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ANTICOMMANDEERING & INDIAN AFFAIRS LEGISLATION

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Abstract

The Supreme Court recently applied the narrow and relatively new anticommandeering doctrine for the first time to federal Indian Affairs legislation in Haaland v. Brackeen. *It did so without explaining why the doctrine should be extended from the Interstate Commerce Clause context to that of the Indian Commerce Clause, as well as to the other congressional powers that form the basis of the Indian Child Welfare Act (ICWA). In subsequent cases relating to Indian Affairs legislation, the Court should clarify that only a very narrow version of the anticommandeering doctrine applies in this context because of the virtual absence of state authority in the area and the history of acceptance of federal activities that can be described as commandeering state enforcement activities. Examples used to demonstrate the general acceptance in Indian Affairs of federal actions that would be considered commandeering in other areas include a treaty rights case that culminated in temporary federal management of state fisheries, Public Law 280, and the Indian Gaming Regulatory Act's requirement that states negotiate with Tribes in order to come to agreement on a gaming compact. Existing literature in this area is limited, with Professor Matthew Fletcher and Randall Khalil having argued, before the opinion in* Brackeen *was issued, that ICWA should be interpreted as having been enacted under Section 5 of the Fourteenth Amendment, an invitation that the Court ultimately did not take up. This Essay, Anticommandeering and Indian Affairs Legislation, is important because it explains holes in the Court's reasoning in* Brackeen *and because it safeguards Congress's ability to protect Native Americans and Tribes from longstanding abusive state practices such as the unwarranted removal of Indian children from their homes.*

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I. Introduction

In *Haaland v. Brackeen*,[1] the Court missed an important opportunity to demarcate the limitations of the anticommandeering doctrine.[2] The anticommandeering doctrine should be viewed to have, at most, an extremely limited scope in relation to statutes enacted under Congress's plenary authority *vis a vis* Indian Tribes,[3] such as the Indian Child Welfare Act (ICWA).[4] The crux of the anticommandeering doctrine as evidenced in pre-*Brackeen* case law is that Congress may not "use its power over interstate commerce to require state or local government to take legislative or executive actions."[5] As explained below, the Court has not expressly limited the doctrine to the context of its interstate commerce power (or to its commerce power more broadly), but all of the cases applying the doctrine before *Brackeen* concerned congressional actions pursuant to interstate commerce power.[6] This Essay argues that the

[1] 599 U.S. 255 (2023).

[2] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[3] *See, e.g.*, 25 U.S.C. § 1901(1) (stating Congress's findings "that clause 3, section 8, article I of the United States Constitution provides that 'The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes' and, through this and other constitutional authority, Congress has plenary power over Indian affairs") (footnote omitted).

[4] *See generally* Indian Child Welfare Act, 25 U.S.C. §§ 1901–03, 1911–23, 1931–34, 1951–52, 1961, 1963.

[5] 1 Ronald D. Rotunda & John E. Nowak, Treatise on Const. L. § 4.10(d)(i) (June 2023 Update).

[6] *See infra* note 151 and sources cited therein. While the Court has applied the doctrine to date only in the context of interstate commerce cases and, most recently, in *Brackeen*, in the

anticommandeering doctrine should not apply to Indian Affairs legislation except in the unlikely event that Congress orders state legislatures to enact specific legislation.

During the Supreme Court oral argument in *Brackeen*, Justice Jackson raised the issue of whether the anticommandeering doctrine even applies to federal statutes pertaining to Indian Tribes and questioned counsel for the individual plaintiffs about the doctrine's application in this context, particularly in light of the doctrine's recent vintage.[7] The majority opinion, however, does not address these concerns and, instead, relies on a granular analysis of the challenged provisions of ICWA and the strictures of the anticommandeering doctrine that ultimately results in the Court's rejection of the anticommandeering challenges on the merits.[8] While this merits analysis is generally sound and would have been appropriate in another context,[9] the Court missed an important opportunity to clarify the limited scope of the doctrine in the context of federal legislation enacted for the benefit of Indian Tribes. Such a clarification would have helped the Court conserve judicial resources by discouraging future challenges rooted in the doctrine in the context of federal statutes relating to Tribes. Indeed, although Texas, Louisiana, Indiana, and the individual plaintiffs did not succeed on their anticommandeering arguments in *Brackeen*, the increasing prominence of the doctrine, and perhaps the partial win before the Fifth Circuit en banc,[10] has emboldened some states. For example, Utah recently codified a process to prohibit state officials from complying with federal directives that the state has determined to "violate[] the principles

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Indian commerce context, it has voiced more general concerns about federal coercion of states in other contexts. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 209–10 (1987) (addressing whether the Twenty-First Amendment should be read as an independent constitutional bar on the spending power). *Dole* also discusses the *Oklahoma v. Civil Service Commission* Court's analysis of the Tenth Amendment. *Id.* (citing Oklahoma v. Civ. Serv. Comm'n, 330 U.S. 127, 142–43 (1947)). However, *Oklahoma v. Civil Service Commission* is not an anticommandeering case in the sense that it views the Tenth Amendment as encompassing non-textually rooted limits on federal power, but rather the case is a garden variety Tenth Amendment case about the interplay between Congress's ability to condition funds and the Tenth Amendment grant of power to the states to "regulate local political activities as such of state officials." 330 U.S. at 143.

[7] *See* Transcript of Oral Argument at 53–54, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376) ("And so it seems to me odd that we would suddenly say in this area using a relatively new anti-commandeering principle that the federal government can't do what it has long done in terms of taking control of this area away from the states related to Indian affairs.").

[8] *See Brackeen*, 599 U.S. at 280–91.

[9] *See generally* Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 Yale L. & Pol'y Rev. 292 (2020) (making many of the same arguments about the ICWA's lack of violation of the anticommandeering doctrine that are relied upon by the majority in *Brackeen*). Professor George Bach, however, argues that the Court in *Brackeen* used indefinite language in defining the parameters of the anticommandeering doctrine, perhaps in order to give itself sufficient wiggle room to find violations in future cases that appear to meet the strictures of the doctrine. George Bach, *The Federal Government Cannot Prohibit the Exercise of a Core State Sovereign Function:* Haaland v. Brackeen *and Expanding the Anticommandeering Doctrine*, 52 UC L. Const. Q. 39–40 (forthcoming 2024).

[10] *See* Brackeen v. Haaland, 994 F.3d 249, 268 (5th Cir. 2021) (en banc), *aff'd in part, vacated in part, rev'd in part*, 599 U.S. 255 (2023).

of state sovereignty."[11] Indian Affairs legislation appears to be in the crosshairs of Utah's recent enactment as the law contains provisions for notice to Tribal governments when the new state process is invoked.[12] Additionally, several states recently invoked the anticommandeering doctrine in their challenge to an Environmental Protection Agency rule promulgated under the Clean Water Act[13] that is designed to protect Tribes' reserved water rights.[14]

The ICWA was enacted in 1978 to provide Native children, Native parents, Indian custodians, and Tribes with protections from (1) states' widespread, unjustified removals of Indian children from their families and Tribes and (2) states' placement of these children with non-Indian families.[15] Statistics pertaining to state removal of Native children from their families in the years leading up to the passage of ICWA make the need for such a statute clear. "By the late 1960s, it is estimated that state governments removed a startling 25–35% of all Indian children from their families and placed them into foster homes, adoptive homes, or institutions."[16] The situation in some states was even more stark. "Native children in New Mexico were separated from their families at a rate of seventy-four times that of non-Indian children."[17] One striking story from the legislative history of the ICWA recounts how a Native child called Ivan "was saved because the sheriff, the social worker and the prospective foster parents fled when the tribal chairman ran to get a camera to photograph their efforts to wrest [Ivan] . . . from his Indian guardian's arms."[18]

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[11] Utah Code Ann. § 63G-16-202 (West 2024); *see also* Eric Levenson, *Utah's new 'Sovereignty Act' sets up a process to overrule the federal government. But is it constitutional?*, CNN (Feb. 19, 2024), https://www.cnn.com/2024/02/19/us/utahs-sovereignty-act-overrule-federal/index.html [https://perma.cc/ABX4-FF7J].

[12] *See* Utah Code Ann. § 63G-16-202 ("Upon the filing of a request for a concurrent resolution under Subsection (1), the Legislature shall provide notice of the concurrent resolution, including the short title and proposed objectives, to the representatives of tribal governments listed in Subsection 9-9-104.5(2)(b).").

[13] *See generally* 33 U.S.C. §§ 1251–1389.

[14] *See* Memorandum in Support of Plaintiffs' Motion for Stay and Preliminary Injunction at 9–10, Idaho v. Environmental Protection Agency, Case 1:24-cv-00100-DLH-CRH (D.N.D. June 14, 2024), ECF No. 5-1 ("Unlike valid regulations promulgated under the CWA, which are permissibly aimed at the technical regulation of water pollution, the Rule impermissibly aims at regulating States as sovereigns."); *see also* Joyce Hanson, *Tribes Fight Red States' Bid To Halt EPA Water Rule*, Law360 (July 15, 2024), https://www.law360.com/articles/1858045 [https://perma.cc/3WTJ-27ZY] (quoting the intervening Tribes' description of the anticommandeering argument as "exceedingly thin"); 40 C.F.R. § 131.9.

[15] *See, e.g.*, Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30, 32–34 (1989); *see also* 25 U.S.C. § 1901(4) (noting 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"); Gale & McClure, *supra* note 9, at 300.

[16] Brief of American Historical Association and Organization of American Historians as Amici Curiae supporting Federal and Tribal Parties, at 22, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376) [hereinafter Brief of Amici Curiae] (citation omitted).

[17] *Id.* at 23.

[18] *Indian Child Welfare Program Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 93rd Cong. 2nd Sess. 23 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs, Inc.).

Devastatingly, the damage from "abusive [state] child welfare practices" that resulted in these disproportionate removals[19] was compounded by federal assimilationist practices that also resulted in, and were designed for, destruction of Indian families. Such actions include the earlier forced removal of Native children to residential boarding schools[20] and the federally-funded Indian Adoption Project through which Native children were removed from their families and placed for adoption with non-Native families.[21]

Given this egregious history of wrongs against Native families, ICWA is properly considered a remedial statute[22] designed to protect the rights of Native parents and custodians, as well as those of Native children and the Indian Tribes that they are part of.[23] Although Professor Fletcher and Randall Khalil have argued that ICWA should be interpreted to have been enacted under section 5 of the Fourteenth Amendment, and therefore to be remedial in that sense,[24] this Essay uses the term more broadly, arguing instead that the horrifying record of state wrongs against Indian parents, Indian children, and their Tribes must be part of the analysis as to the validity of ICWA's requirements that affect states.[25]

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[19] *Holyfield*, 490 U.S. at 32; *see also* 25 U.S.C. § 1901 (noting 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").

[20] *See, e.g.*, Neoshia Roemer, *Un-Erasing American Indians and the Indian Child Welfare Act from Family Law*, 56 Fam. L.Q. 31, 50 (2022). Federal policy embraced boarding schools for Native children beginning in 1879 and then began to turn away from them in 1917, although many boarding schools persisted beyond that timeframe. *See* 1 Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton & Kevin K. Washburn ed., 2023) [hereinafter, Cohen's Handbook].

[21] *See, e.g.*, Ellen Herman, *Indian Adoption Project*, The Adoption History Project (last updated Feb. 24, 2014), https://pages.uoregon.edu/adoption/topics/IAP.html [https://perma.cc/SA5M-UTZH]. The Indian Adoption Project was in place from 1958 through 1967. *Id.* For information on earlier colonialist attacks on Indian families, *see, e.g.*, Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 Colum. Human Rts. L. Rev. 104, 157 (2015).

[22] *See, e.g.*, Roemer, *supra* note 20, at 33; Norika L. Kida Betti & Cameron Ann Fraser, *Michigan Indian Family Preservation Act at Seven Years*, 98 Mich. Bar J. 32, 32 (2019); *see also* Matthew L.M. Fletcher & Randall F. Khalil, *Preemption, Commandeering, & the Indian Child Welfare Act*, 2022 Wisc. L. Rev. 1199, 1204, 1220 (2022) (noting that "Congress designed ICWA to remedy the abuses of state courts and agencies" and describing ICWA as a "key statute" enacted to further the United States' attempt to "remedy the ongoing harms it perpetrated against Indian people"); Brief of Amici Curiae, *supra* note 16, at 4 (noting that "ICWA must be viewed against . . . [the] historical record" of extremely widespread state removal of Native children from their families).

[23] *See* Fletcher & Khalil, *supra* note 22, at 1213 ("All of the provisions of ICWA challenged in *Brackeen* involve the creation of federal rights in individual Indian parents concerning their custodial relationships over their children."); *see also Holyfield*, 490 U.S. at 34–35 (discussing the fact that Congress was trying to protect the rights of Indian parents, Indian children, and Tribes in enacting ICWA).

[24] *See generally* Fletcher & Khalil, *supra* note 22.

[25] Fletcher and Khalil's argument that ICWA was enacted under section 5 of the Fourteenth Amendment is based on the reference to open-ended "other constitutional authority" in ICWA's

ICWA was enacted, in part, pursuant to Congress's power under the Commerce Clause "[t]o regulate Commerce . . . with Indian tribes."[26] In ICWA's legislative findings section, Congress also alludes to the Treaty power, the trust responsibility,[27] and congressional plenary power, which it notes is based on the Indian Commerce Clause "and other constitutional authority."[28]

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legislative findings section. *Id*. at 1217 (quoting 25 U.S.C. § 1901(1)). While the author agrees with them that a statute like ICWA would be an excellent candidate for section 5 authority, the chances of a court's relying on section 5 in the absence of an explicit reference to it in the legislative findings seem low. *See* Pennhurst State Sch. v. Halderman, 451 U.S. 1, 16 (1981) ("[W]e should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Our previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5."). It is worth noting, however, that most section 5 cases address the question of whether a state's sovereign immunity has been validly abrogated by Congress, a question which presumably accounts for much of the Court's careful attention to congressional intent and justifications in section 5 cases, whereas the abrogation question is not raised under ICWA. *See, e.g.*, Erwin Chemerinsky, Constitutional Law: Principles and Policies 327 (7th ed. 2023). And, interestingly, while in some contexts, states have been held to have waived their sovereign immunity in the area in question simply by participating in the Constitutional Convention, *see, e.g.*, Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 589–90 (2022) (discussing "Congress' power to build and maintain the Armed Forces"), the Court has determined that Indian Affairs power is not such an area. *See id.* at 581 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[26] 25 U.S.C. § 1901(1) (quoting U.S. Const. art. I, § 8, cl. 3).

[27] 25 U.S.C. § 1901(2). While the President's treaty power, described in Article 2, Section 2, Clause 2 of the Constitution, is not explicitly cited in ICWA's legislative findings, ICWA's description of treaties with Tribes as evidence of Congress's assumption of "the responsibility for the protection and preservation of Indian tribes and their resources" is an allusion to the treaty power. *See id.* Similarly, ICWA's reference to Congress's "responsibility for the protection and preservation of Indian tribes and their resources" is a reference to the trust responsibility. *Id; see also* Fletcher & Khalil, *supra* note 22, at 1208 ("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."). As *Cohen's Handbook of Federal Indian Law* explains:

> One of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes. Courts have invoked language of guardian and ward, or more recently trustee and beneficiary, to describe this relationship in a variety of legal settings. The concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court. Today the trust doctrine is one of the cornerstones of Indian law.

Cohen's Handbook, *supra* note 20, § 5.04[3][a].

[28] 25 U.S.C. § 1901(1). *See, e.g.*, Fletcher & Khalil, *supra* note 22, at 1201, 1212–13, for a description of the constitutional and preconstitutional powers the Court has relied on as bases of congressional plenary power over Indian Affairs. Plenary power is a controversial doctrine that has been used to both benefit and harm Tribes. *See, e.g.*, Restatement of the L. of Am. Indians § 6 DD No. 2 (2014) ("[P]lenary power is undertheorized and controversial, with commentators on both the left and right highly critical of Congressional plenary power. In the course of American history, Congress has used plenary power to protect Indians and tribes and to exploit tribal resources and undermine tribal cultures."). However, as the author discussed in a previous article, the doctrine is of extremely longstanding character. Ann E. Tweedy, *Using Plenary Power As A Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 Env't. L. 471, 490 n.69 (2005). Some Supreme Court Justices, such as Justice Thomas, have toyed with abolishing the doctrine in recent years. United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring in the judgment) ("I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'") (citation omitted); United States v. Bryant, 579 U.S. 140, 160 (2016)

Congress's plenary power relating to Indian Tribes has been most frequently tied to the Commerce Clause, with the Treaty Clause also being mentioned in some cases.[29] Additionally, the Property and Territory Clause and the United States' preconstitutional powers have been cited as bases of congressional plenary power as well.[30]

The plaintiffs in *Brackeen*, including the States of Texas, Indiana, and Louisiana, a birth mother, and foster and adoptive (and prospective adoptive) parents challenged the constitutionality of the ICWA and associated federal regulations on multiple grounds.[31] The Supreme Court rejected most of the challenges on the merits but declined to reach the equal protection and non-delegation doctrine challenges due to lack of standing.[32] This Essay focuses in particular on the constitutional challenges based on the anticommandeering doctrine. The Court has held the anticommandeering doctrine to be rooted in the Tenth Amendment,[33] as well as, in some cases, the structure of the Constitution.[34] While this Essay addresses ICWA specifically, the analysis applies equally to other federal statutes pertaining to Indian Affairs. For example, the Indian Gaming Regulatory Act (IGRA)[35] and Public Law 280,[36] as described in Part II.D., have faced occasional anticommandeering challenges as well. Additionally, Indian Affairs statutes are likely to be enacted in the future that some states may challenge on anticommandeering grounds.[37]

(Thomas, J., concurring) ("Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to 'regulate Commerce … with Indian Tribes,' not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority.") (citation omitted). But a strong majority of Justices appear to be committed to the doctrine, as reflected in the fact that seven Justices joined the majority opinion affirming a broad but not unlimited version of the doctrine in *Brackeen*. 599 U.S. at 274–75.

[29] *See, e.g.*, Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?*, 37 Ga. St. U. L. Rev. 739, 757 n.95 (2021) [hereinafter Tweedy, *Has Federal Indian Law Finally Arrived*].

[30] *See* Fletcher & Khalil, *supra* note 22, at 1212–13 (citing United States v. Lara, 541 U.S. 193, 200–01, 203 (2004)).

[31] *Brackeen*, 599 U.S. at 264. Of the three states that were plaintiffs, only Texas filed a petition for writ of certiorari. *See, e.g.*, 7-11 Mealey's Native American Law Report 10 (2022).

[32] *Id.* at 291–92.

[33] *See, e.g.*, Reno v. Condon, 528 U.S. 141, 149 (2000).

[34] *See, e.g.*, Printz v. United States, 521 U.S. 898, 905, 918–19 (1997).

[35] 25 U.S.C. §§ 2701–21; 18 U.S.C. §§ 1166–68.

[36] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18, 25, and 28 U.S.C.).

[37] For example, some commentators have argued for a legislative fix to remedy the change in law wrought by the decision in Oklahoma v. Castro-Huerta, 597 U.S. 629, 636 (2022). *See* Sarah Murray, Ryan Smith & Bella Sewall Wolitz, *Congress Should Fix High Court's Tribal Sovereignty Error*, Brownstein, Farber, Hyatt, Schreck LLP (July 11, 2022), https://www.bhfs.com/Templates/media/files/insights/Law360%20-%20Congress%20Should%20Fix%20High%20Court_s%20Tribal%20Sovereignty%20Error.pdf [https://perma.cc/4MPM-7USV]. Because the Court in *Castro-Huerta* gave states criminal jurisdiction within Indian Country that they previously lacked, a legislative fix—particularly a partial fix—might be framed in a way that imposes duties on states. *See infra* note 138 and sources cited therein. More generally,

The question that Justice Jackson explored in oral argument in *Brackeen*—namely, what role, if any, does the relatively new anticommandeering doctrine play in an area such as Indian Affairs in which the federal government has long been acknowledged to have broad plenary power, with state power being correspondingly severely circumscribed or even nonexistent—is the primary focus of this Essay.[38]

As a result of Congress's plenary power over Indian Affairs, the Tenth Amendment does not generally play a role in federal legislation relating to Indian Affairs, and states are generally excluded from legislating in this area of law absent congressional authorization.[39] Thus, the anticommandeering doctrine, which has been most often held to derive from the Tenth Amendment,[40] should have at most an extremely limited role in evaluating the validity of such legislation. Only the most egregious intrusions on state sovereignty, such

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Professor Kirsten Carlson has determined, based on an empirical study, that Congress enacts legislation relating to Tribes at higher rates than it does for other subjects. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77, 155 (2015) ("[T]he study finds that Congress enacted a higher percentage of Indian-related legislation than its enactment rate of legislation more generally."). Thus, more Indian Affairs legislation in the future can be reasonably expected.

[38] *See* Transcript of Oral Argument at 53–54, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376) ("I'm just trying to understand whether it even conceivably applies to an area in which we have already or long recognized that the federal government has this sort of plenary authority because states were interfering with Indian affairs."). For a discussion of the lack of state power in Indian Affairs, *see* Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

[39] *See* Gila River Indian Cmty. v. United States, 729 F.3d 1139, 1153–54 (9th Cir. 2013) (holding that the Gila River Act is within Congress's power and does not violate the Tenth Amendment because Congress has plenary power with respect to Indian Affairs and because, as the Supreme Court has explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." (quoting New York v. United States, 505 U.S. 144, 155–57 (1992)); Carcieri v. Kempthorne, 497 F.3d 15, 39 (1st Cir. 2007) (explaining that "[t]he powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive"), *rev'd on other grounds* Carcieri v. Salazar, 555 U.S. 379 (2009); *accord* Oneida Cnty., N.Y, 470 U.S. at 234 ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1023 (2015) [hereinafter Ablavsky, *Commerce Clause*] ("Received wisdom in both doctrine and scholarship has long held that the federal government enjoys exclusive power over Indian affairs, displacing state authority."); *Brackeen*, 599 U.S. at 313 (Gorsuch, J., concurring) (noting that "responsibility for managing interactions with the Tribes rests exclusively with the federal government"); Cohen's Handbook, *supra* note 20, § 5.04[2][b] ("States lack authority to regulate Indian affairs absent congressional authorization. Thus, challenges to Indian legislation based on the tenth amendment or general principles of state sovereignty have been unsuccessful . . . ."). *Seminole Tribe of Fla.*, 517 U.S. at 62 (observing that "the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes"); *cf.* Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 471 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.").

[40] *See, e.g.*, Reno v. Condon, 528 U.S. 141, 149 (2000).

as commandeering a state's legislative process, should be a basis for invalidating such legislation as a result of a violation of the principles inherent in the structure of the United States Constitution.[41] While one must be mindful that the Supreme Court has read the Tenth Amendment broadly in the anticommandeering context, interpreting it to have residual, extra-textual power to protect state sovereignty,[42] the fact that state power is at its nadir in the context of Indian Affairs should be understood to significantly reduce the potency of the doctrine in this context. The history of state over-reach during the period in which the Articles of Confederation were in place and the Founders' decision to set forth stronger federal power over Indian Affairs in the United States Constitution also supports this conclusion.[43]

II. The Anticommandeering Doctrine and the ICWA

A. An Overview of the Anticommandeering Doctrine

Importantly, the anticommandeering doctrine has been described as a "very limited principle," and it has been defined in only a small body of

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[41] *See* Printz v. United States, 521 U.S. 898, 918–19 (1997) (tying the anticommandeering doctrine to the structure of the Constitution).

[42] *New York*, 505 U.S. at 156 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . ."); *see also Printz*, 521 U.S. at 941–42 (Stevens, J., dissenting); Martin H. Redish, *Doing It with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 Hastings Const. L.Q. 593, 597 (1994).

[43] *See, e.g.*, Gregory Ablavsky, *The Savage Constitution*, 63 Duke L.J. 999, 1018–41 (2014) [hereinafter Ablavsky, *Constitution*] (describing the depredations of New York, Georgia, and North Carolina against Tribes in the 1780s, prior to the adoption of the Constitution, as well as attacks on Indians by bands of violent settlers, and the subsequent drafting and adoption of the Indian Commerce Clause); Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1806–07 (2019) ("Following independence, the Articles of Confederation adopted a vague compromise approach that appeased all, but settled nothing. The Articles provided power over Indian affairs to the Confederation Congress, while simultaneously limiting national power to Indians 'not members of any of the states' and retained explicitly the 'legislative right' of a state within its borders. The Articles soon foundered under confusion as states asserted their claims to Indian land under colonial charters and as squatters, emboldened by independence, flooded Indian Country.") (footnote omitted). Professor Ablavsky sees the Treaty Clause and the Property Clause as more important constitutional repositories of federal power relating to Indian Affairs than the Indian Commerce Clause, Ablavsky, *Constitution*, *supra*, at 1041–45, and he also views the states having received important concessions relating to Tribes in the Constitution, especially the right to federal protection in the event of armed conflict with Tribes, an asset that was particularly influential for Georgia when it considered ratifying the Constitution. *Id.* at 1067–70. These important concessions help explain why states like Georgia would ratify the Constitution despite the fact that the Indian Commerce Clause eliminated their ability, previously based on the confusing wording in the Articles of Confederation, to claim state power over Indian Affairs. In another article, Professor Ablavsky describes federal constitutional power relating to Indian Affairs as being understood historically as roughly akin to field preemption. Ablavsky, *Commerce Clause*, *supra* note 39, at 1044.

Supreme Court case law.[44] At the outset, one key aspect of the doctrine is that it is to be distinguished from valid federal preemption.[45] The Court formerly appeared to draw a distinction between legislation imposing affirmative duties on states, which was not permissible, and that prohibiting harmful activities, which was permissible, in distinguishing the two doctrines.[46] More recently, however, the Court has distinguished preemption from commandeering on the basis that federal laws that validly preempt state laws "confer a federal right" on "private entities."[47]

The primary cases elucidating the anticommandeering doctrine are described below. To briefly distill these complex cases into their most fundamental elements, the Court in *New York v. United States*,[48] held that Congress may neither commandeer state legislatures to enact legislation pursuant to a federal regulatory scheme nor may it compel states to take title to radioactive waste.[49] This holding was extended in *Printz v. United States*[50] to also prohibit Congress from compelling state and local officials to aid in the enforcement of a federal scheme.[51] In *Murphy v. National Collegiate Athletic Association*,[52] the Court struck down a law regarding sports betting that grandfathered in pre-existing state laws permitting sports betting but prohibited states from altering their own statutory prohibitions on sports betting.[53] *Murphy* also contains the aforementioned discussion of preemption, concluding that a valid, preemptive federal law confers rights on private parties.[54] *Reno v. Condon*[55] focused on whether a state was voluntarily choosing to engage in an activity that the federal government regulated, and, secondarily, the Court noted,

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[44] Rotunda & Nowak, *supra* note 5, § 4.10(d)(i); *see also* Gale & McClure, *supra* note 9, at 316 (describing the anticommandeering doctrine as "limited" and "narrow" and noting that it has only been used by the Supreme Court three times to strike down federal legislation).

[45] *See, e.g.*, Rotunda & Nowak, *supra* note 5, § 4.10(d)(i). ("And, of course, Congress can prevent states from regulating private individuals when such state regulation is inconsistent with federal objectives, at least where (as here) Congress enjoys the power to regulate the particular field of activity itself. That is preemption.").

[46] *See, e.g.*, Chemerinsky, *supra* note 25, at 362–63.

[47] Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 471, 478–79 (2018); *see also* Chemerinsky, *supra* note 25, at 362–63; Rotunda & Nowak, *supra* note 5, § 4.10(d)(i). The Court in *Murphy* further explained that

> all . . . [types of federal preemption] work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

584 U.S. at 477.

[48] 505 U.S. 144 (1992).

[49] *Id.* at 176; *see also* Rotunda & Nowak, *supra* note 5, § 4.10(d)(i) (discussing New York v. United States, 505 U.S. 144 (1992)).

[50] 521 U.S. 898 (1997).

[51] *Id.* at 935.

[52] 584 U.S. 453 (2018).

[53] *Id.* at 462–63.

[54] *Id.* at 477, 479–80.

[55] *See* 528 U.S. 141 (2000).

without deciding whether general applicability was required, that the same federal regulations also governed private parties engaged in the activity. In *Condon*, the Court determined that there was no commandeering problem.[56]

These four cases are described in fuller detail below, with the discussion proceeding chronologically of the three cases that struck down federal legislative provisions based on the doctrine (*New York*, *Printz*, and *Murphy*) and concluding with the one case pre-*Brackeen* that upheld legislation in the face of such a challenge (*Condon*).

1. The Origin of the Doctrine: New York v. United States

The anticommandeering principle was first enunciated in 1992 in *New York v. United States*.[57] In *New York*, the Court explored the balance between state and federal power before arriving at its conclusion that the federal statute at issue in that case, the Low-Level Radioactive Waste Policy Amendments Act of 1985,[58] contained one invalid provision. This provision impermissibly required some states to choose between regulating radioactive waste according to federal instructions or taking title to, and accepting liability for, radioactive waste produced in the state.[59] The Court relied primarily on the Tenth Amendment in defining the scope of the anticommandeering doctrine.[60] It explained that courts sometimes look to whether a challenged action by Congress is within the enumerated powers laid out in Article I or whether it relates to a power reserved by the states in the Tenth Amendment but that, either way,

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[56] *See id.* at 146, 150–51.

[57] *See* New York v. United States, 505 U.S. 144 (1992); *see, e.g.*, Rodney A. Smolla, 1 Federal Civil Rights Acts § 1:55 (3d ed. 2023). While Counsel for the individual plaintiffs in *Brackeen*, Matthew McGill asserted in oral argument that Coyle v. Smith, 221 U.S. 559 (1911), "was the earliest case [he] found that actually applied some version of the anti-commandeering concept," Transcript of Oral Argument at 54, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376), in fact, *Coyle* was based on the Equal Footing Doctrine. *Coyle*, 221 U.S. at 565, 579. The Court in *Coyle* expressly distinguished situations where Congress was acting pursuant to an Article I power. 221 U.S. at 574. Thus, *Coyle* cannot properly be conceived of as an anticommandeering case. In *Printz v. United States*, the Court suggested that the first incident of commandeering it examined related to Environmental Protection Agency regulations, which were addressed in a case that was ultimately dismissed as moot. 521 U.S. 898, 925 (1997) (citing EPA v. Brown, 431 U.S. 99 (1977) (per curiam)). The term "commandeer" also appears in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, where the Court states that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 452 U.S. 264, 288 (1981). Charlotte Butash argues that Chief Justice Rehnquist and Justice O'Connor "set the stage for articulation" of the anticommandeering doctrine through a series of cases beginning in 1976 with *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985), and including *Virginia Surface Mining*, 452 U.S. at 288, decided in 1981, and a couple of other cases. Charlotte S. Butash, *The Anti-Commandeering Doctrine in Civil Rights Litigation*, 55 Harv. C.R.-C.L. L. Rev. 681, 685 (2020).

[58] *See* 42 U.S.C. §§ 2021(b)–2021(j).

[59] *See* New York v. United States, 505 U.S. 144, 154–59, 174–77 (1992).

[60] *See id.* at 155–57.

"the two inquiries are mirror images of each other."[61] The Court also noted, however, that sometimes Congress's Article I powers are constrained by other constitutional provisions, drawing upon the First Amendment's constraints on Congress's commerce power as an example.[62] Despite the lack of any hint in the text of the Tenth Amendment to support its conclusion,[63] the Court further expounded that the Tenth Amendment, like the First Amendment, contains implicit limits on Congress's ability to impinge on "incident[s] of state sovereignty."[64]

The Court left in place two of the challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 in *New York*. The first involved Congress's "condition[ing] grants to the States upon the States' attainment of a series of milestones," and the Court held it to be "well within" Congress's authority.[65] The other challenged provision the Court upheld authorized increases in costs for access to radioactive waste disposal sites, followed by denial of "access altogether, to radioactive waste generated in States that [did] . . . not meet federal deadlines."[66] In upholding this provision, the Court noted that it was "a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority."[67] But the Court, as noted above, struck down the third provision, concluding that the third challenged provision of "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[68] In so holding, the Court emphasized that the Constitutional "Convention [had] opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."[69] Like the Court's other analyses of the strictures of federalism, the Court's analysis in *New York* suffers from the omission of any recognition of the role of Tribes as the Third Sovereign.[70]

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[61] *Id.* at 155–56.

[62] *See id.* at 156. The Court explained that Congress may regulate publishers pursuant to its Commerce power but that "it is constrained in the exercise of that power by the First Amendment." *Id.*

[63] *See* Printz v. United States, 521 U.S. 898, 941–42 (1997) (Stevens, J., dissenting); *accord* Redish, *supra* note 42, at 597; *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1031 (1995) (stating that "[the Tenth] Amendment is best viewed simply as a truism stating that powers not delegated to the national government are thus retained by the states").

[64] *New York*, 505 U.S. at 157.

[65] *Id.* at 173.

[66] *Id.*

[67] *Id.* at 174.

[68] *Id.* at 173–74, 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[69] *Id.* at 165.

[70] *See id.* at 154–59, 162–63; Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and The Rehnquist Court: The Need for Coherence and Integration*, TEX. F. ON C.L. & C.R. 1, 4 (2003) (describing the problem of the Supreme Court's omission of Tribes from federalism analyses more generally); *accord* Gale & McClure, *supra* note 9, at 344–45 (describing the fact that "Indian tribes comprise a third and equally significant player in the federal

2. The Other Major Cases

Prior to *Brackeen*, three additional Supreme Court cases elucidated the anticommandeering doctrine: *Printz v. United States*,[71] *Murphy v. National Collegiate Athletic Association*,[72] and *Reno v. Condon*.[73] In *Printz* and *Murphy*, decided in 1997 and 2018 respectively, the Court struck down statutory provisions based on the anticommandeering doctrine. In *Condon*, decided in 2000, the Court rejected the anticommandeering challenge.

Printz involved the legality of an interim requirement of the Brady Handgun Violence Prevention Act ("Brady Act")[74] under which certain state and local law enforcement officers were required to undertake background checks of prospective handgun purchasers.[75] The Court rejected the government's emphasis on the importance of the Brady Act and on the efficiency of utilizing state and local law enforcement for these purposes by distinguishing between laws of general applicability that incidentally apply to state governments from those, like the Brady Act, whose "whole *object*" is to "direct the functioning of the state executive."[76] Over a strong dissent by Justice Stevens, the Court struck down the requirement that state officers and local sheriffs undertake background checks on the basis of dicta in *New York v. United States* stating that "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program."[77] As Justice Stevens explains in his dissent, the question of whether states can be compelled to administer a federal regulatory program was not at issue in *New York*, so the Court's pronouncements on that question in *New York* are properly considered dicta.[78]

In *Murphy*, the Court examined, and ultimately struck down, a complicated statute regarding sports gambling, the Professional and Amateur Sports Protection Act (PAPSA).[79] In PAPSA, Congress declined to make sports gambling a federal crime, instead inviting civil actions by specified types of organizations and by the Attorney General, and, as relevant here, it also made it "'unlawful' for a State or any of its subdivisions 'to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery,

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system" and noting that their role in that system is often ignored in "scholarly discussions of federalism").

[71] *See* Printz v. United States, 521 U.S. 898 (1997).

[72] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453 (2018).

[73] *See* Reno v. Condon, 528 U.S. 141 (2000). *See generally* Rotunda & Nowak, *supra* note 5, § 4.10(d)(i) (explaining the doctrine and relying on the four Supreme Court cases discussed here).

[74] *See* 34 U.S.C. §§ 40302, 40901; *see also* 18 U.S.C. § 925A.

[75] *See Printz*, 521 U.S. at 903–04; *id*. at 955 n.16 (Stevens, J., dissenting).

[76] *See id.* at 932 (emphasis in original).

[77] *Id.* at 933 (quoting New York v. United States, 505 U.S. 144, 188 (1992)) (emphasis added).

[78] *See id.* at 963–64 (Stevens, J., dissenting).

[79] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 461–62, 486 (2018); 28 U.S.C. §§ 3701–04.

sweepstakes, or other betting, gambling, or wagering scheme based . . . on' competitive sporting events."[80] The *Murphy* Court invalidated the provision quoted above prohibiting states from authorizing sports gambling on the basis that it "unequivocally dictates what a state legislature may and may not do."[81] The Court then declined to sever the invalid provision because the Act would not operate coherently without it.[82]

Murphy has been criticized on the basis that the directives in PAPSA should have been read as preemption rather than commandeering.[83] As Ronald D. Rotunda and John E. Nowak explain, the true problem with the Act was likely its lack of clarity as to "the conditions under which federal preemption would or would not kick in to displace state law."[84]

Besides *Brackeen*, *Condon* is the sole Supreme Court anticommandeering case holding the doctrine not to have been violated. *Condon* pertained to the validity of the Driver's Privacy Protection Act (DPPA),[85] which generally prohibits the disclosure of a driver's personal information without his or her consent.[86] The Court first held that the personal information at issue was itself an article of commerce.[87] While agreeing with South Carolina's argument that the statute would require a significant amount of effort on the part of state employees, the Court upheld the statute, relying substantially on its decision in *South Carolina v. Baker*[88] in doing so.[89] As the Court in *Condon* explained, the Court in *Baker* "upheld a statute that prohibited States from issuing unregistered bonds."[90] The Court in *Condon* quoted the *Baker* Court's statement

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[80] *Id.* at 461 (quoting 28 U.S.C. § 3702(1)).

[81] *Id.* at 474.

[82] *Id.* at 484–86.

[83] Rotunda & Nowak, *supra* note 5, § 4.10(d)(i); *see also* Rebecca Aviel, *Remedial Commandeering*, 54 U.C. Davis L. Rev. 1999, 2019–20 (2021) (describing *Murphy* as expanding the anticommandeering doctrine by viewing it to encompass, not just federal laws creating affirmative obligations, but also "federal statutes making certain kinds of lawmaking off limits to state governments . . ."); *accord* Chemerinsky, *supra* note 25, at 362–63.

[84] Rotunda & Nowak, *supra* note 5, § 4.10(d)(i). Rotunda & Nowak argue that PAPSA constituted conditional preemption, which is analogous to conditional spending laws such as the first challenged statutory provision that was upheld in *New York*. *Id.*; New York v. United States, 505 U.S. 144, 173 (1992). *See also supra* note 65 and accompanying text (discussing this first challenged provision). They further explain that

> one of the key teachings of conditional funding doctrine is that, in order for a deal not to be coercive, the terms of the bargain offered to the states must be laid out unambiguously, so that States are able to exercise their choice knowingly, cognizant of the consequences of their participation.

Rotunda & Nowak, *supra* note 5, § 4.10(d)(i) (internal quotation marks omitted). Thus, they argue that the true flaw in PAPSA may well have been that it failed to "tell [states] . . . what kinds of partial repeals [of their sports gambling prohibitions were] . . . disallowed." *Id.* (emphasis subtracted).

[85] 18 U.S.C. §§ 2721–25.

[86] Reno v. Condon, 528 U.S. 141, 144 (2000).

[87] *Id.* at 148.

[88] 485 U.S. 505 (1988).

[89] *Condon*, 528 U.S. at 150–51.

[90] *Id.* at 150.

that: "'[a]ny federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.'"[91] The *Condon* Court concluded that the "DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases."[92] Finally, the Court noted that the DPPA regulates not just states but also "private resellers or redisclosers of that information in commerce."[93] It thus used DPPA's applicability to private parties to bolster its conclusion that there was no anticommandeering problem with the statute, a conclusion that was based primarily on the fact that the state had voluntarily elected to engage in a federally-regulated sphere of activity.[94]

3. Take-Aways from the Court's Anticommandeering Pronouncements

All four of the Court's pre-existing anticommandeering cases rely in some measure on the Tenth Amendment,[95] with *Printz* being somewhat unique among them in its prioritizing the structure of the Constitution as a basis of its holding above the Tenth Amendment.[96] This difference in focus in *Printz* may be due to the fact that the late Justice Scalia authored the majority opinion, and perhaps, as a dyed-in-the-wool textualist,[97] he could not quite bring himself to read into the Tenth Amendment requirements that were not supported by its text. The other three anticommandeering cases do primarily rely on the Tenth Amendment.[98] As alluded to above and as *New York* illustrates, the Court's broad view of the Tenth Amendment is not textually rooted.[99] Rather, the Court reads into the Amendment some residual protection of state sovereignty that goes beyond the textual question of whether a power has been delegated to the federal government, thus removing it from the states' purview.[100]

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[91] *Id.* at 150–51 (quoting *Baker*, 485 U.S. at 514–15) (some internal quotation marks omitted).
[92] *Id.* at 151.
[93] *Id.*
[94] *Id.*
[95] *See* New York v. United States, 505 U.S. 144, 154–55 (1992); Printz v. United States, 521 U.S. 898, 919, 923 (1997); *Condon*, 528 U.S. at 149; Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 471 (2018).
[96] *See Printz*, 521 U.S. at 923–24, 918–25 (reflecting that the majority's response to the dissent's textualist Tenth Amendment argument and Necessary and Proper Clause argument focuses on the Necessary and Proper Clause, rather than the Tenth Amendment, and, further, relying on "the structure of the Constitution" as support for the holding).
[97] *See, e.g.*, Tweedy, *Has Federal Indian Law Finally Arrived?*, *supra* note 29, at 748 (noting that Justice Scalia was a textualist jurist except in the context of federal Indian law).
[98] *New York*, 505 U.S. at 154–55; *Condon*, 528 U.S. at 149; *Murphy*, 584 U.S. at 471.
[99] *New York*, 505 U.S. at 156 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . ."); *see also Printz*, 521 U.S. at 941–42 (1997) (Stevens, J., dissenting); Redish, *supra* note 42, at 597.
[100] *New York*, 505 U.S. at 156 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . ."); *see also Printz*, 521 U.S. at 941–42 (1997) (Stevens, J., dissenting); Redish, *supra* note 42, at 597.

In terms of the holdings of cases striking down federal legislation on anticommandeering grounds, *New York* is the narrowest, with its proscription of a congressional requirement that a state enact legislation mandated by a federal statute. The idea that the federal legislature should not be allowed to order a state legislature to enact legislation has intuitive appeal as such a scenario would appear to demean state legislatures and could even be said to make a mockery of their work since they would not be truly making the choice to enact anything in such a case. In addition to having intuitive appeal, this rejection of legislative commandeering may well accord with the Founders' intent.[101] The Court's concern that, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished" appears to have some truth to it.[102] Citizens would naturally expect that the sovereign that passes a given piece of legislation has chosen to do so, rather than having had the legislation be pre-ordained by another sovereign, behind the scenes.

Printz substantially broadens *New York*'s proscription to also apply to the duties of state and local executive officials. Under *Printz*, these officials may not be required to undertake federally-mandated enforcement duties.[103] However, the holding in *Printz* appears to be qualified by *Condon*'s explanation "[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."[104] Thus, under *Condon*, if the federally mandated duties arise from a state's voluntary decision to engage in a certain sphere of activity, the anticommandeering problem is avoided. Additionally, the dissent in *Printz* sharply criticized the majority, pointing out discussions in the Federalist Papers in which federal utilization of state officials was contemplated, as well as several historical instances in which state officials (primarily in state courts) were tasked with federal duties.[105]

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[101] *See, e.g.*, Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957, 1959–60 (1993) (arguing that the Framers and Ratifiers rejected commandeering of state legislatures but that they accepted the federal government's ability to commandeer state executive officers to enforce federal law).

[102] *New York*, 505 U.S. at 168. *But see* Caminker, *supra* note 63, at 1062–64.

[103] *Printz*, 521 U.S. at 903–04, 932–33.

[104] Reno v. Condon, 528 U.S. 141, 150–51 (2000) (citations and internal quotation marks omitted).

[105] *Printz*, 521 U.S. at 945–47, 949–53 (Stevens, J., dissenting); *see also* Caminker, *supra* note 63, at 1042–44 (discussing the views of the Framers and arguing that they, particularly Hamilton and Madison, contemplated that state officials could be called upon to enforce federal laws); Gregory M. Hall, *Case Comment: Constitutional Law—United We Stand: the Further Compartmentalization of Power under the Tenth Amendment*—Printz v. United States*, 521 U.S. 98 (1997)*, 32 Suffolk U. L. Rev. 169, 177–78 (1998) (criticizing the majority's historical analysis). *Cf.* Wesley J. Campbell, *Commandeering & Constitutional Change*, 122 Yale L.J. 1104, 1108–09 (2013) (arguing that the Federalists supported the use of state officers to enforce federal law in order to placate the Anti-Federalists, who advocated for this practice, believing that it would further local control).

The legislation at issue in *Murphy* was subject to conflicting interpretations by the parties,[106] but the Court adopted petitioner's view that the PASPA, with exceptions not at issue in the case, required states to leave in place any pre-existing bans on sports gambling.[107] Read in that way, *Murphy* can be viewed as the unremarkable progeny of *New York*. Just as Congress cannot compel a state legislature to enact particular legislation, it cannot command that existing state legislation be left in place in the face of changing state policy. If Congress wishes to enforce its policy via legislation, it must do so through its own legislation, not by freezing state legislation, thus avoiding the accountability problems that could otherwise arise.

The bedrock of the anticommandeering doctrine thus appears to be *New York*'s holding that the federal legislature must not commandeer state legislatures to enact particular legislation or, as *Murphy* clarifies, to leave their existing legislation in place unchanged. The first part of this statement constitutes the Court's first clear enunciation of the anticommandeering doctrine, and this encapsulation is in harmony with longstanding, robust protections for the legislative process, such as the recognition of legislative immunity for the legislative actions of state and local legislators.[108] The significant expansion we see in *Printz* to state executive officials is less analytically sound both because it is rooted in dicta from *New York* and because the majority does not adequately address the dissent's historical analyses of the Federalist Papers and of early legislation. Even accepting the validity of *Printz*, as a significant expansion of the doctrine applied in *New York*, *Printz* clearly represents the outer perimeter of the doctrine, while *New York* constitutes the inner core. In other words, as the Court's first statement of, and application of, the anticommandeering doctrine, *New York* represents its core, a conceptualization supported by *New York*'s focus on protecting state legislative functions from federal interference, a sphere of governmental activity long considered to warrant strong protections from outside interference.[109] By contrast, *Printz*'s expansion of the doctrine to the broader realm of state and local officials' enforcement of laws constitutes the outer perimeter of the anticommandeering doctrine, a conceptualization supported by the Court's treatment of functions involving enforcement of laws as being protected only by qualified immunity (and thus as potentially subject to liability in the case of abuses of power), a treatment that indicates that these functions are neither as sacrosanct nor as in need of special protections as the legislative functions the Court protected in *New York*.[110] While immunities available to state and local actors do not

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[106] Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 466–67 (2018).
[107] *Id.* at 462, 467.
[108] *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 48-49 (1998).
[109] *See id.*
[110] *Compare id.* (providing for absolute immunity for local legislatures), *with* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (providing for qualified, rather than absolute, immunity for officers alleged to have violated an individual's constitutional rights), *and* Harlow v. Fitzgerald, 457

bear directly on the anticommandeering doctrine, the immunities available in other contexts shed light on the meaning of applying the doctrine to different spheres of state activity.

As noted above, although some argue that the Court misconstrued the questions at issue in *Murphy*[111] in its framing of the case, *Murphy* can be seen, under the Court's interpretation, as raising a related—but converse—question to that at issue in *New York*, namely whether Congress can order states to leave in place existing legislation in the face of changing policy. *Condon* fleshes out some of the subtleties of the anticommandeering doctrine, relating to the significance of a state's choosing to engage in a federally regulated sphere of activity and, secondarily, of whether Congress is regulating both state and private actors.

B. The Plaintiffs' Anticommandeering Challenges in Haaland v. Brackeen *and the Court's Responses*

In *Brackeen*, the plaintiffs set forth a "host of anticommandeering arguments."[112] The Court divided them into three categories.[113] The first category related to ICWA's provisions imposing certain requirements when a child is being adopted or placed in foster care as a result of involuntary proceedings.[114] The second category of challenges pertained to ICWA's placement preferences, which apply when a child is being placed with an adoptive parent or in foster care.[115] The third and final set of challenges attacked record-keeping requirements that ICWA imposes on state courts.[116]

As noted, the first category pertained to provisions of ICWA applicable to involuntary proceedings to either place a child in foster care or to terminate parental rights.[117] This first category included challenges to ICWA's

> requirements that an initiating party demonstrate "active efforts" to keep the Indian family together; serve notice of the proceeding on the parent or Indian custodian and tribe; and demonstrate, by a heightened burden of proof and expert testimony, that the child is likely to suffer "serious emotional or physical damage" if the parent or Indian custodian retains custody.[118]

The Court disposed of the challenges in this first category on the basis that the contested provisions of ICWA relating to involuntary proceedings applied

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U.S. 800, 807 (1982) (providing for qualified immunity for federal executive officials alleged to have abused their offices).

[111] *See, e.g.*, Rotunda & Nowak, *supra* note 5, § 4.10(d)(i).

[112] Haaland v. Brackeen, 599 U.S. 255, 280 (2023).

[113] *Id.*

[114] *Id.*

[115] *Id.* at 285.

[116] *Id.* at 287–88.

[117] *Id.*

[118] *Id.*

to both state and private actors.[119] The anticommandeering doctrine was described in *Murphy* (and suggested in earlier cases) to not encompass congressional commands that apply to both state and private actors,[120] and the Court's conclusion on this point was, therefore, a viable basis on which to reject this set of challenges.

The plaintiffs' second set of anticommandeering challenges pertained to ICWA's placement preferences for foster and adoptive placements.[121] Section 1915 of ICWA dictates that state or private agencies placing Indian children in foster care or for adoption comply with certain ranked placement preferences, with the first preference for both types of placements being "a member of the child's extended family."[122] The individual plaintiffs, in their opening brief, colorfully argued that "the forcible application of Congress's own placement preferences to state-law adoption petitions unlawfully 'reduc[es] States to puppets of a ventriloquist Congress.'"[123] The State of Texas similarly challenged the placement preferences on anticommandeering grounds, making a more modulated argument that they require the State to undertake "a 'proactive effort[] to comply with the placement preferences.'"[124]

The Court rejected the anticommandeering challenges to the placement preferences on three grounds. First, it noted that, as with the first category of anticommandeering challenges, the placement preferences apply to both private and state parties so they do not offend the anticommandeering doctrine.[125] Second, it held, based on its troubling decision in *Adoptive Couple v. Baby Girl*,[126] that the preferences do not require states or private agencies to seek

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[119] *Id.* at 281–85.

[120] Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 475–76 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."); *see also* Reno v. Condon, 528 U.S. 141, 151 (2000) (rejecting South Carolina's argument that the challenged law "regulate[d] States exclusively" and emphasizing that it instead was "generally applicable" without explicitly deciding whether general applicability was required); Printz v. United States, 521 U.S. 898, 932 (1997) (distinguishing between laws of general applicability that incidentally apply to states from those whose "whole *object*" is "to direct the functioning of the state executive"); ROTUNDA & NOWAK, *supra* note 5, § 4.10(d)(i); *accord* New York v. United States, 505 U.S. 144, 160 (1992). This rule derives from an earlier case, one that predates the anticommandeering doctrine. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) (upholding the application of the Fair Labor Standards Act to San Antonio Metropolitan Transit Authority (SAMTA) and noting that "SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.").

[121] *Brackeen*, 599 U.S. at 285.

[122] 25 U.S.C. § 1915(a)(1); *see also* 25 U.S.C. § 1915(b)(i).

[123] Brief for Individual Petitioners at 29, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 1786984, at *62 (quoting Printz v. United States, 521 U.S. 898, 928 (1997)) (internal quotation marks omitted).

[124] Brief for the State of Texas at 34, Haaland v. Brackeen, 599 U.S. 255 (2023) (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 1785628, at *63 (quoting 81 Fed. Reg. at 38,839) (alteration in original).

[125] *Brackeen*, 599 U.S. at 286.

[126] 570 U.S. 637 (2013). *Adoptive Couple* is troubling for a whole host of reasons. For one, the majority opinion starts off by disparaging the child's level of Native ancestry, apparently

out placements that comply with the preferences, instead simply requiring compliance with the preferences if eligible placements have come forward.[127] While this interpretation follows from *Adoptive Couple*, *Adoptive Couple* was a results-oriented decision that broke with prior interpretations of ICWA generally and with those relating to the placement preferences specifically.[128] Because of the analytical weakness of the Court's construal of ICWA's placement preference requirements in *Adoptive Couple*, the Court's decision in *Brackeen* would have been stronger if it had avoided relying on this second rationale to reject the anticommandeering challenge to the placement preferences. Finally, the Court in *Brackeen* rejected the anticommandeering challenge relating to the requirement that state courts apply the preferences based on the Supremacy Clause.[129] The Court explained that Congress can require *state courts* to apply federal law without running afoul of the anticommandeering doctrine because this requirement is considered preemption, not commandeering, further clarifying that it makes no difference whether state law is providing the cause of action, which is then modified by federal law, or whether it is a federal cause of action.[130]

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evoking a view of Native American status as a purely racial (rather than political and cultural) category. 570 U.S. at 641. *But see* Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974). A second reason is that it relies on state law to define an unmarried father's rights, *Adoptive Couple*, 570 U.S. at 646, 650, without addressing the fact that the Court had previously rejected incorporation of state law into ICWA. Mississippi Choctaw Indians v. Holyfield, 490 U.S. 30, 44–47 (1989). A third reason is that the Court in *Adoptive Couple* held, contrary to longstanding interpretations of ICWA, that the placement preferences need not be applied "if no alternative party that is eligible to be preferred under § 1915(a) has come forward." *Adoptive Couple*, 570 U.S. at 654; *see, e.g.*, Marcia A. Zug, *The Real Impact of* Adoptive Couple v. Baby Girl*: The Existing Indian Family Doctrine Is Not Affirmed, But the Future of the ICWA's Placement Preferences Is Jeopardized*, 42 Cap. U. L. Rev. 327, 353 (2014) (noting that "[u]ntil the *Baby Girl* decision, § 1915(a) appeared to place an affirmative duty on states to seek out and prefer Indian custodians to non-Indian custodians in all Indian child adoption and custody cases.").

The source of the *Adoptive Couple* Court's troubling language disparaging the child's Native ancestry on the basis that she is only "3/256 Cherokee," 570 U.S. at 641, appears to be from a brief filed by renowned Supreme Court practitioner Paul Clement on behalf of the guardian ad litem in the case. *See* Kathryn Fort, *The Road to* Brackeen*: Defending ICWA 2013-2023*, 72 Am. U. L. Rev. 1673, 1685 & n.79 (2023) (describing the arguments in the brief that "ICWA was unconstitutional [as being] based primarily on racist arguments regarding Baby Girl's tribal citizenship") (citing Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399)). Indeed, this brief uses the "3/256ths" language a total of five times. Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal, at 3, 18 & n.6, 30, 52, *supra*.

[127] *Brackeen*, 599 U.S. at 286.

[128] *See, e.g.*, Zug, *supra* note 126, at 353–54 and sources cited therein (regarding prior interpretations of the preferences); *supra* note 126; Jessica Di Palma, Adoptive Couple v. Baby Girl*: The Supreme Court's Distorted Interpretation of the Indian Child Welfare Act of 1978*, 47 Loy. L.A. L. Rev. 523, 537–38 (2014).

[129] *Brackeen*, 599 U.S. at 287.

[130] *Id.* at 286–87. The Court's view, which was first enunciated in *New York v. United States*, that state courts, in contrast to other branches of state government, are uniquely subject to federal commandeering based on the text of the constitution has been criticized. *See, e.g.*, Caminker, *supra* note 63, at 1034-42; Wesley J. Campbell, *Commandeering & Constitutional Change*, 122 Yale L.J. 1104, 1163–64 (2013). The basic premise of the argument that federal

The third set of anticommandeering challenges related to recordkeeping duties that the ICWA imposes on state courts.[131] The Court rejected these challenges, affirming that "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment."[132] The Court's determination that imposition of recordkeeping requirements on state courts is constitutional was based on language in *Printz* permitting Congress to impose requirements on state courts that are "'ancillary'" to their adjudicatory functions.[133] The Court also conducted a historical analysis in which it canvassed "early congressional enactments" imposing duties on state courts relating to such matters as processing and transmitting citizenship applications and coordinating inspection of vessels and then preparing reports on the results of the inspections, among other matters.[134] The Court concluded that these early federal laws "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning."[135] It therefore rejected the challenges to ICWA's recordkeeping requirements.

Conspicuously missing from the Court's anticommandeering analysis is a discussion of the fact that the Tenth Amendment generally has no application in the context of Indian Affairs legislation, particularly where Congress has directly spoken on an issue, given Congress's plenary power in that area.[136] While the Supreme Court very recently invoked the Tenth Amendment

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commands to state courts and state judges (unlike federal commands to other state officials and state legislatures) are properly considered to be preemption rather than commandeering is that the Supremacy Clause's text supports this conclusion in providing that "the judges in every state shall be bound . . . [by the United States Constitution, federal laws, and treaties], anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2; *see also* New York v. United States, 505 U.S. 144, 178–79 (1992). Although there is, at least on the surface, textual support in the wording of the Supremacy Clause for the view that state courts are uniquely subject to commandeering, Caminker notes the novelty of this textual view, first articulated in *New York*. Caminker, *supra* note 63, at 1035–36. He then argues that the reference to state judges being bound by federal law in the Supremacy Clause, U.S. CONST. art. VI, cl. 2, has two other plausible meanings. *Id*. at 1036. One is that the clause simply imposes a conflict of laws rule on state judges, namely that they nullify state laws that conflict with federal laws. *Id.* The second possible alternative reading he posits is that the reference to state judges being bound by federal law in the Supremacy Clause is meant to create a default rule that "state courts must entertain federal claims unless and until Congress overrides the default by withdrawing their jurisdiction." *Id*. at 1039. Similarly, Campbell argues that the *Printz* Court's "expansive reading of the Supremacy Clause has no merit," Campbell, *supra*, at 1163, explaining that the language of the Clause "simply requires that if and when state courts take jurisdiction over a case, they follow the supreme law of the land." *Id.* (citation and internal quotation marks omitted). Campbell further explains that the language was necessary to clear up controversy about the validity of judicial review and the need to adhere to federal law. *Id*. at 1163–64.

[131] *Brackeen*, 599 U.S. at 287–88.

[132] *Id.* at 291.

[133] *Id.* at 288 (quoting Printz v. United States, 521 U.S. 898, 908 n.2 (1997)).

[134] *Id.* at 288–90.

[135] *Id.* at 290 (quoting Bowsher v. Synar, 478 U.S. 714, 723 (1986)) (alteration in original).

[136] *See, e.g.*, Gila River Indian Cmty. v. United States, 729 F.3d 1139, 1153–54 (9th Cir. 2013) (holding that the Gila River Act is within Congress's power and does not violate the Tenth Amendment because Congress has plenary power with respect to Indian Affairs and because, as the Supreme Court has explained, "'[i]f a power is delegated to Congress in the Constitution,

in a federal Indian law case, namely *Oklahoma v. Castro-Huerta*,[137] this decision flies in the face of almost two centuries of precedent, as many scholars have recognized.[138] Even setting those issues aside, however, *Castro-Huerta* raised very different issues and arose in a very different context than *Brackeen* in that the ICWA unquestionably constitutes an act of federal preemption, whereas the majority in *Castro-Huerta* viewed the lack of explicit language in federal statutes as indicating a lack of federal preemption.[139] Perhaps more

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the Tenth Amendment expressly disclaims any reservation of that power to the States.'" (quoting New York v. United States, 505 U.S. 144, 155–57 (1992))); Carcieri v. Kempthorne, 497 F.3d 15, 39 (1st Cir. 2007) (explaining that "[t]he powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive"), *rev'd on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009); *accord* Oneida Cnty. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). *Cf.* Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 471 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.").

[137] 597 U.S. 629, 636 (2022).

[138] *See, e.g.*, John P. LaVelle, *Surviving* Castro-Huerta*: The Historical Perseverance of the Basic Policy of* Worcester v. Georgia *Protecting Tribal Autonomy, Notwithstanding One Supreme Court Opinion's Errant Narrative to the Contrary*, 74 Mercer L. Rev. 845, 847 (2023) (describing the holding in *Castro-Huerta* as being "at war with a bedrock principle of Indian law, namely, that reservations are essentially 'free from state jurisdiction and control,' a policy that 'is deeply rooted in the Nation's history'") (quoting McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020)); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 Colum. L. Rev. 1533, 1537 (2023) ("*Castro-Huerta* upended foundational principles of Indian law by endorsing the very theory of state supremacy the Court's predecessors had rebuffed."); Lauren van Schilfgaarde, Aila Hoss, Ann E. Tweedy, Sarah Deer & Stacy Leeds, *Tribal Nations and Abortion Access: A Path Forward*, 46 Harv. J. L. & Gender 1, 49 n.317 (2023) (noting that *Castro-Huerta* does not follow "basic federal Indian law principles"); Ann E. Tweedy, *Off-Reservation Treaty Hunting Rights, the Restatement, and the Stevens Treaties*, 97 Wash. L. Rev. 835, 845 n.38 (2022) [hereinafter Tweedy, *Hunting Rights*] ("*Castro-Huerta*'s analysis is divorced from basic Indian law principles . . . ."); *see also* Bryce Drapeaux, *Symposium: A New Entry into the Anticanon of Indian Law:* Oklahoma v. Castro-Huerta *and the Actual State of Things*, 68 S.D. L. Rev. 513, 544 (2023) (arguing "if the majority [in *Castro-Huerta*] had truly observed the Court's prior rulings and congressional enactments, the outcome would have been utterly different").

As *Cohen's Handbook of Indian Law* indicates, reliance on the Tenth Amendment to support a state's assertion of authority with respect to Indian Tribes or Indian country is anomalous:

> Indian affairs is not an area of traditional state control. States "have been divested of virtually all authority over Indian commerce and Indian tribes." States lack authority to regulate Indian affairs absent congressional authorization. Thus, challenges to Indian legislation based on the tenth amendment or general principles of state sovereignty have been unsuccessful, even when federal Indian laws regulate criminal activities, child welfare, gambling, or other areas that have traditionally been regulated by the states.

1 Cohen's Handbook of Federal Indian Law § 5.04[2][b] (quoting Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996)) (footnotes and citations omitted); *accord* Restatement of the L. of Am. Indians § 7 cmt. (g).

[139] Fletcher & Khalil, *supra* note 22, at 1212 (quoting 25 U.S.C. § 1921); 1 Cohen's Handbook of Federal Indian Law § 11.01[1] (noting that ICWA invokes "federally preemptive power"); *Castro-Huerta*, 597 U.S. at 638–40; *see also* van Schilfgaarde et al., *supra* note 138, at 50 (explaining that preemption in the context of federal Indian law is broader than ordinary preemption).

importantly, *Castro-Huerta* concerned a state's attempts to criminally regulate non-Indians, albeit within an Indian reservation,[140] whereas the plaintiffs' anticommandeering challenges in *Brackeen* struck at the heart of federal legislation directly relating to, and enacted for the benefit of, Native Americans.[141] Thus, as the majority in *Castro-Huerta* viewed the issues at stake, the question of whether the Tenth Amendment preserves any authority for states when Congress speaks clearly and directly on matters involving Tribes and individual Native Americans was not raised in *Castro-Huerta*.[142]

Because all previous Supreme Court cases on anticommandeering examined legislation enacted under the Interstate Commerce Clause,[143] the Court's omission of any discussion of why the doctrine should also apply in the context of legislation enacted under the Indian Commerce Clause is a significant analytical gap. This conclusion is bolstered by the fact that scholars have persuasively argued that, historically, the meaning of "commerce" in each of the clauses was different, with the notion of "commerce" being significantly broader in the context of commerce relating to Indian Tribes than it was understood to be in the interstate commerce context.[144] Additionally, the fact

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[140] *Castro-Huerta*, 597 U.S. at 639–40, 647–48.

[141] *See, e.g.*, Gale & McClure, *supra* note 9, at 297, 309–10; *see also* 25 U.S.C. § 1902.

[142] *See generally Castro-Huerta*, 597 U.S. 629.

[143] *See infra* note 151 and associated text.

[144] *See, e.g.*, Ablavsky, *Commerce Clause*, *supra* note 39, at 1025–32. At oral argument in *Brackeen*, counsel for the individual plaintiffs and the State of Texas objected vociferously to the idea that child placements and adoptions could be tied to commerce. Transcript of Oral Argument at 16–19, 79, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376). While the much broader meaning of commerce and trade in the context of governmental relations with Indian Tribes at the time of the Constitutional Convention and ratification, *see* Ablavsky, *supra* note 39, at 1025–1032, is the strongest rejoinder to these objections, there are other important responses as well. The adoption and child welfare services industry, which is comprised of "private non-profit and for-profit organizations that provide social assistance services for children and young adults," totaled $20.5 billion in revenue in 2022. Matty O'Malley, IBISWorld, Adoption & Child Welfare Services in the US: Welcome Home: Rising Federal Funding for Social Services is Expected to Support Industry Growth 2411, 8 (2022). Moreover, funding incentives from the state have been posited as one of the primary reasons that some state social services agencies appear to ignore ICWA's requirements. Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011), https://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system [https://perma.cc/L74F-WWQV] (noting that "[a] close review of South Dakota's budget shows there's a financial incentive for the department as a whole to remove more children"). The scarcity of adoptable babies and the high demand for them by prospective adoptive parents, along with other factors, "has [also] helped enable for-profit middlemen—from agencies and lawyers to consultants and facilitators—to charge fees that frequently stretch into the tens of thousands of dollars per case." Tik Root, *The Baby Brokers: Inside America's Murky Private-Adoption Industry*, Time (June 3, 2021), https://time.com/6051811/private-adoption-america/ [https://perma.cc/W9X7-GNZP]; *see also* Marcia Zug, Brackeen *and the "Domestic Supply of Infants"*, 56 Fam. L.Q. 175, 176–77, 180 (2023) (documenting the Supreme Court's concern regarding the "low 'domestic supply of infants'" as expressed in Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 & n.46 (2022)); Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 U.C. Irvine L. Rev. 611, 617 (2017) ("Because baby markets function within systems of oppression, they tend to benefit most people who have higher social status and exploit those who don't.").

that the Indian Commerce Clause appears to have been drafted in response to the record of state (as well as settler) transgressions against Tribes under the weaker and internally contradictory language of the Articles of Confederation further supports this conclusion.[145]

Poor women, especially poor women of color, and other vulnerable persons, such as teenagers who have been classified as troubled, are particularly subject to the coercive forces of these so-called baby markets. Root, *supra* (describing a biological mother with an imprisoned partner who was told when pregnant that if she bowed out of a planned adoption she would have to pay back all the money the prospective adoptive couple had provided to her for expenses); Rachel Aviv, *The Shadow Penal System for Struggling Kids*, The New Yorker (Oct. 11, 2021), https://www.newyorker.com/magazine/2021/10/18/the-shadow-penal-system-for-struggling-kids [https://perma.cc/MHN5-DKPE] (describing the story of Emma, an adopted biracial teenager who was put into a home for troubled girls by her adoptive parents, later realized she was pregnant, and was forced to give up her baby by the administrators of the home and her parents); *see also* Roberts, *supra*, at 617–18 ("The application of market logic to childbearing results in the hiring of poor and working class women, especially women of color, for their reproductive labor. These women are paid to gestate fetuses or to produce eggs for genetic research although bearing their own children is socially devalued."). In *Adoptive Couple v. Baby Girl*, the majority spoke approvingly of the wealthy adoptive couple's financial support for the economically disadvantaged biological mother during pregnancy, almost seeming to intimate that this was a quid pro quo that demonstrated their entitlement to the child. 570 U.S. 637, 644 (2013). To pretend that there is no commercial aspect to adoption and foster care is not realistic and ignores the economic coercion that poor women and other vulnerable persons who may become pregnant or bear children face, and it disregards the economic incentives that social services agencies in at least some states have to remove children from Native parents in violation of ICWA.

[145] *See, e.g.*, Ablavsky, *Constitution*, *supra* note 43, at 1018–41 (describing the depredations of New York, Georgia, and North Carolina against Tribes in the 1780s, prior to the adoption of the Constitution, as well as attacks on Indians by bands of violent settlers, and the subsequent drafting and adoption of the Indian Commerce Clause); Blackhawk, *supra* note 43, at 1806–07 ("Following independence, the Articles of Confederation adopted a vague compromise approach that appeased all, but settled nothing. The Articles provided power over Indian affairs to the Confederation Congress, while simultaneously limiting national power to Indians 'not members of any of the states' and retained explicitly the 'legislative right' of a state within its borders. The Articles soon foundered under confusion as states asserted their claims to Indian land under colonial charters and as squatters, emboldened by independence, flooded Indian Country.") (footnote omitted); Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution 32 (2009) (describing the Articles of Confederation as "structurally ineffective" and "often contradictory"); *accord* Worcester v. Georgia, 31 U.S. 515, 559 (1832) ("The ambiguous phrases which follow the grant of power to the United States [in the Articles of Confederation] were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to Congress, which were referred to a committee, who made their report in 1787 . . . . The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."); *see also* 2 Joseph L. Story, Commentaries on the Constitution of the United States, §§ 245, 262 at 226, 242–43 (1833) (describing the Articles of Confederation as conferring to Congress, during peace, only "a delusive and shadowy sovereignty" and further describing the states' disregard of the treaty of peace with Great Britain of 1783 and problems with Indian Tribes that ensued from Britain's retaliation in response to the United States' lack of enforcement of the treaty provisions); Gordon S. Wood, Creation of the American Republic, 1776–1787 466 (1998) ("[O]nce men grasped, as they increasingly did in the middle [seventeen] eighties, that reform of the national government was the best means of remedying the evils caused by the state governments, then the revision of the Articles of Confederation assumed an impetus and an importance that it had not had a few years earlier."). The substantial threat to

To summarize, the following three factors signal that the application of the anticommandeering doctrine must, at a minimum, be vastly constrained in the context of Indian Affairs legislation: (1) the Tenth Amendment has been recognized to have no role to play in Indian Affairs in the presence of clear Congressional direction;[146] (2) the long history of exclusive federal control of issues relating to Indian Affairs;[147] and (3) the history of state abuses of power with respect to Tribes under the Articles of Confederation, which the stronger federal authority over Indian Affairs reflected in the Constitution was designed to avoid.[148] Given this backdrop, the doctrine should only exist in a much weaker form, if at all, in the context of Indian Affairs legislation. Specifically, in this context, it should be confined to its role as a prohibition on commandeering state legislatures.[149] This would mean that Congress would be prohibited from ordering states to enact legislation relating to Tribes or Indian Affairs issues but that Congress could impose duties on state and local officials relating to enforcement of Indian Affairs legislation. To roughly analogize to *Printz*, under the approach argued for here, a hypothetical statute that

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national peace and stability caused by Indian Tribes' unrest, which in turn resulted largely from the United States' failure and inability to enforce treaty provisions and to protect Tribal lands under the Articles of Confederation, *see* Ablavsky, *Constitution*, *supra* note 43, at 1018–33, calls into question the *Torres* Court's suggestion, in dicta, that the Indian Commerce Clause, unlike the power to raise armies, did not "prove[] comparably essential to the survival of the Union." Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 596 (2022).

James Madison initially drafted a more emphatic Indian Commerce Clause that more explicitly rejected state authority. Ablavsky, *Commerce Clause*, *supra* note 39, at 1022. The Committee of Detail then proposed adding in qualifiers that would have supported state authority for those Indians subject to state law, but the Committee on Postponed Parts ultimately removed all qualifiers, leaving us with the simple version we have today. *Id.* The final version was praised by Madison in the Federalist Papers on the basis "that the elimination of the earlier qualifiers resolved earlier contentions over the division of authority." *Id.* at 1022–23. In construing another constitutional provision that was altered by a committee before it was passed, the Court in *Nixon v. United States* affirmed that "the plain language of the enacted text is the best indicator of intent." 506 U.S. 224, 232 (1993).

[146] *See, e.g.*, 1 Cohen's Handbook of Federal Indian Law § 5.04[2][b].

[147] *See infra* note 173 and sources cited therein. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), is not to the contrary. Although reading the Eleventh Amendment's protection of state sovereign immunity broadly and holding that it could only be congressionally abrogated under section five of the Fourteenth Amendment, the Court nonetheless acknowledged the utter lack of state authority in Indian Affairs. *Id.* at 62, 66–68.

[148] *See supra* notes 43 and 145 and *infra* notes 182–87 and sources cited therein.

[149] This is the form of the doctrine reflected in the holding in *New York v. United States*, 505 U.S. 144 (1992), the first case to formally apply the doctrine. *See, e.g.*, Smolla, *supra* note 57, at § 1:55. It accords with an earlier case that can be seen as foreshadowing the enunciation of the doctrine. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (noting, in rejecting a challenge to legislation, that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact *and* enforce a federal regulatory program") (emphasis added); *see* Butash, *supra* note 57, at 685 (arguing that *Virginia Surface Mining* was one of the cases that "set the stage for the articulation of . . . [the] new doctrine"). Importantly, *Virginia Surface Mining*'s conjunctive phrase "enact and enforce," 452 U.S. at 288, is transmuted to a disjunctive phrase, "enact or administer" in dicta in *New York*, 505 U.S. at 188. This dicta is then seized upon and applied, considerably expanding the doctrine, in *Printz v. United States*, 521 U.S. 898, 926 (1997).

required state and local law enforcement officials to provide state background check data to a Tribe at its request when an individual applied for a Tribal permit to carry a firearm would be permissible.[150]

The Court's failure to grapple with these important issues in *Brackeen* constitutes a missed opportunity to clarify the applicability of the doctrine in different areas of the law and unfortunately is likely to invite further, baseless attacks on Indian Affairs legislation pertaining to other subject areas.

C. How the ICWA, and Indian Affairs Legislation Generally, Fits in with Pre-Existing Anticommandeering Cases

All four pre-existing anticommandeering cases involved statutes enacted under Congress's Interstate Commerce Power,[151] whereas ICWA, as discussed above, was enacted under the Indian Commerce Power, as well as Congress's trust responsibility to Indian Tribes.[152] Additionally, ICWA alludes to "other constitutional authority" in addition to the Indian Commerce Clause, as a basis for Congress's plenary authority with respect to Tribes, [153] and it implicitly references the treaty power in describing Congress's trust responsibility with respect to Tribes.[154]

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[150] *See, e.g.*, Ann Tweedy, *Symposium Article: Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 Alb. L. Rev. 885, 890–91, 891 n.30 (2015) (discussing Tribal laws that require permits for carrying firearms, some of which require background checks). Importantly, Tribes do have access to national background check data through the federal background check system. *See, e.g.*, *Information Sharing*, Office of Tribal Just., U.S. Dep't of Just. (updated Nov. 1, 2023), available at https://www.justice.gov/otj/information-sharing [https://perma.cc/KL94-9M97]; *see also* 28 U.S.C. § 534(d). Additionally, some Tribes are able to access state background check systems directly (rather than accessing the data through the federal system), Office of Tribal Just., *supra*, but such access is currently dependent on state law, and some Tribes have faced barriers accessing such systems. *See* Office of the Chief Information Officer, *Overview of Tribal Access Program for National Crime Information (TAP)*, U.S. Dep't of Just. (2019), at 2, https://www.fedbar.org/wp-content/uploads/2019/12/PANEL-2-Overview-TAP-PPT-pdf-1.pdf [https://perma.cc/8ZG6-KR76]; *see also* Adam Crepelle, *Protecting the Children of Indian Country: A Call to Expand Tribal Court Jurisdiction and Devote More Funding to Indian Child Safety*, 27 Cardozo J. Equal Rts. & Soc. Just. 225, 243 (2021).

[151] *See, e.g.*, Jason Egielski, *Don't Hate the Player, Hate the Game: Video Game Loot Boxes, Gambling, and a Call for Administrative Regulation*, 50 Hofstra L. Rev. 175, 193 (2021) (discussing the fact that PAPSA was enacted based on Congress's Commerce power); Kari Furnanz, *The Brady Handgun Violence Prevention Act: Testing the Limits of Congress' Ability to Regulate State Governmental Officers*, 31 Willamette L. Rev. 873, 898 (1995) (discussing the Brady Act's Commerce power basis); Logan Everett Sawyer III, *The Return of Constitutional Federalism*, 91 Denv. U. L. Rev. 221, 223 n.9 (2014) (describing the Low-Level Radioactive Waste Policy Amendments Act of 1985 as being rooted in the Commerce Clause); Debbie J. Sluys, Senne v. Village of Palatine: *The Seventh Circuit's Parking Ticket Payout*, 58 St. Louis U. L.J. 847, 851, 870 (2014) (describing the DPPA as being based on Congress's Commerce powers); *see also* Rotunda & Nowak, *supra* note 5, at § 4.10(d)(i) (defining the doctrine as pertaining to interstate commerce power).

[152] 25 U.S.C. § 1901(1)–(2).

[153] *Id.* § 1901(1).

[154] *Id.* § 1901(2).

The Indian Commerce Clause has long been interpreted more broadly than the Interstate Commerce Clause, and such a broad interpretation is sound because, as scholars such as Gregory Ablavsky have explained, the concepts of "commerce" and "trade" in the context of the United States' relations with Indian Tribes were interpreted at the time of the drafting and ratification of the Constitution much more broadly than those terms were understood in other contexts.[155] Indeed, the Court has not required a tie to commerce in evaluating legislation enacted under the Indian commerce power.[156] Additionally, the plenary power Congress exercises over Indian Affairs, relied upon as a basis of congressional authority in Section 1901(1) of ICWA,[157] is best understood as not being rooted solely in the Indian Commerce Clause but as having other bases as well, including the Treaty Clause and Congress's pre-constitutional powers.[158] The Court has consistently interpreted Congress's plenary power relating to Tribes quite broadly, as explained below.

The United States' trust responsibility with respect to Indian Tribes is another basis of authority that Congress relied on in passing the ICWA.[159] *Cohen's Handbook of Federal Indian Law* describes the trust responsibility as follows:

> One of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes. Courts have invoked language of guardian and ward, or more recently trustee and beneficiary, to describe this relationship in a variety of legal settings. The concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court. Today the trust doctrine is one of the cornerstones of Indian law.[160]

The trust responsibility is at the root of the Court's relatively liberal test for evaluating whether federal legislation relating to Tribes or individual Indians violates equal protection. Under *Morton v. Mancari*,[161] as long as Congress's

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[155] Ablavsky, *Commerce Clause*, *supra* note 39, at 1023, 1026–32; *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."). Notably, Ablavsky does not believe that the Founders envisioned the Commerce Clause to support authority as broad as Congress's plenary power is often interpreted as being, Ablavsky, *Commerce Clause, supra* note 39, at 1014–17, and he sees other parts of the Constitution, such as the Treaty Clause, as having been historically more important in cementing the federal role in Indian Affairs. Ablavsky, *Constitution*, *supra* note 43, at 1041–45.

[156] *See, e.g.*, 15 C.J.S. *Commerce* § 9 (2024).

[157] 25 U.S.C. § 1901(1).

[158] *See* Tweedy, *Has Federal Indian Law Finally Arrived*, *supra* note 29, at 757 n.95; Fletcher & Khalil, *supra* note 22, at 1212–13.

[159] 25 U.S.C. § 1901(2).

[160] 1 Cohen's Handbook of Federal Indian Law § 5.04[3][a].

[161] 417 U.S. 535 (1974).

special treatment for Indians "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[162]

Because Congress relied on different sources of authority in enacting the ICWA than the source of authority at issue in the other anticommandeering cases—namely the Indian Commerce Clause and, to some degree, the Treaty Clause—it follows that, as Justice Jackson suggested in oral argument, a different analysis should apply.[163] The scope of congressional and state power will necessarily be delineated differently under different constitutional provisions,[164] and the text of the Tenth Amendment tells us that it concerns those particular balances of power.[165] As described above, the Indian Commerce Clause, one of the powers Congress relied on in enacting the ICWA,[166] has been interpreted more broadly than the Interstate Commerce Clause. Additionally, the historical interpretation of the notion of Indian trade and commerce was also much broader than was the understanding of commerce in relation to the states.[167] Moreover, given that ICWA's congressional findings also expressly invoke Congress's plenary power,[168] the fact that the Court has only very rarely struck down congressional exercises of plenary authority relating to Indian Affairs should logically be part of the anticommandeering analysis.[169]

Notable examples of instances in which the Court has determined that legislation enacted under Congress's plenary power relating to Indian Affairs was held invalid include a statute that provided for uncompensated takings

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[162] *Id.* at 555; *see also* Gretchen G. Biggs, *Is There Indian Country in Alaska? Forty-Four Million Acres in Legal Limbo*, 64 U. Colo. L. Rev. 849, 859 n.73 (1993) (connecting the holding in *Morton* to the federal government's trust responsibility).

[163] As noted previously, all the pre-*Brackeen* anticommandeering doctrine cases examined legislation enacted under the Interstate Commerce Clause. *See supra* note 151 and associated text. For an analysis of contexts in which commandeering has been accepted as permissible, such as section 5 of the Fourteenth Amendment, *see generally* Aviel, *supra* note 83.

[164] For example, the federal government has been held to have broad authority over foreign affairs issues, *see, e.g.*, H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash. L. Rev. 527, 566–67 (1999), with state authority being correspondingly limited as a result. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003); *see also* Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 589–94 (recognizing exclusive power in the federal government "to build and maintain the Armed Forces" and a corresponding lack of power in this area for states). However, by contrast, state authority is at an apex when it comes to state police power. *See, e.g.*, Allison M. Whelan, *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 Harv. J.L. & Gender 131, 151 (2023); *see also* Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19*, 2021 U. Chi. Legal F. 233, 234–35, 235 n.10 (2021) [hereinafter Tweedy, *The Validity of Tribal Checkpoints*].

[165] The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[166] 25 U.S.C. § 1901(1).

[167] *See* Ablavsky, *Commerce Clause*, *supra* note 39, at 1023, 1026–32.

[168] 25 U.S.C. § 1901(1).

[169] *See generally* 1 Cohen's Handbook of Federal Indian Law § 5.04.

of individual Indians' property upon death (to consolidate fractionated land ownership), thus violating the Fifth Amendment, and a statute that abrogated state immunity from suit, thus violating the Eleventh Amendment.[170] Importantly, it was not that Congress's plenary power was held to be too narrow to support the legislation in these cases but rather that specific constitutional amendments served as checks on that power in the context of these cases.[171] States have generally not fared well in arguing that a congressional exercise of plenary authority impinges on their authority, with the only win in that regard involving state sovereign immunity from suit under the Eleventh Amendment.[172] Indian Affairs has been described as the exclusive province of the federal government, with states being unable to regulate in the area absent authority conferred by Congress,[173] with a limited exception for situations in which states are legislating in furtherance of a federal scheme.[174] Importantly, state challenges to Indian Affairs legislation under the Tenth Amendment have failed.[175]

This landscape contrasts sharply with that presented by the pre-existing anticommandeering cases and federal and state power under the Interstate Commerce Clause more broadly. For example, unlike the Court's approach to evaluating legislation enacted pursuant to the Indian Commerce Clause, the Supreme Court scrutinizes legislation enacted under the Interstate Commerce Clause to ensure that it has a substantial connection to interstate commerce.[176] Additionally, states retain some power to regulate in ways that affect interstate commerce so long as "any state regulation [is] . . . consistent with the

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[170] *Id.* at §§ 5.04[2][b]–[c].

[171] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996); Babbitt v. Youpee, 519 U.S. 234, 236–37 (1997).

[172] 1 Cohen's Handbook of Federal Indian Law § 5.04[2][b].

[173] Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); Haaland v. Brackeen, 599 U.S. 255, 313 (2023) (Gorsuch, J., concurring) ("As this Court has consistently recognized, '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' Instead, responsibility for managing interactions with the Tribes rests exclusively with the federal government.") (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)); 1 Cohen's Handbook of Federal Indian Law § 5.04[2][b] (citing *Seminole Tribe*, 517 U.S. at 62 (1996)); 1 Cohen's Handbook of Federal Indian Law § 6.03[1][a]. *Accord* Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 595–96 (2022) (noting that the Court held in *Seminole Tribe* "that Congress could not rely on its Article I commerce powers to abrogate state sovereign immunity simply because that power was exclusive.") (citation omitted).

[174] *See* Robert T. Anderson, Sarah A. Krakoff & Bethany Berger, American Indian Law: Cases & Commentary 200 (4th ed. 2020).

[175] 1 Cohen's Handbook of Federal Indian Law § 5.04[2][b]. While, as discussed above, the *Castro-Huerta* majority took the unprecedented step of relying on the Tenth Amendment in deciding the case, the decision does not throw the scope of plenary authority into question because the Court mistakenly interpreted the Indian Country Crimes Act as not bearing on state jurisdiction. *See supra* notes 139–144, associated text, and sources cited therein. In *Seminole Tribe*, the state belatedly raised a Tenth Amendment challenge, and the Court declined to address it. *Seminole Tribe of Fla.*, 517 U.S. at 61 n.10.

[176] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); United States v. Lopez, 514 U.S. 549 (1995).

paramount federal power over foreign and interstate commerce and . . . [does] not incidentally impose an undue burden or substantially interfere with interstate or foreign commerce."[177] Moreover, longstanding precedent elucidates that federal preemption of state authority is a much broader doctrine in the context of federal Indian law than the version of preemption we find outside of that context[178] (although the *Castro-Huerta* Court did not recognize this).[179]

The history of adoption of the Indian Commerce Clause is also instructive. Briefly, the Articles of Confederation contained an internally contradictory provision regarding Tribes that caused a great deal of strife between the federal and state governments. As *Cohen's Handbook of Federal Indian Law* explains:

> Article IX of the Articles conferred on the Continental Congress "the sole and exclusive right and power of … regulating the trade and managing all affairs with Indians not members of any of the states; provided, that the legislative right of any state within its own limits be not infringed or violated."[180]

This compromise between the federal government and the states "produced constant federal-state friction during the period of government under the Articles."[181] More specifically, states such as New York, Georgia, and North Carolina flouted federal law under the Articles of Confederation, seized Indian land, and actively attempted to thwart federal treaty-making with Tribes, with New York and Georgia also attempting to negotiate illegal treaties with Tribes.[182] Thus, such state abuses, combined with settler land theft and violence, led to the circumstance that, as the Constitutional "Convention gathered in Philadelphia, the nation confronted two Indian wars of its own making it could ill-afford."[183] Secretary of War Henry Knox in July 1787 had pointed to state "usurpation" of treaty-protected lands as the cause of the violence.[184] John Jay similarly argued in Federalist No. 3 that there were "several instances of Indian hostilities having been provoked by the improper conduct of individual States."[185]

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[177] *See, e.g.*, 17 Fed. Proc. Forms § 66:1; *see also Seminole Tribe of Fla.*, 517 U.S. at 62 (recognizing that "the States still exercise some authority over interstate trade").

[178] *See, e.g.*, van Schilfgaarde et al., *supra* note 138, at 50; 1 Cohen's Handbook of Federal Indian Law § 6.03[2][a]; *Castro-Huerta*, 597 U.S. at 668 (Gorsuch, J., dissenting).

[179] *Castro-Huerta*, 597 U.S. at 649.

[180] 1 Cohen's Handbook of Federal Indian Law § 1.02[2].

[181] *See, e.g.*, Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Penn. L. Rev. 195, 199 n.13 (1984).

[182] Ablavsky, *Constitution*, *supra* note 43, at 1020–33; *accord* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1147 (1995).

[183] Ablavsky, *Constitution*, *supra* note 43, at 1033; *see also* Clinton, *supra* note 182, at 1147.

[184] Ablavsky, *Constitution*, *supra* note 43, at 1031.

[185] The Federalist No. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961).

Although the Indian Commerce Clause, originally drafted by James Madison, occasioned little debate at the Constitutional Convention,[186] the events preceding the adoption of the Indian Commerce Clause suggest a strong need for effective federal regulation of states, including the ability to prevent states that were violating federal treaties with Tribes and other federal laws, such as non-intercourse acts,[187] from continuing to do so. It can be inferred from this background that federal regulation of states was one of the goals of replacing the equivocating provision of Article IX of the Articles of Confederation with the clearer wording of the Indian Commerce Clause. This need for the federal government to have the sole authority with respect to Indian Affairs to the exclusion of states is also supported by other provisions of the Constitution, such as the Treaty Clause.[188]

Indeed, while different versions of what became the Indian Commerce Clause were proposed during the Constitutional Convention, the one that ultimately passed granted full authority to the federal government.[189] James Madison praised the final version as resolving the earlier tensions in favor of the federal government, whereas Anti-Federalist Abraham Yates, Jr. "attacked the Clause along with other provisions" because he viewed them as "grant[ing] the federal government an improper supremacy over Indian affairs."[190]

This history demonstrates a resolution of the conflict regarding authority over Indian Affairs under the Articles of Confederation in favor of the federal government, and, as described above, it also demonstrates a corresponding need for the federal government to be able to enforce this authority in the face of recalcitrant states. In this sense, there is some level of similarity between the Indian Commerce Clause and the Fourteenth Amendment in that the Indian Commerce Clause appears to have been drafted, in large part, to deal with state overreach.[191] This history also leads to the conclusion that

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[186] Clinton, *supra* note 182, at 1155, 1157. It is clear that Madison's intent in drafting and advocating for inclusion of the Indian Commerce Clause was to restrain state abuses of power with respect to Tribes. *Id.* at 1155, 1163; Ablavsky, *Constitution*, *supra* note 43, at 1052–53.

[187] *See, e.g.*, Prohibition on Sale of Indian Tribal Land, Generally, 19 Fed. Proc., L. Ed. § 46:52 (citing and discussing the current version of the Non-Intercourse Act, 25 U.S.C. § 177).

[188] Ablavsky, *Constitution*, *supra* note 43, at 1041–45.

[189] U.S. Const. art. I, § 8, cl. 3; Ablavsky, *Commerce Clause, supra* note 39, at 1022; Haaland v. Brackeen, 599 U.S. 255, 332 (2023) (Gorsuch, J., concurring); *see also Brackeen*, 599 U.S. at 317 (Gorsuch, J., concurring) ("The Washington Administration insisted that the federal government enjoyed exclusive constitutional authority over managing relationships with the Indian Tribes.") (quotation marks and citations omitted).

[190] Ablavsky, *Commerce Clause, supra* note 39, at 1022–23.

[191] For a discussion of the Fourteenth Amendment's function *vis a vis* states, *see, e.g.*, Aviel, *supra* note 83, at 2023–27; *see also* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 Ala. L. Rev. 551, 565 (1998) (describing evidence that the drafters of the Fourteenth Amendment were aware of states' violations of enslaved persons' religious rights and that they were attempting to prohibit such violations through the Amendment); *accord* Chemerinsky, *supra* note 25, at 555 ("During the congressional debate over the Fourteenth Amendment, representatives and senators said that the Fourteenth Amendment privileges or immunities clause was meant to protect basic rights from state interference.").

the anticommandeering doctrine should, at a minimum, have less force in the context of legislation based on congressional power rooted in the Indian Commerce Clause and other provisions that support federal power in Indian Affairs, such as the Treaty Clause. Otherwise, the federal supremacy relating to Indian Affairs reflected in the Indian Commerce Clause and other constitutional provisions could be rendered a nullity.

Thus, from the general absence of state constitutional authority in the face of explicit federal legislation regarding Native Americans,[192] it necessarily follows that the scope of the anticommandeering doctrine would be minimized, if it applies at all in this context.[193] Admittedly, the Court in *New York* attributed extra-textual protections for states to the Tenth Amendment,[194] while, in other cases, such as *Printz*, the Court has attributed such protections to the structure of the Constitution.[195] Whether the source of protections for state sovereignty expressed in the anticommandeering doctrine are properly understood to be the Tenth Amendment or the structure of the Constitution, longstanding precedent counsels that, at a minimum, there is general absence of state authority in the face of a federal statute like the ICWA that explicitly preempts state law.[196] This fact, in turn, counsels in favor of a very limited view of the anticommandeering doctrine if it is to apply at all in this context.

It is important to note that there are two additional reasons, based on the Supreme Court's anticommandeering cases, that ICWA does not constitute commandeering even if the doctrine continues to be held to apply in this context. One is based on the fact that states have voluntarily entered the

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[192] *See* 1 Cohen's Handbook of Federal Indian Law § 6.03[1][a] (2023) ("[T]he United States Constitution . . . vests exclusive legislative authority over Indian affairs in the federal government."); *Brackeen*, 599 U.S. at 318 (Gorsuch, J., concurring) ("States have virtually no role to play in managing interactions with Tribes."); *see also* Fisher v. District Court, 424 U.S. 382, 390 (1976) (holding in part that the Indian Reorganization Act's encouragement of tribal self-government and establishment of tribal courts preempts the state's exercise of jurisdiction over an adoption proceeding involving Indian parties who reside on the reservation).

[193] *Accord* Aviel, *supra* note 83, at 2044 ("Commandeering constraints do not apply uniformly across each of Congress's enumerated powers—even those within Article I."). While Aviel seems to assume that the anticommandeering doctrine applies to all facets of Congress's commerce power, her article does not address the Indian Commerce Clause. *See generally id*. at 2041.

[194] New York v. United States, 505 U.S. 144, 156–57 (1992).

[195] Printz v. United States, 521 U.S. 898, 918–19 (1997).

[196] *See, e.g.*, *Fisher*, 424 U.S. at 390 (holding in part that the Indian Reorganization Act's encouragement of tribal self-government and establishment of tribal courts preempts the state's exercise of jurisdiction over an adoption proceeding involving Indian parties who reside on the reservation). One example of federal preemption of state laws relating to Indians that has some parallels to ICWA pertains to Tribes' rights to regulate their members' exercise of off-reservation treaty hunting, fishing and gathering rights. *See* 1 Cohen's Handbook of Federal Indian Law § 18.04[3][a] n.107 and cases cited therein (describing federal cases in which courts (1) determined that tribal regulation of off-reservation, treaty-protected activities, such as hunting, fishing, and gathering, was adequate and (2) did not permit state intervention into the regulatory arena). There is a parallel because these treaties preempt state law as to Indians exercising off-reservation rights, and ICWA also similarly recognizes rights that apply off-reservation.

realm of child welfare, and the second is that ICWA's provisions are properly viewed as preemptive as opposed to commandeering. These reasons are briefly addressed below.

First, *Condon* explained that, when a state voluntarily decides to engage in a sphere of activity, it must comply with applicable federal regulations.[197] While state regulation of child welfare is so common now as to be taken for granted, states did not begin to pass laws governing child welfare until the early 1900s.[198] Prior to that, these issues were dealt with by religious and charitable organizations and, later, private agencies.[199] Thus, child welfare is, in fact, a sphere of activity that states have voluntarily entered into. Justice Barrett touched on this question during oral argument but in a more limited way, asking if states could decline to address Native American child welfare issues.[200] Counsel for the Tribal parties rightly answered that, while declining to deal with the welfare of Native American children could raise equal protection problems, states did have a choice about whether to run a foster care system at all.[201] Thus, an additional reason that ICWA does not qualify as commandeering is because, under *Condon*, child welfare systems are a sphere of activity that states have voluntarily entered into.

A second reason that ICWA should not be interpreted as commandeering states even if the doctrine applies in full force to Indian Affairs legislation is that the statute meets the Court's definition of preemption. The Court explained in *Murphy* that preemptive legislation is to be distinguished from commandeering legislation on the basis that the former "imposes restrictions or confers rights on private actors."[202] As discussed in the Introduction, ICWA was designed to protect the rights of Native parents and Indian custodians, as well as those of Native children and the Indian Tribes to which they and their families belong.[203] Moreover, in the context of federal Indian law, state law has been held to be preempted not just because of negative impacts on the federally protected rights of individuals but also because of such impacts on the rights of Tribal governments.[204] Thus, as Fletcher and Khalil have underscored, ICWA validly preempts state law and no commandeering analysis is

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[197] Reno v. Condon, 528 U.S. 141, 150–51 (2000) (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

[198] *See, e.g.*, Kasia O'Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, MassLegalServices (Nov. 1, 2004), https://www.masslegalservices.org/system/files/library/Brief%20Legislative%20History%20of%20Child%20Welfare%20System.pdf [https://perma.cc/5FTX-UKXG].

[199] *Id.*

[200] Transcript of Oral Argument at 199–202, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21–376).

[201] *Id*. at 200–01.

[202] Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 477 (2018).

[203] *See supra* notes 22 and 23 and associated text.

[204] *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Fisher v. District Court, 424 U.S. 382 (1976).

needed, even if the doctrine is held, contrary to the arguments in this Essay, to be fully applicable to Indian Affairs legislation.[205]

Next, this Essay turns to three examples of federal laws that would almost certainly be construed as impermissible commandeering in other contexts.

D. Examples of Judicially Approved Commandeering in the Indian Affairs Context

Three important examples illustrate that commandeering of state executive officials has been allowed in the context of Indian law. One example involves the federal district court's taking over control of Washington State's fisheries department after the state refused to comply with federal court orders recognizing Tribal treaty fishing rights.[206] The second example is Public Law 280. A third example relates to a provision of the IGRA that requires states to negotiate with Tribes in good faith regarding proposed gaming compacts.[207]

Taking the district court's management of the state fisheries first, both the Supreme Court and the Ninth Circuit approved the district court's management in light of the state's intransigence in upholding the treaty rights recognized by the federal courts.[208] As the Ninth Circuit explained:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.[209]

It is true that federal courts have been held to have broad authority to enforce their rulings, especially in the face of repeated violations.[210] However, just as the federal district court in *Puget Sound Gillnetters Ass'n v. U.S. District Court for Western District of Washington*[211] found itself bound to undertake fisheries management in the stead of a state that refused to recognize and enforce federal law, the ICWA is Congress's response to states' longstanding

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[205] Fletcher & Khalil, *supra* note 22, at 1212–17.

[206] Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct. for W. Dist. of Wash., 573 F.2d 1123, 1126, 1130 (9th Cir. 1978), *vacated sub nom.* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696, n.36 (1979).

[207] 25 U.S.C. § 2710(b)(3)(A).

[208] *See supra* note 206 and cases cited therein.

[209] *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1126 (citations omitted).

[210] *See, e.g.*, Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976); *see also* Cooper v. Aaron, 358 U.S. 1 (1958).

[211] *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1126, 1130 (describing district court decision).

failure to recognize the rights of Indian parents, Indian children, and the Tribes they are part of.[212] The parental rights that the states flouted before ICWA, and which ICWA is still needed to protect today, include the substantive due process right to raise one's children,[213] the right not to be denied equal protection,[214] and the right to procedural due process.[215] ICWA's legislative history focuses on shocking violations of procedural due process in particular, as indicated in this statement made during a 1974 congressional hearing:

> The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel or to have the supporting testimony of expert witnesses. 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. 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. In a current South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights.[216]

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[212] *See supra* notes 15–19 and associated text.

[213] *See, e.g.*, Fletcher & Khalil, *supra* note 22, at 1221; Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 Rutgers L. Rev. 305, 313 (2010) ("The constitutional protection of the family includes the fundamental right to raise one's child."); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that the liberty interests protected by the Fourteenth Amendment include the right "to establish a home and bring up children"). Violations of the substantive due process right to raise one's children often flow ineluctably from violations of procedural due process, as shown in ICWA's legislative history, but the legislative history does not appear to explicitly reference substantive due process by name. *See, e.g.*, Indian Child Welfare Program Hearings Before the Subcomm. on Indian Aff. of the Senate Comm. on Interior and Insular Aff., 93rd Cong. 2 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs, Inc.) [hereinafter Indian Child Welfare Program Hearings].

For data demonstrating that ICWA is still necessary, see Fletcher & Khalil, *supra* note 22, at 1206–07; *accord* Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015), *on reconsideration in part sub nom*. Oglala Sioux Tribe v. Hunnik, No. CV 13-5020-JLV, 2016 WL 697117 (D.S.D. Feb. 19, 2016), and *vacated sub nom*. Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018); Sullivan & Walters, *supra* note 144.

[214] *See, e.g.,* Fletcher & Khalil, *supra* note 22, at 1221. Concerns about violations of equal protection are evident in the legislative history, for instance in Senator James Abourezk's statement that "the pattern of discrimination against American Indians is evident in the area of child welfare." Indian Child Welfare Program Hearings (opening statement of Sen. James Abourezk).

[215] *See, e.g.*, Fletcher & Khalil, *supra* note 22, at 1221.

[216] Indian Child Welfare Program Hearings (statement of William Byler, Executive Director, Association on American Indian Affairs, Inc.).

As Fletcher and Khalil argue, states' egregious history of violating all three of the rights that ICWA is designed to protect (substantive due process, procedural due process, and equal protection) makes the subject matter of ICWA an ideal candidate for congressional action under Section 5 of the Fourteenth Amendment.[217] However, assuming that ICWA was not enacted pursuant to Section 5 of the Fourteenth Amendment (because the Fourteenth Amendment is not explicitly referenced in ICWA's legislative findings), Congress should nonetheless have the power to remedy state violations of Native Americans' and Tribes' federal rights through legislation enacted pursuant to its Indian Affairs power. Because Congress is the branch of the federal government that has plenary power with respect to Tribes, it unquestionably has the authority to protect Tribal rights and those of individual Indians.[218] Although its record of doing so has been checkered, there have been many instances, besides ICWA, where it has protected such rights.[219] The federal government's duty to protect Tribal interests pursuant to the trust responsibility, another basis of authority relied upon in ICWA, also supports the validity of ICWA.[220] Moreover, it

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[217] *See supra* notes 22–25, associated text, and sources cited therein.

[218] *See, e.g.*, Tweedy, *Has Federal Indian Law Finally Arrived, supra* note 29, at 757 n.95 and associated text (discussing McGirt v. Oklahoma, 591 U.S. 894 (2020)); *see also* 1 Cohen's Handbook of Federal Indian Law § 6.03[1][a] ("The United States Constitution . . . vests exclusive legislative authority over Indian affairs in the federal government."). Notably, even with ICWA in place, there are considerable barriers to Native parents' judicial enforcement of their rights under ICWA and their related constitutional rights to due process and to Tribes' enforcement of their rights under the ICWA. *See, e.g.*, Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (Tribes' and individual parents' § 1983 claims held to be barred by *Younger* abstention); *see generally* Sullivan & Walters, *supra* note 144. It is ironic that a state and non-Native individuals were able to litigate many of their claims as to the ICWA's invalidity in the United States Supreme Court, whereas Tribes and individual parents were not able to litigate their claims as to South Dakota state courts' egregious violations of ICWA in federal court due to an abstention doctrine. For more detail on the gross violations of ICWA that the *Fleming* litigants had endured, *see* Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015), *rev'd on other grounds* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018).

[219] For examples of federal statutes and statutory provisions protecting Tribal rights and those of Native individuals, *see, e.g.*, Native American Grave Protection & Repatriation Act of 1990, 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–13; Violence Against Women Act Reauthorization of 2022, 25 U.S.C. § 1304; Indian Mineral Leasing Development Act of 1982, 25 U.S.C. §§ 2101–08; Clean Water Act, 33 U.S.C. § 1377(e). For examples of federal laws and policies disparaging and abrogating Tribal rights, *see, e.g.*, General Allotment Act, 25 U.S.C. §§ 334, 339, 341–42, 348–49, 354, 381; House Concurrent Resolution 108 (67 Stat. B132) (1953); *see also* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 Seattle U. L. Rev. 129, 136 (2012) (explaining that "[n]on-consensual allotments of tribal lands, under which land was forcibly taken from tribes and redistributed to individual Indians, constituted uncompensated takings of tribal lands because, while individual Indians received something of value, the tribe that owned the land did not").

[220] 25 U.S.C. § 1901(2); *see also* 1 Cohen's Handbook of Federal Indian Law § 5.04[3][a] ("One of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes."). The trust responsibility was invoked in the legislative history of ICWA when Senator Abourezk stated that "it is the responsibility of the Congress to take whatever action is within its power to see to it that American Indian communities and their families are not destroyed." Indian Child Welfare Program Hearings (opening statement of Sen. James Abourezk).

would appear to contravene the plenary power doctrine for the Court to hold that only the federal courts may protect the constitutional rights of Indian parents, Indian children, and their Tribes,[221] despite the Court's cursory attempt in *New York* to distinguish the treaty rights case discussed here on the basis that it involved the actions of federal courts, not Congress.[222] Additionally, because neither federally-protected Tribal rights nor those of individual Native Americans were at issue in *New York*, the Court's passing reference to those rights in that case was dicta. Finally, even with ICWA in place, Tribes and individual Native American parents have struggled—and have often been unable—to protect their rights.[223] These difficulties underscore the need for strong legislation like ICWA because it can only be assumed that, without ICWA or a comparable federal statute, the situation in many states would be even more dire.[224]

As mentioned, Public Law 280 is the second example of federal legislation commandeering state executive officials in the Indian law context—under the statute, state and local police, probation officers, parole officers, prison guards, prosecutors, defense attorneys, and courts are all commandeered with respect to on-reservation crimes.[225] Through Section 2 of Public Law 280, the

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[221] *See, e.g.*, Tweedy, *Has Federal Indian Law Finally Arrived, supra* note 29, at 757 n.95. Courts have explained that a remedial scheme may be broader in scope than the violation of rights, so there should be no requirement that Congress demonstrate in ICWA exactly what violation of federal law is being remedied through each provision of ICWA. *See, e.g.*, *Morgan v. Kerrigan*, 530 F.2d 401, 416 n.19 (1st Cir. 1976).

[222] New York v. United States, 505 U.S. 144, 179 (1992) (citing Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695–96 (1979)).

[223] *See, e.g.*, Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (relying on *Younger* abstention to reverse the lower court's holding in favor of Tribes and Native parents and to dismiss the case, despite the egregious violations of ICWA recounted in the lower court decision, Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015)); *see also* Adoptive Couple v. Baby Girl, 570 U.S. 637, 644 (2013) (holding in favor of the non-Native adoptive couple despite the facts that (1) the Cherokee Nation had not received proper notice of the pending adoption proceeding due to an attorney's "misspell[ing of] Biological Father's first name and incorrect state[ment of] his birthday" and that (2) the biological father, a Tribal member, had received no notice of the pending adoption, which was officially begun one day after the child's birth and had been planned during the biological mother's pregnancy, until four months after her birth); *see generally* Sullivan & Walters, *supra* note 144; *accord* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward A Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. Mich. J.L. Reform 651, 716 (2009) (arguing that "the Supreme Court's treatment of tribes over the past several decades seriously calls into question whether tribes and tribal members reap the benefits from Article III courts that appear to be available to other litigants").

[224] Some states have passed their own laws to protect Native children and families in furtherance of ICWA but in some instances going well beyond the federal statute's protections. *See, e.g.*, Bryce Drapeaux, *Towards a More Meaningful Future: An Indian Child Welfare Law for South Dakota*, 69 S.D. L. Rev. 119, 135–39 (2024).

[225] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18, 25, and 28 U.S.C.). In particular, 18 U.S.C. § 1162(a), results in the commandeering of a host of state officials as a result of its extension of state criminal jurisdiction over Indian reservations. It provides:

> Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has

federal government unilaterally conferred general state criminal jurisdiction on the vast majority of reservations in six states.[226] Section 4 of the statute also requires state courts in those states to hear civil causes of action brought by individual Native Americans,[227] and to apply state and federal law and, in some cases, Tribal law.[228]

The federal government had multiple motives in enacting the statute, including off-loading the cost of law enforcement and judicial resources from itself to state governments and furthering the assimilation of Indians.[229] As practitioner Andy Harrington explains, in enacting Public Law 280, "Congress, in an early version of an unfunded mandate, called upon the states to extend the reach of their criminal laws into the Indian country within their borders. Congress made this criminal law jurisdictional extension mandatory" for six states.[230] While the *Printz* Court expressed concern that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States,"[231] Public Law 280 did precisely that with respect to the police officers of six states, as well as a host of other state officials who work in the

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> jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

Id.; *accord* Carole Goldberg & Duane Champagne, *Final Report Law Enforcement and Criminal Justice Under Public Law 280*, NCJRS (2008) ("We know very little about how county prosecutors are conducting investigations and exercising their discretion in Indian country cases, or how judges and juries are responding to those cases. We know equally little about public defender, probation, and parole services available to tribal communities affected by Public Law 280.").

[226] *American Indians and Alaska Natives - Public Law 280 Tribes Fact Sheet*, Admin. for Native Ams. (last visited June 26, 2024), https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-public-law-280-tribes#:~:text=The%20states%20required%20by%20Public,except%20the%20Red%20Lake%20Reservation)%2C [https://perma.cc/ME4H-5JM7]; Andy Harrington, *Exclusive of What? The Historical Context of the 1970 "Metlakatla" Amendment to PL 280*, 23 Alaska L. Rev. 1, 10 (2006). In some cases, the law over-rode state enabling acts disclaiming jurisdiction over Indian country located within the state. *See, e.g.*, Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405, 460 (2003) (describing Wisconsin's enabling act as stating "that Indian rights will not be impaired until extinguished by a treaty"); *see also* Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1658 n.175 (1998) (providing more context on disclaimers as to authority over Indian lands within state enabling acts). Notably, Wisconsin was one of six states affected by Public Law 280. Administration for Native Americans, *supra*. The original version of Public Law 280 is available at 67 Stat. 588, ch. 505 (Aug. 15, 1953).

[227] 28 U.S.C. § 1360(a).

[228] *Id.* § 1360(c). The statute requires the specified states to give "tribal ordinance[s] or custom[s]" "full force and effect" so long as they are "not inconsistent with any applicable civil law of the State." *Id.*

[229] Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 701–02 (2006).

[230] Harrington, *supra* note 226, at 10. As Harrington explains, the original list included five states, but Alaska was added a few years later, in 1958. *Id.* at 10, 15.

[231] Printz v. United States, 521 U.S. 898, 922 (1997).

criminal justice system. Indeed, it has been held that Public Law 280 required no acceptance by those states,[232] and its constitutionality has been upheld in federal appellate courts, as well as state courts.[233]

In a case examining the validity of Public Law 280, the Ninth Circuit distinguished *Printz* on the grounds that the criminal regulatory scheme at issue was not federal (because the affected states were permitted to enforce their own laws against Indians) and that states were not required to enact legislation to comply with Public Law 280.[234] However, the fact remains that Public Law 280 conferred extensive new law enforcement and criminal justice system mandates on the affected states without even providing funds to implement them.[235]

The provision of Public Law 280 requiring state courts to hear civil causes of action involving Native litigants also raises interesting commandeering issues.[236] As discussed above in Part II.B, the Court has held that state courts are uniquely subject to federal commandeering based, controversially, on the text of the Supremacy Clause.[237] However, the text of the Supremacy Clause that the Court relied on for this proposition requires state courts to uphold federal law.[238] A federal requirement for state courts to apply Tribal law in certain circumstances most likely would not have been anticipated by the Framers and therefore could be seen as exceeding the authorization in the Supremacy Clause and raising the specter of commandeering for originalist justices like the late Justice Scalia.[239] The fact that this requirement was passed by Congress in 1953, during a period in which the federal government

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[232] Robinson v. Sigler, 187 N.W.2d 756, 759 (1971).

[233] *See* Robinson v. Wolff, 468 F.2d 438 (8th Cir. 1972); Bishop Paiute Tribe v. Cnty. of Inyo, 291 F.3d 549 (9th Cir. 2002), *judgment vacated on other grounds*, 538 U.S. 701 (2003); Anderson v. Britton, 212 Or. 1 (1957).

[234] *Bishop Paiute Tribe*, 291 F.3d at 561–62.

[235] Not only did Congress not provide states funds to implement Public Law 280, but the Act also was held not to provide states with taxing authority for personal property, such as mobile homes, located on trust lands. Bryan v. Itasca Cnty., 426 U.S. 373, 393 (1976).

[236] 18 U.S.C. § 1162. This section was interpreted narrowly to only require state courts to hear civil causes of action and not to provide state taxing authority in *Bryan*, 426 U.S. at 380–81.

[237] *See supra* note 130 (citing Caminker and Campbell) and associated text.

[238] The Supremacy Clause provides that "the judges in every state shall be bound . . . [by the United State Constitution, federal laws, and treaties], anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI; *see also* New York v. United States, 505 U.S. 144, 178–79 (1992).

[239] *See* Tweedy, *Has Federal Indian Law Finally Arrived*, *supra* note 29, at 748 (discussing Justice Scalia's originalism and textualism); *cf.* Laura Little, Conflict of Laws: Cases, Materials, & Problems 582 (2d ed. 2018) (discussing the fact that congressional adoption of a comprehensive choice of law code for state courts "would likely meet resistance from those who champion state sovereignty and limited federal power"). In *Brackeen*, Texas chose to challenge a requirement in ICWA that state courts apply Tribal law as to placement preferences when Tribes had a different order for placement preferences than that set out in ICWA on non-delegation grounds rather than on anticommandeering grounds. Brief for the State of Texas, *supra* note 124, at 69–74 (discussing 25 U.S.C. § 1915(c)).

was hostile to Tribal rights,[240] and that it remains on the books, suggests that commandeering has long been viewed as acceptable in the context of Indian Affairs legislation.

It does not appear that states have challenged Public Law 280's constitutionality,[241] and this could conceivably be part of the reason that the constitutional challenges to date have failed, although it is important to note that the Court has linked federalism to preservation of individual liberty, explaining that "[s]tates are not the sole intended beneficiaries of federalism."[242] In theory, then, individual and Tribal challenges to Public Law 280 should carry just as much weight as a state challenge would.

Significantly, an amendment to Public Law 280 in 1968 allowed states to request retrocession of criminal jurisdiction conferred under the Act and allowed the United States to accept or reject such a request.[243] Professor Goldberg attributes this amendment to states' financial difficulties resulting from the obligations imposed by Public Law 280.[244] Tribes have no formal role in this process under federal law,[245] but the retrocessions that have occurred in the six mandatory Public Law 280 states[246] merely except out certain Tribes from state jurisdiction rather constituting a wholesale retrocession of state jurisdiction in those states.[247] Thus, state criminal jurisdiction remains in

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[240] *See, e.g.*, Robert Odawi Porter, *American Indians and the New Termination Era*, 16 Cornell J.L. & Pub. Pol'y 473, 473 (2007) (describing the Termination Era, which began in the late 1940s, as a period that was hostile to Tribal sovereignty but arguing that even eras of favorable federal policy towards Tribes are tainted with assimilationist goals); Nicholas Barron, *Lessons in Safe Logic: Reassessing Anthropological and Liberal Imaginings of Termination*, 79 J. of Anthropological Rsch. 492, 500 (2023) (discussing how PL 280 "reflect[s] a growing hostility toward both tribal sovereignty and the Indian Affairs bureaucracy"); *see also* Anderson et al., *supra* note 174, at 138–41 (describing the Termination Era).

[241] *See* Claudia G. Catalano, *Construction and Application of § 2 of Federal Public Law 280, Codified at 18 U.S.C.A. § 1162, Under Which Congress Expressly Granted Several States Criminal Jurisdiction Over Matters Involving Indians*, 55 A.L.R. Fed. 2d 35 § 16 (2011).

[242] Bond v. U.S., 564 U.S. 211, 222 (2011).

[243] 25 U.S.C. § 1323; 1 Cohen's Handbook of Federal Indian Law § 6.04[3][a]; Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation, Indians*, 22 UCLA L. Rev. 535, 558–59 (1975).

[244] Goldberg, *supra* note 243, at 557–58.

[245] Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 Wash. L. Rev. 915, 945 (2012).

[246] The term "mandatory Public Law 280 states" refers to those six states who had full criminal jurisdiction conferred on them by 18 U.S.C. § 1162. So-called "optional states" had the choice whether to undertake such jurisdiction (or some part of it) after passage of the Act, although a later amendment required Tribal consent to do so. *See* 67 Stat. 588, ch. 505, § 7 (Aug. 15, 1953); 25 U.S.C. § 1321(a).

[247] Anderson, *supra* note 245, at 946, 952–53; Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States*, NCJRS (1998); Valentina Dimitrova-Grajzl, Peter Grajzl & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 Law & Soc'y Rev. 127, online app. at 1–2 (March 2014), https://grajzlp.academic.wlu.edu/files/appendices/PL280-Online-Appendix.pdf [https://perma.cc/X48S-T48R] (listing retrocessions).

place, with important exceptions for certain Tribes, in the mandatory states.[248] However, "[t]here was no provision [in the 1968 amendment] for retrocession of civil jurisdiction."[249]

The 1968 amendment allowing for state retrocession did partially ameliorate the commandeering aspects of the criminal jurisdiction provision of Public Law 280 going forward, although discretion remains with the federal government whether to accept a proffered retrocession. As noted, the civil provision requiring state application of Tribal law in some circumstances, which could also be understood as commandeering, remains in place, with no opportunity for retrocession.

The small number of challenges to the constitutionality of Public Law 280[250] and the fact that they have all failed appear to indicate a lack of salience of anticommandeering concerns in the context of federal legislation relating to Tribes.[251]

Turning to the third example of federal Indian Affairs legislation that permits commandeering, the requirement in the IGRA that, in certain circumstances, a state must negotiate in good faith with a Tribe to enter a gaming compact when a Tribe requests that it do so also contains elements of commandeering.[252] The IGRA was enacted based on Congress's power under the Indian Commerce Clause.[253] Lower courts have gone both ways on whether this provision violates the anticommandeering doctrine, with the vast majority

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[248] *See* notes 246–47 and sources cited therein. A small handful of Tribes have requested that the federal government also undertake jurisdiction (in addition to state jurisdiction under Public Law 280) under a more recent amendment to the statute. *See, e.g.*, United States Assumption of Concurrent Federal Criminal Jurisdiction; Mille Lacs Band of Ojibwe, Docket No. OTJ 110, 81 Fed. Reg. 4335, at 4336 (Jan. 26, 2016); United States Assumption of Concurrent Federal Criminal Jurisdiction; Hoopa Valley Tribe, Docket No. OTJ 120, 81 Fed. Reg. 90870 (Dec. 15, 2016); 18 U.S.C.A § 1162(d) (2010); Carole Goldberg, *Unraveling Public Law 280: Better Late than Never*, 43 Hum. Rights 11 (2017).

[249] Anderson, *supra* note 245, at 946.

[250] Catalano, *supra* note 241, at § 16.

[251] Most of the constitutional challenges pre-dated the anticommandeering doctrine, with Bishop Paiute Tribe v. Cnty. of Inyo, 291 F.3d 549 (9th Cir. 2002), *judgment vacated on other grounds*, 538 U.S. 701 (2003), being the exception.

[252] 25 U.S.C. § 2710(d)(3)(A). Treaties with Indian Tribes have also been held to impose duties on states. *See, e.g.*, United States v. Washington, 853 F.3d 946, 966, 978–79 (9th Cir. 2017), *aff'd by an equally divided Court,* 584 U.S. 837 (2018) (holding that the State's maintenance of barrier culverts unlawfully interfered with the Tribes' treaty fishing rights and that the injunction did not violate federalism principles). However, *Washington* can be understood as simply providing that federal standards govern state activities, *viz* installation and maintenance of state-owned culverts. *Id.*; Tweedy, *Hunting Rights*, *supra* note 138, at 861, and this characterization would render it outside of the commandeering framework. *See* Reno v. Condon, 528 U.S. 141, 150–51 (2000); Butash, *supra* note 57, at 687–88. The treaties at issue in *Washington* can also be understood as simply having valid preemptive effect. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 477–79 (2018); *see also supra* note 204 and associated text (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) and Fisher v. District Court, 424 U.S. 382 (1976)).

[253] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57.

holding that there is no violation.[254] For example, in *Cheyenne River Sioux Tribe v. South Dakota*[255] the court noted that the IGRA gives states additional input into Indian gaming that they would not otherwise have and further held that the state was not forced to negotiate under the provision because the IGRA provides that, if a state does not negotiate, after a certain period of time and several interim steps, the Secretary of Interior can simply prescribe the procedures for class III Indian gaming for that particular Tribe.[256] Although the *Cheyenne River Sioux* Court's functional analysis of this portion of the statute is understandable, the directive statutory language providing that "the State shall negotiate" is striking, and it is hard to see how a federal requirement that a sovereign state negotiate in good faith could escape the commandeering bar in another context.

As the *Cheyenne River Sioux* Court recognizes, IGRA governs the relationship between two types of sovereigns, states and Tribes, and the statute did provide states with rights that the Supreme Court had held them to lack in *California v. Cabazon Band of Mission Indians*.[257] Because the IGRA offers states the possibility of regulatory rights with respect to Tribal gaming that they would otherwise lack, some courts appear to view the negotiation requirement as analogous to the type of conditional grant of federal funds that was upheld in *New York*.[258] Unlike a conditional funding statute, however, IGRA does not offer states an either-or option, with negotiating on one side and not having any regulatory say on the other. Rather, the IGRA requires states to negotiate; it is simply that the consequences of disobeying the requirement, at least after the Supreme Court, on Eleventh Amendment grounds, struck down the statutory provision allowing Tribes to hale non-complying states into court,[259] are merely that the disobeying state foregoes the possibility of having any regulatory authority.[260]

Indeed, IGRA's requirement of good faith negotiation is in some respects more onerous than the background check requirement struck down in *Printz*. Rather than state and local law enforcement officers having to engage in

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[254] *See, e.g.*, Warren v. United States, 859 F. Supp. 2d 522 (W.D.N.Y. 2012); Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California, 163 F. Supp. 3d 769 (E.D. Cal. 2016); Ponca Tribe of Okla. v. Oklahoma, 834 F. Supp. 1341, 1347 (W.D. Okla. 1992), *aff'd in part*, *rev'd in part*, 37 F.3d 1422 (10th Cir. 1994), *cert. granted*, *judgment vacated sub nom.* Oklahoma v. Ponca Tribe of Okla., 517 U.S. 1129 (1996), *and aff'd*, 89 F.3d 690 (10th Cir. 1996); Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson, No. CIV-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. 1993); Glenn M. Feldman, *The Great Casino Controversy*, 29 Ariz. Att'y 19, 21 (July 1993) (describing different approaches taken by federal courts on whether IGRA violates the anticommandeering doctrine).

[255] 830 F. Supp. 523, 526 (D.S.D. 1993).

[256] *Id.* at 526–27.

[257] 480 U.S. 202 (1987).

[258] New York v. United States, 505 U.S. 144, 171–73 (1992); *see, e.g.*, *Rumsey Indian Rancheria of Wintun Indians*, 1993 WL at *10; *Cheyenne River Sioux Tribe*, 830 F. Supp. at 526–27.

[259] *Seminole Tribe of Fla.*, 517 U.S. at 67.

[260] *See, e.g.*, *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal.*, 163 F. Supp. 3d at 779.

run-of-the-mill activities to support a federal law outside of the public's view, the IGRA requires high-level state officials to negotiate with another sovereign regarding that sovereign's plans for often-controversial economic development activities. Individual states and Tribes may have fraught relationships that make good-faith negotiation more difficult.[261] Non-Native citizens of the state may, in some cases, vociferously object to the negotiations.[262] It is true that there is no requirement that negotiations ultimately result in a compact—the Secretary of Interior will determine how the gaming establishment will be regulated if there is no compact[263]—but, given the public visibility of Tribal-state negotiations and the requirement that high-level state officials engage in them, some states may view IGRA's negotiation requirement to be more nettlesome than the background check requirement struck down in *Printz*. Despite the court holdings pointing to the unobjectionable quality of a negotiation requirement, perhaps the true reason that this IGRA provision has been so often upheld over the course of thirty-five years is that commandeering is simply understood to be less objectionable in the Indian Affairs context. Indeed, as explained above, this course of events regarding IGRA suggests that the anticommandeering doctrine is applied weakly if at all in the context of Indian Affairs legislation.

III. Conclusion

In sum, the anticommandeering doctrine should be interpreted very narrowly in the context of Indian Affairs legislation for two important reasons. First, congressional authority with respect to Indian Affairs is broader than that under the Interstate Commerce Clause, with state authority being entirely excluded in the face of explicit federal legislation regarding Tribes or individual Indians. Second, courts have upheld commandeering of state officials in the context of treaty rights, the jurisdictional provisions of Public Law 280, and IGRA's gaming compact negotiation requirement. If the doctrine has a role in this context, it should be limited to a narrow version of the doctrine, namely a prohibition on Congress's commandeering of state legislatures. This narrow approach would harmonize the doctrine with the history of the federal, state, and Tribal relationship in the context of Indian Affairs, including

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[261] *See, e.g.*, Tweedy, *The Validity of Tribal Checkpoints*, *supra* note 164, at 247 (referring to South Dakota's "difficult and checkered history" with respect to Tribes (quoting Lori Walsh, *Prof Pommersheim Talks Checkpoints*, S.D. Pub. Broad. (June 3, 2020), https://listen.sdpb.org/post/prof-pommersheim-talks-checkpoints [https://perma.cc/NU68-3TH4])).

[262] *Accord Bigotry, Calls for Violence, Follow Protest of Tribal Treaty Fishing*, Washington Fly Fishing F. (June 16, 2016), https://www.washingtonflyfishing.com/threads/bigotry-calls-for-violence-follow-protest-of-tribal-treaty-fishing.118802 [https://perma.cc/CPZ3-7A2R].

[263] Warren v. United States, 859 F. Supp. 2d 522, 533 (W.D.N.Y. 2012) (no compact required); Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal., 163 F. Supp. 3d at 779 (a failure to negotiate merely results in the Secretary of Interior stepping in).

the treaty rights, Public Law 280, and IGRA examples.[264] Such an approach should also be attractive to originalist judges and justices because it may well be more faithful to the Founders' original intent, given that commandeering of state officials for enforcement of federal laws appears to have been generally an acceptable practice at the time that the Constitution was drafted and ratified.[265]

The conclusion that the anticommandeering doctrine should play a diminished role in the context of Indian Affairs legislation seems particularly strong in the face of a statute like the ICWA that was enacted to prevent further violations of the rights of Native parents, Native children, and Indian Tribes.[266] At a minimum, then, the commandeering examples from the treaty fishing, the Public Law 280, and the IGRA contexts indicate that federal commandeering of state executive officials is permissible in the context of Indian Affairs. The IGRA example is perhaps the strongest in that it requires negotiation in a sovereign capacity with another governmental sovereign.

Read narrowly, the treaty fishing example could tell us only that federal commandeering is permissible when there has been a state history of violation of federal rights, as there has been in the ICWA context. And the Public Law 280 example could be read in a restrictive way to suggest that, even in the absence of such a history of state violation of Tribal or individual Indians'

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[264] One federal district court that held IGRA to violate the Tenth Amendment was concerned, not about the requirement to negotiate in and of itself, but about the possible eventuality that the Secretary of Interior could impose regulations for class III gaming that might conceivably include a requirement that the state regulate such gaming. Ponca Tribe of Okla. v. Oklahoma, 834 F. Supp. 1341, 1347 (W.D. Okla. 1992), *aff"d in part, rev'd in part*, 37 F.3d 1422 (10th Cir. 1994), *cert. granted, judgment vacated sub nom*. Oklahoma v. Ponca Tribe of Okla., 517 U.S. 1129, 116 S. Ct. 1410, 134 L. Ed. 2d 537 (1996), *and aff"d*, 89 F.3d 690 (10th Cir. 1996). This concern seems like a stretch in that the court could have, in accord with the canon of constitutional avoidance, simply have interpreted IGRA not to allow the Secretary to require the state to regulate in order to avoid the constitutional issue. *See, e.g.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

[265] Prakash, *supra* note 101, at 1959–60 (arguing that the Framers and Ratifiers rejected commandeering of state legislatures but that they accepted the federal government's ability to commandeer state executive officers to enforce federal law); Campbell, *supra* note 105, at 1108–09. *See also* Caminker, *supra* note 63, at 1042–50 (discussing the views of the Framers and arguing that they, particularly Hamilton and Madison, contemplated that state officials could be called upon to enforce federal laws); Hall, *supra* note 105, at 177–78 (criticizing the *Printz* Court majority's historical analysis).

[266] *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 477–79 (2018) (defining preemption, in contrast to commandeering, as consisting of a federal law "that imposes restrictions or confers rights on private actors," which conflicts with a state law that covers similar territory); ROTUNDA & NOWAK, *supra* note 5, at § 4.10(d)(i) (describing this portion of *Murphy*). ICWA unquestionably creates rights for Native parents, as well as Native children and Indian Tribes. *See, e.g.*, Fletcher & Khalil, *supra* note 22, at 1214–15 (explaining how ICWA's challenged requirements, such as that active efforts be provided to prevent the break-up of an Indian family, operate as federal rights for Native parents). These federal rights contrast with the lower standards in many states that would otherwise apply in dependency proceedings. Therefore, ICWA meets *Murphy*'s definition of preemption.

rights, the federal government may offload its duties onto states, at least if states have discretion as to implementation.[267] Read in this way, of the two examples, the treaty fishing rights example of permissible commandeering is more in line with the background and operation of the ICWA.

In closing, if the anticommandeering doctrine is to be retained with respect to Indian Affairs legislation, it should either be restricted to a prohibition on commandeering state legislatures or, at a minimum, it should not apply when a federal statute is enacted to remedy states' violations of Tribal and/or individual Native Americans' rights. Doctrinal tests in federal Indian law tend to be rife with uncertainty,[268] and the Court in the next anticommandeering case involving Indian Affairs legislation should sharply restrict the doctrine's scope in this area. This approach would conserve judicial resources, reinforce that Congress—rather than the Court—has authority to regulate in this area, and create a much-needed pocket of predictability in a field generally clouded with uncertainty.

Rebecca Aviel theorizes that "commandeering concerns jump into action where Congress does not have authority to regulate states directly."[269] While the Indian Commerce Clause and the other bases of Congress's plenary power with respect to Indian Affairs, such as the treaty power, may not explicitly describe the authority to regulate states, the history of the Indian Commerce Clause (and that of its predecessor in the Articles of Confederation) demonstrates that it is rooted in a need to regulate states. Moreover, Congress's exercise of statutory regulation of states in the Indian Affairs context goes back to at least 1790, when Congress enacted the first Trade and Intercourse Act.[270] Among other provisions, this Act barred states from purchasing land from Indian Tribes.[271] Other historical examples exist as well.[272] If anticommandeering has any role to play in the context of federal Indian Affairs legislation, it must be an extremely limited one.

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[267] *See* Bishop Paiute Tribe v. Cnty. of Inyo, 291 F.3d 549, 561–62 (9th Cir. 2002), *judgment vacated on other grounds*, 538 U.S. 701 (2003).

[268] Tweedy, *The Validity of Tribal Checkpoints*, supra note 164, at 274.

[269] Aviel, *supra* note 83, at 2045.

[270] 1 Stat. 137–38 (1790).

[271] *See, e.g.*, ANDERSON ET AL., *supra* note 174, at 45 (quoting 1 Stat. 137–38 § 4 (1790)).

[272] For instance, a 1933 statute under which the federal government added land from the State of Utah to the Navajo Reservation provided that Utah would receive 37.5 percent of the royalties from this land if oil and gas were later found *and* that Utah would have to spend these royalties on "the tuition of Indian children in white schools and/or the building or maintenance of roads across the lands described [here] . . . , or for the benefit of the Indians residing therein." Act to Permanently Set Aside Certain Lands in Utah as an Addition to the Navajo Indian Reservation, and for Other Purposes, Pub. L. No. 72-403, ch. 160, 47 Stat. 1418 (1933). Thus, Utah was called out by name and required to spend any money received in specified ways, with the only determinant of whether money would be received being something out of Utah's control—whether oil or gas was found on the land.

Some treaties also directly prohibited state legislatures from removing restrictions on lands allotted under the treaty to Tribal members "without the consent of Congress." Treaty with the Walla-Walla, Cayuse, etc., 1855, 12 Stat. 945.