¹⁸² Professor Laurence Tribe has called *Meyer* and *Pierce* "the two sturdiest pillars of the substantive due process temple" and has noted that the line of cases establishing the fundamental right to family integrity free from arbitrary government interference has survived on strong footing.¹⁸³

The House Report documents a pattern by which Indian children are removed from Indian families resulting in a violation of Indian families' substantive due process right to rear their children as they see fit.¹⁸⁴ The report states, "[i]n judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists."¹⁸⁵ *Meyer v. Nebraska* and *Pierce v. Society of Sisters* stand for the principle that parents' right to raise their children as they see fit, in whichever culture or religion they choose, is protected by the Due Process Clause. By unfairly labeling these cultural practices as "neglect" or "abandonment," social workers were engaged in a pattern of denying Indian families the right to raise their children in their cultures. This is analogous to *Meyer*, which held that Nebraska's criminalization of teaching children the German language denied parents the right to direct the upbringing of their children,¹⁸⁶ and to *Pierce*, which held that prohibition of sending children to Catholic schools violated parents' rights to rear their children as they saw fit.¹⁸⁷

Equal Protection. The virulent race discrimination of the pre-ICWA era certainly implicates the Equal Protection Clause. When courts evaluate state conduct for an equal protection violation, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."¹⁸⁸ A showing of disparate impact alone is not sufficient to state an equal protection claim.¹⁸⁹ A plaintiff

181. 142 S. Ct. 2228 (2022) (overruling nearly 50 years of precedent establishing a right to abortion under the doctrine of substantive due process).

182. See Reva Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 53–64), <https://ssrn.com/abstract=4179622> [<https://perma.cc/H4WW-75MA>].

183. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1934 (2004).

184. H.R. REP. NO. 95-1386, at 11–12.

185. *Id.* at 10.

186. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

187. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

188. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.).

189. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

must show a racially discriminatory intent, which may be evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers.¹⁹⁰ Plaintiffs may show an equal protection violation through “persuasive circumstantial evidence” that race was the government actor’s “dominant and controlling rationale.”¹⁹¹ “[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”¹⁹² Courts have held that Indians are denied equal protection of law when a government actor acts in a manner that is impermissibly motivated by their race.¹⁹³ This is straightforward equal protection which courts have long recognized.

The House Report documented ample evidence that Indian families were denied equal protection in the discriminatory application of family laws against them compared to non-Indians.¹⁹⁴ It noted the disturbing frequency at which Indian children were separated from their families—“approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”¹⁹⁵ The House Report also noted the shocking disparity in the rates at which Indian children are separated from their families compared with non-Indian children.¹⁹⁶

While disparate impact alone is not enough to show a violation of the Equal Protection clause, the House Report also documents evidence of discriminatory intent. For example, it notes that abuse of alcohol is disproportionately cited as grounds for separating Indian children from their families; non-Indian families were not targeted for alcoholism at the

190. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977).

191. *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995).

192. *Davis*, 426 U.S. at 242 (1976).

193. *See, e.g., Navajo Nation v. San Juan County*, 162 F. Supp. 3d 1162, 1182–83 (D. Utah 2016).

194. H.R. REP. NO. 95-1386, at 9–10 (1978).

195. *Id.* at 9.

196. *Id.* (“The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State’s Department of Public Welfare since 1967–68 are of Indian children, yet Indians make up only 7 percent, of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent [17 times] greater than it is for non-Indian children.”).

same rate.¹⁹⁷ The report also notes that discriminatory standards have made it difficult for Indian couples to qualify as foster or adoptive parents “since they are based on middle-class values.”¹⁹⁸ Tribal leaders had been arguing that Indian families of “modest means” could serve as foster or adoptive parents, but state actors ignored them.¹⁹⁹ Congress showed an awareness of the fact that cultural differences among Indians was a reason why they often did not qualify as foster parents or adoptive parents. With all this evidence, Congress could conclude that there was a pattern in which states applied their family laws unfairly against Indian families in violation of the Equal Protection clause.

C. Congruence and Proportionality

For Congress’s action to fall within its Section 5 authority, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²⁰⁰ Some scholars have explained that Congress may validly abrogate aspects of states’ sovereignty by issuing affirmative commands to states that might otherwise run afoul of the Tenth Amendment’s anti-commandeering principle when it acts under its Section 5 enforcement powers.²⁰¹ Recent cases concerning Congress’s power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment reflect a broader theory of abrogation of state sovereignty, of which immunity from suit is but one aspect. For example, *Alden v. Maine*²⁰² grounded the concept of state sovereignty in the Tenth Amendment in addition to the Eleventh Amendment.²⁰³ Under a theory of remedial commandeering, the congruence and proportionality test that is used to determine whether

197. *Id.* at 10 (“One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again cultural biases frequently affect decisionmaking.”).

198. *Id.* at 11.

199. *Id.* (“Recognizing that in some instances it is necessary to remove children from their homes, community leaders argue that there are Indian families within the tribe who could provide excellent care, although they are of modest means.”).

200. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

201. See Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2005 (2021) (“If Congress has satisfied *City of Boerne’s* congruence and proportionality test, then . . . Congress should be—and to this point always has been—free to regulate in a manner that issues direct orders to state actors.”).

202. 527 U.S. 706 (U.S. 1999).

203. *Id.* at 749 (“A power to press a State’s own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.”).

Congress has validly abrogated the sovereign immunity of states may be applied to determine when Congress has validly “commandeered” the states by issuing them an affirmative command.

ICWA’s remedial provisions are congruent and proportional to the record of constitutional violations Congress had before it. Much of ICWA consists of safeguards to ensure fairness in proceedings involving the termination of parental rights of an Indian child. For example, Congress enacted the active efforts provision in response to the stark frequency of the constitutional violations,²⁰⁴ which mandates that “any party seeking to effect [the change of status of an] Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” This provision is proportional to the astonishing frequency of the problem Congress had identified, that Indian children were removed from their families at a shockingly disproportionately high rate and that twenty-five to thirty-five percent of all Indian children at the time ICWA was enacted were removed from their families.

The provisions requiring the expert witnesses in foster care placement and termination of parental right proceedings are also proportional to the extent of the pattern of Constitutional violations Congress found. ICWA requires that:

[N]o foster care placement may be ordered in [a foster care placement proceeding where the court knows or has reason to know that an Indian child is involved] in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁰⁵

ICWA also requires that:

[N]o termination of parental rights may be ordered in [a termination of parental rights proceeding where the court knows or has reason to know that an Indian child is involved] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the

204. 25 U.S.C. § 1912(d).

205. § 1912(e).

parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁰⁶

Congress believed that not relying on expert witnesses was one of the primary reasons behind disparate outcomes in states' application of family laws.²⁰⁷ Congress specifically identified courts' reliance on social workers who lacked cultural competence.²⁰⁸ By requiring states to furnish an expert witness in these proceedings, Congress went no further than necessary to remedy this cause of the pattern of constitutional violations. Although Congress specified a "beyond a reasonable doubt" burden of proof, which goes beyond the "clear and convincing" burden of proof required by the Constitution in parental termination proceedings, Congress may have concluded that this prophylactic measure was necessary given the widespread problem it was tackling. Such a prophylactic measure is acceptable. The Court has held that "Section 5 allows Congress to 'enact[] reasonably prophylactic legislation' to deter constitutional harm."²⁰⁹

The recordkeeping requirements are also proportional to the pattern of Constitutional violations Congress found. ICWA states:

[A] record of each [adoptive] placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.²¹⁰

ICWA provides that any State court entering a final order in any Indian child adoptive placement shall provide the Secretary with a copy of such order along with specified information.²¹¹ Given the widespread nature of the problem and gaps in information that Congress identified (*e.g.*, noting that not all states kept detailed records like Minnesota), Congress may have concluded that this recordkeeping was necessary to allow it to better quantify the scale of the problem and to measure the effect of the remedial measures it enacted.²¹²

206. § 1912(f).

207. H.R. REP. NO. 95-1386, at 11 (1978).

208. *Id.* at 10-11.

209. *Allen v. Cooper*, 140 S. Ct. 99, 1004 (2020) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

210. § 1915(e).

211. § 1951(a).

212. H.R. REP. NO. 95-1386, at 9 (1978).

The placement preferences privileging Indian adoptive and foster parents²¹³ come in response to testimony made during the Congressional hearings leading up to ICWA explaining that the states intentionally placed Indian children removed from their homes in non-Indian homes²¹⁴ and, further, that states discriminated against Indian potential foster and adoptive parents. State actors believed without evidence that growing up Indian on an Indian reservation with Indian family members was the worst thing possible for an American child and acted accordingly.

ICWA's notice provision requires that in any State court proceeding seeking foster care placement of, or termination of parental rights to, an Indian child, the party seeking the action shall notify the parent or Indian custodian and the Indian child's tribe.²¹⁵ ICWA also mandates a certain period of time to allow the Indian parents and the tribe to respond.²¹⁶ These requirements serve the clear remedial purpose of redressing the pattern of Constitutional violations Congress found. Congress noted that Indian children are frequently removed from their families without affording the Indian families their constitutionally required procedural due process rights.

CONCLUSION

The Indian Child Welfare Act continues to be an important statute. Race discrimination by state actors, after all, cannot be legislated away. Consider the suit brought by the Oglala Sioux Tribe against state judges in Rapid City, South Dakota, *Oglala Sioux Tribe v. Van Hunnik*.²¹⁷ The court found that the practices of state judges, led by Judge Jeff Davis, routinely violated Indian parents' and custodians' due process rights:

Judge Davis does not permit Indian parents to present evidence opposing the State's petition for temporary custody. Judge Davis prevents Indian parents from cross-examining any of the State's witnesses who would support of the petition. Judge Davis does not require the States Attorney or [Department of Social Services] to call witnesses to support removal of Indian children nor does Judge Davis permit testimony as to whether

213. § 1915(a)–(b).

214. *Indian Child Welfare Hearing*, *supra* note 51, at 5 (estimating ninety percent of Indian children removed were placed with non-Indian families).

215. § 1912(a).

216. *Id.*

217. 100 F. Supp. 3d 749 (D.S.D. 2015), *rev'd on other grounds sub nom. Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir 2018).

a removed child is in immediate risk of harm if returned to her parents.²¹⁸

The court added further that Judge Davis' practices plainly violate ICWA:

Judge Davis does not conduct any inquiry during the 48-hour hearings to determine whether emergency removal remains necessary. He permits no testimony by the Indian parents or presentation of testimony by the tribal attorney to determine whether the risk of imminent physical harm has passed. Contrary to the clear intent of ICWA, the [Department of the Interior] Guidelines and the [South Dakota] Guidelines, all of which contemplate evidence will be presented on the record in open court, Judge Davis relies on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians. These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence.²¹⁹

The federal district court concluded that the Rapid City judiciary's practices violated the Due Process Clause:

Judge Davis and the other defendants failed to protect Indian parents' fundamental rights to a fair hearing by not allowing them to present evidence to contradict the State's removal documents. The defendants failed by not allowing the parents to confront and cross-examine DSS witnesses. The defendants failed by using documents as a basis for the court's decisions which were not provided to the parents and which were not received in evidence at the 48-hour hearings.

Plaintiffs are entitled to judgment as a matter of law on their Due Process Clause claims.²²⁰

In short, the "wholesale" removal of Indian children from their Indian parents and custodians that so concerned Congress in 1978²²¹ never stopped in Rapid City.

Van Hunnik is perhaps an extreme example, but recent studies conclude that state court compliance with ICWA is unusually rare. In 2015, a Casey Family Programs study found that state compliance with

218. *Id.* at 764.

219. *Id.* at 768.

220. *Id.* at 772.

221. H. REP. NO. 95-1386, at 9 (1978).

ICWA was “inconsistent.”²²² Another study found that adoption attorneys often intentionally violate or subvert compliance with ICWA.²²³ This year, scholars reviewing ICWA compliance studies found that tribes do not receive notice of ICWA-eligible cases, children are under-identified as Indian children, ICWA cases are treated the same as non-ICWA cases, and more.²²⁴ One consequence to the lack of compliance is that “Native American children are continuously overrepresented at alarmingly high rates in the child welfare system.”²²⁵

Other states go the opposite direction, going so far as to codify and domesticate ICWA. Ten states, most recently New Mexico’s Indian Family Preservation Act,²²⁶ have adopted such laws.²²⁷ State laws enacted in furtherance of the federal government’s duty of protection to Indians and Indian tribes are valid under the Fourteenth Amendment Equal Protection Clause.²²⁸ Recently, the Washington Supreme Court roundly approved of and broadly applied the Washington Indian Child Welfare Act, which extended protections to Indian children where their parents were not yet enrolled as a tribal citizen.²²⁹ ICWA defines “Indian child” as one who is either a member of an Indian tribe or is the biological child of a tribal member.²³⁰ The court relied on ICWA, but in an important alternative holding, concluded that the state statute alone was a sufficient and valid basis for reaching that conclusion.²³¹

222. CASEY FAMILY PROGRAMS, A RESEARCH AND PRACTICE BRIEF: MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT 6 (2015), <https://theacademy.sdsu.edu/wp-content/uploads/2015/06/measuring-compliance-icwa-brief.pdf> [<https://perma.cc/3KDK-HR9B>]; see also JUSTINE VAN STRAATEN & PAUL G. BUCHBINDER, CENTER FOR COURT INNOVATION, THE INDIAN CHILD WELFARE ACT: IMPROVING COMPLIANCE THROUGH STATE-TRIBAL COOPERATION 1 (2011), <https://www.courtinnovation.org/sites/default/files/documents/ICWA.pdf> [<https://perma.cc/HUS2-NFJN>].

223. Gregory D. Smith, *ICWA Adoptions: An Indian Child Welfare Act Primer*, 5 ACCORD, LEGAL J. FOR PRAC. 81, 89–91 (2016).

224. Melanie Sage & Carenlee Barkdull, *Operationalizing ICWA Compliance to Improve Native American Child & Family Outcomes*, 73 JUV. & FAM. CT. J. 7, 10 (2022).

225. *Id.* at 9.

226. H.B. 135, 55th Leg., 2d Sess. (N.M. 2022).

227. *Comprehensive State ICWA Laws*, TURTLE TALK, <https://turtletalk.blog/icwa/comprehensive-state-icwa-laws> [<https://perma.cc/JZ43-U4KD>] (listing the ten states which have adopted ICWA laws).

228. RESTATEMENT L. AM. INDIANS, *supra* note 13, § 9(b); see also *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (holding that while states “do not enjoy [the federal government’s] unique relationship with Indians,” state laws “enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians,” for example, will be judged under the rational-basis test).

229. *In re Dependency of Z.J.G.*, 196 Wash. 2d 152, 175 (2020).

230. 25 U.S.C. § 1903(4).

231. *Z.J.G.*, 196 Wash. 2d at 183–84.

All of this is to say that twenty percent of states have endorsed ICWA through positive legislation adopting or domesticating the law.²³² These states have learned the ICWA lesson.

Where state actors comply with ICWA, success stories abound. Consider the story of Chief Judge Allie Greenleaf Maldonado, a citizen of the Little Traverse Bay Bands of Odawa Indians:

I am looking at a picture of a beautiful little boy who is a citizen of the Little River Band of Odawa Indians. He is my son. He became my son because of ICWA.

His 14-year-old biological mother ran away to Nevada where she gave birth. The State of Nevada immediately took custody of the baby and placed him into a non-relative, non-Indian placement. However, the Little River Band was properly notified and the tribe intervened. The good people of Nevada wanted to follow ICWA and so they asked the tribe for an appropriate placement.

If they had not followed ICWA, under Nevada law, the family that brought him home from the hospital would have maintained custody and would have had the first right to adopt him if no family members came forward. They were very nice people, great people, but they had no ties to the Native community whatsoever. My son would have been brought up thousands of miles from his tribe and his culture but for ICWA.

However, because he is Indian, and Nevada followed federal law, he was transported back to Michigan and placed into foster care with my husband and me. I am from a sister tribe and member of the same clan as my son, so the tribe decided we were an appropriate placement. After about two years of trying to reunite him with his birth mother, both birth parents voluntarily gave up their parental rights and we were allowed to adopt him.²³³

In the Anishinaabe traditional creation stories, Gitchi Manitou (the great mystery) created Anishinaabewaki (the world).²³⁴ The first human beings were created and introduced into Anishinaabewaki last.²³⁵ They were physically weak compared to other entities and creatures already

232. See *Comprehensive State ICWA Laws*, *supra* note 227.

233. Allie Greenleaf Maldonado, Opinion, *Allie Greenleaf Maldonado: My Personal ICWA Success Story*, INDIANZ (May 8, 2015), <https://www.indianz.com/News/2015/05/08/allie-greenleaf-maldonado-my-p.asp> [<https://perma.cc/U42V-NDP8>].

234. BRENNOR JACOBS, DAUGHTERS, SISTERS, MOTHERS & WIVES: AN ANISHINAABE READER 13–14 (n.d.).

235. *Id.* at 14.

present in and around the world, creatures like mukwaag (bears) and entities like animikiiwaag (thunderers).²³⁶ But these had two great powers: independence and the power to dream. These earliest humans forgot the Ki Inaakonigewin (great laws), which angered Gitchi Manitou. They sent a great flood and destroyed all of Anishinaabewaki, including all of the Anishinaabeg.²³⁷ There was one creature who remained, Gizhigokwe (Sky Woman), who lived in the sky. Gizhigokwe descended onto the world, landing on the back of mikinaak (turtle) and created new people, known as the Anishinaabeg.²³⁸ These Anishinaabeg were different than the earlier people. They were not made of earth, water, fire, and wind—they were “spontaneous creatures.”²³⁹ The Anishinaabeg are the manifestation of the full circle of creation, destruction, and re-creation.

The very existence of an Anishinaabe *binoojiinh/penojé* is the continuing manifestation of this cycle of re-creation. As Leanne Simpson concludes, “Nishnaabeg parenting was rooted in attachment, following children through their stages of development, with empathy, patience, unconditional love, mutual respect, and freedom of choice.”²⁴⁰ Children are not chattel. Children are people with agency, to whom we are all obligated. And because children are effectively agents of change, they are the greatest threats to those who now possess power. It is obvious why colonizers and oppressors target children.²⁴¹

Congress has power to enact ICWA, to preempt inconstant state laws, and require that state courts apply it. Even if some provisions of ICWA violated that Anti-commandeering principle of the Tenth Amendment, Congress has potent power under Section 5 to enact those provisions and to force state actors to comply with it.

236. *Id.*

237. *Id.* at 15.

238. *Id.* at 15–16.

239. *Id.* at 16.

240. Simpson, *supra* note 2, at 123 (emphasis removed).

241. See, e.g., Christina Firpo & Margaret Jacobs, *Taking Children, Ruling Colonies: Child Removal and Colonial Subjugation in Australia, Canada, French Indochina, and the United States, 1870–1950s*, 29 J. WORLD HIST. 529, 530–31 (2018).

* * *