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ICWA and the Commerce  
Clause

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## **Abstract**

Congress enacted the Indian Child Welfare Act, it said, in accordance with its authority under the Indian Commerce Clause and because it has assumed responsibility over Indian affairs. But under the line of cases developed by the Rehnquist Court, the Court takes a very dim view of Congressional authority under the Commerce Clause, while resurrecting the Tenth Amendment from its stasis as a “truism.” At least one Justice asserts that there is nothing in the Constitution that authorizes Congress to assume authority over Indian affairs to the exclusion of the Executive branch or the states. This paper argues that, despite the Court’s recent Commerce Clause jurisprudence, Congress had sufficient authority to enact the Indian Child Welfare Act. The intent of the paper is to present the strongest case for the constitutionality of the Indian Child Welfare Act as a matter of the original understanding of the Indian Commerce Clause.

# ICWA and the Commerce Clause

Matthew L.M. Fletcher

## Introduction

Despite the fact that the Indian Child Welfare Act<sup>1</sup> (ICWA or Act) is a monumental piece of legislation – it affects every Indian child born in the United States *and* it serves as one of the most stinging rebukes of states’ rights by Congress in the 20th Century – the Supreme Court has heard only one case involving the Act. That case, *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>2</sup> did not address any challenges to the constitutionality of the Act. But in the years since *Holyfield*, a few state courts and a few commentators have expressed doubts as to the constitutionality of the Act under the Indian Commerce Clause and the Tenth Amendment.<sup>3</sup>

This Chapter will address only one of several potential constitutional challenges to the Act – those relating to the Indian Commerce Clause and the Tenth Amendment. The questions of equal protection and substantive due process have been addressed elsewhere in the scholarship,<sup>4</sup> but no one has addressed in detail the question of the commerce clause and states’ rights.

For our purposes, we interpret Article I, Section 8, Clause 3, which reads, “Congress shall have Power ... To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>5</sup> From this language derives the Indian Commerce Clause. This Chapter will attempt to determine whether Congress had

authority to enact the Indian Child Welfare Act. This inquiry is limited, however, to determining whether the Indian Commerce Clause *alone* authorizes Congress to enact ICWA. Since Congress offered additional (albeit vague) sources of authority,<sup>6</sup> the analysis conducted and the conclusion reached in this Chapter is not the entire story. Nevertheless, even an originalist reading of the Indian Commerce Clause must compel the interpretation that Congress had authority under the Indian Commerce Clause to enact ICWA.

### **An Originalist Perspective of “Commerce” with Indian Tribes**

Perhaps the predominant mode of constitutional interpretation is “originalism.”<sup>7</sup> Originalists hold that the only legitimate interpretation of ambiguity in the Constitution is through discerning the original meaning of the Constitution as the Framers and/or Ratifiers of the time period around the Constitutional Convention of 1787 and the ultimate ratification of the Constitution in 1789.<sup>8</sup> Originalism is the product of conservative scholars and judges intent on wiping away the work of the Warren Court and its notion of a “living constitution.”<sup>9</sup> Originalists tend to be textualists, as well, meaning that they would follow the plain meaning of the provisions of the Constitution first and above all other possible interpretations.

Originalism can be for everybody, which could be its most serious fault. One of the major problems with originalism is the almost impossible task of discerning the original meaning or intent of the Constitution, opening the door to a plethora of competing interpretations.<sup>10</sup> Consider the question of the Second Amendment, about which federal courts have marshaled significant and persuasive historical evidence that

supports two separate and competing interpretations of the right to bear arms.<sup>11</sup> Not all federal and state court judges label themselves as “originalists,” but an increasing minority of judges (and two or more Supreme Court Justices) attempt to follow its tenets. As a matter of clarity and an attempt to appeal to conservative judges and scholars, this Chapter will attempt to provide an originalist perspective of the Indian Commerce Clause, as well as the Tenth Amendment’s relation to Indian affairs.

Like major schools of thought, there are at least two schools of thought on originalism. The first school elevates “original meaning” or “original understanding” to the most critical and legitimate form of meaning.<sup>12</sup> The original meaning of the terms and phrases of the Constitution includes the understanding of the average reader of the Constitution around the time of the ratification or shortly thereafter. Of course, the average reader did not tend to write down their interpretation of the Constitution, so the proponents of the original meaning look to secondary sources of the original meaning, such as the interpretation of the Constitution given by the First Congress or the early statements of the Framers. Of particular note is the Federalist Papers authored by James Madison, Alexander Hamilton, and John Jay for the purpose of convincing the voters of New York to ratify the Constitution.<sup>13</sup> Often, the proponents of the original meaning look to the dictionaries of the day to discern the public meaning of Constitutional provisions.<sup>14</sup>

The second major school of originalist elevates “original intent” to the forefront. The original intent of the Framers includes the purposes to which the Constitution was intended to serve.<sup>15</sup> The evidence used to discern the original intent of the Constitution includes the statements and notes of the Framers during the Constitutional Convention and the debates surrounding each state’s decision on whether the ratify the Constitution.

The Federalist Papers also serve as a primary source of authority for the proponents of original intent and in general any of the statements of any of the Framers could be used to discern the intent of the Framers. The general principles governing the use of historical evidence tend to be looser here than for the discovery of original meaning, but both groups tend to use the same kinds of evidence to suit their purposes.

Despite the emphasis on historical evidence, all interpreters of the Constitution must begin with the plain language of the document. Article I, Section 8, Clause 3 reads, “Congress shall have Power ... To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Congress stated that it would primarily rely on this language for authority to enact the Indian Child Welfare Act, but it was not doing so because of the language alone. Almost 100 years of Supreme Court precedent strongly supported Congress’s view of its authority under the Indian Commerce Clause, with the Court holding on numerous occasions that Congressional authority under the Clause was “plenary.” The Court’s jurisprudence in the area, as of 1978, had almost entirely been “hands-off,” with the Court often holding that the question of whether Congressional authority under the Indian Commerce Clause was sufficient was a non-justiciable political question. In short, the Court had never struck down an Act of Congress in Indian Affairs, even those that appeared to transgress the boundaries of “commerce.”

The one exception, which could barely be called an exception, was *United States v. Kagama*,<sup>16</sup> where the Court upheld Congressional authority to extend federal criminal law and federal court jurisdiction into Indian Country under the Major Crimes Act.<sup>17</sup> The Court held that the Indian Commerce Clause could not be held to be authority for Congress’s action,<sup>18</sup> but that sufficient structural, statutory, and political authority existed

instead.<sup>19</sup> The Court’s reasoning, perhaps, is explained by the particular, non-Indian law-related doctrinal era that the Court had just entered and that would later be discredited as illegitimate as of 1937.

It suffices to state for now that as of 1978, the great weight of legal authority would hold that Congressional power under the Indian Commerce Clause was broad, plenary, exclusive of state authority, and subject only to a rational basis test for constitutionality.<sup>20</sup> In other words, Congress would have believed and understood that its authority under the Indian Commerce Clause was sufficient to enact ICWA. This incredibly broad power has since come under scrutiny by legal scholars and even a few judges, most notably Justice Thomas. These challenges will be discussed in the final portion of this Chapter.

Once the plain language of the Constitutional provision has been deemed ambiguous, then the interpreter may look to interpretative tools. As “Indian Commerce” is undefined by the Constitution – as in fact almost all provisions in the Constitution remain – is it appropriate to begin interpretation of the clause. There are many potential roads to follow at this point. One of the great flaws of (or opportunities afforded by) the Constitution is the lack of an interpretive guide, meaning that there are no interpretative rules to follow. As Yale law professor Jed Rubenfeld wrote:

In constitutional law ... there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all. In any given case raising an undecided constitutional question, nothing in any current constitutional law stops a judge from relying on original intent, if the judge wishes. But nothing stops a judge from ignoring original intent, if a

judge wishes. Or suppose a plaintiff comes to court asserting an unwritten constitutional right. Under current case law, judges are fully authorized to dismiss the right because the Constitution says nothing about it. Another admissible option, however, is to uphold the right on nontextual grounds. Evolving American values? Judges can consult them or have nothing to do with them.<sup>21</sup>

We will discuss two interpretive modes, with an emphasis on originalism. The first, another favorite of conservative scholars and judges and that we can dispense with quickly, is textualism. A textualist reading of the Constitution would allow the interpreter the chance to interpret the plain language of the provision as it relates to the other provisions in the Constitution,<sup>22</sup> or (perhaps to some extent) the overall structure of the Constitution.<sup>23</sup>

A textualist reading of the Indian Commerce Clause does not answer the question of whether the Indian Commerce Clause authorizes the Act. However, a textualist reading could lead an interpreter into a significant trap that would tend to obliterate the original meaning and intent of the Indian Commerce Clause. It would work this way. First, a textualist would note that the Indian Commerce Clause is part of a strange trichotomy in the Constitution – sometimes known as the Three Commerce Clauses. The three clauses are the Interstate Commerce Clause, the Foreign Nations Commerce Clause, and the Indian Commerce Clause. A textualist would interpret the three clauses, because they are so linked together, in the same way.<sup>24</sup> As such, a textualist would use the same definition of “commerce” for all three clauses. Therein rests the trap. Two influential originalist legal scholars appear to have fallen into this trap.<sup>25</sup> Decades ago, Professor Albert Abel



offered compelling historical evidence that the Indian Commerce Clause should not be interpreted in light of the Interstate or Foreign Nations Commerce Clauses.<sup>26</sup>

Professor Abel offered historical evidence that tends to show the original intent of the Framers in drafting the Indian Commerce Clause was completely separate from the other two Commerce Clauses. First, Professor Abel asserted that “the Indian trade was almost exclusively an *internal* trade.”<sup>27</sup> He offered this assertion as a possible argument refuting the notion that Congress’s Interstate Commerce Clause authority can never reach inside domestic, intrastate commerce, but rejected it himself because, he stated, “The Indian trade was a special subject with a definite content, which had been within the jurisdiction of congress under the articles of confederation, although with certain ambiguous qualifications omitted from the constitutional provision. *It was thus derived from a totally different branch ... than did the control over foreign and interstate commerce.*”<sup>28</sup> Professor Abel demonstrated that the Interstate and Foreign Nations Commerce Clause had been debated and approved *long before* James Madison implored the Convention to incorporate an Indian affairs clause into the Constitution:<sup>29</sup>

The provision for regulation of commerce with foreign nations and among the several states had been published by the committee of detail two weeks, and definitely approved by the convention two days, before the subject of the Indian trade was introduced on the floor of the convention. It was not until several days later that the latter reported out of committee, still encumbered with some of the qualifications attached to it in the articles; and less than two weeks before the close of the convention that it was finally incorporated with the rest of the commerce clause and

approved in the form with which we are familiar. By this time, the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to Indian trade.<sup>30</sup>

Professor Abel, after listing the evidence concluded, “Whatever regulation of commerce might mean in connection with transactions with the Indians, it was so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause.”<sup>31</sup> Professors Prakash and Barnett do not mention these records whatsoever in their discussion of the Indian Commerce Clause. It would appear that a textualist reading of the Indian Commerce Clause in conjunction with the other two Commerce Clauses likely is implausible. The Framers original intent was to distinguish them.

Moreover, the Framers intended that Congress’s authority over Indian Commerce extend beyond mere “commerce.” As Professor Robert Stern argued, the Framers intended the Constitution to serve as a “fix” on the problem of the Articles of Confederation, which had allowed the states to muddy the waters of federal Indian affairs policy.<sup>32</sup> Stern asserted that “the whole spirit of the proceedings indicates that ... the draughtsmen meant commerce to have a broad meaning with relation to the Indians....”<sup>33</sup> In fact, Stern acknowledged that “[t]he exigencies of the time may have called for a more complete system of regulating affairs with the Indians than of controlling commerce among the states....”<sup>34</sup>

But what of the original meaning of the Indian Commerce Clause? The original meaning of the Indian Commerce Clause squares with the original intent of the Framers. Professor Akhil Amar has argued that the First Congress answered the question when it

adopted the first Trade and Intercourse Act.<sup>35</sup> The Act, in the words of the leading treatise on federal Indian law, “contain[s] the fundamental elements of federal Indian policy: Federal regulation of trade with the Indians, prohibition of purchases of Indian lands except by governmental agents in official proceedings, and punishment of non-Indians committing crimes and trespasses against the Indians.”<sup>36</sup> Professor Amar wrote, “It also bears note that none of the leading clausebound advocates of a narrow economic reading of ‘commerce’ has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes.”<sup>37</sup> The criminal law provision of the 1790 Act goes well beyond a narrow definition of “commerce” and represented the First Congress’s understanding of the Indian Commerce Clause. As Professor Jerry Mashaw wrote, “From the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers.”<sup>38</sup>

In sum, from either the perspective of original meaning or original intent, the Indian Commerce Clause should be interpreted broadly to include subject matters beyond the narrow meaning (whatever it may be) of “commerce.” The question, then, is whether Congress’s Indian Commerce Clause authority extends into the realm of social legislation and regulation of family affairs as provided for in the Indian Child Welfare Act.

### **Purposes and Scope of the Act: Limiting the States in their Constitutional Arena**

The Indian Child Welfare Act operates in a unique area in the realm of federalism. All areas of family law, including child custody, child endangerment, and adoption are within the realm of state law.<sup>39</sup> There is nothing in the Constitution that authorizes Congress to legislate in the area of family law. Because the U.S. Constitution is an enumerated powers constitution, as opposed to a plenary powers constitution, whatever is not listed in the enumerated powers in Article I, for example, is reserved to the states by definition. In sum, the People did not delegate the powers to legislate in the field of family law to Congress. Of course, the Tenth Amendment, as we will see in the next section, explicitly reserves all non-delegated powers to the states or the People.

The Act, however, explicitly infringes on state authority to legislate and implement family law as it relates to Indian children. In fact, that was its very purpose. Congress took testimony from innumerable sources and concluded that, with Indian children, the states had failed miserably and tragically. In *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>40</sup> Justice Brennan's opinion for the Court reiterated many of the findings of fact that compelled Congress to intervene.<sup>41</sup> The House Report accompanying the Act relied on findings that "approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions."<sup>42</sup> Extrapolating Minnesota statistics to the nation, Congress found that about 90 percent of the placements were in non-Indian homes.<sup>43</sup> Congress found "shocking" the disparity in placement rates for Indians and non-Indians: Indians were placed five times more often than non-Indians in Minnesota; 13 times more often in Montana; 16 times in South Dakota (foster care); and 10 times more often in Washington (foster care).<sup>44</sup> Congress concluded: "It is clear that the Indian child welfare crisis is of

massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.”<sup>45</sup>

Congress also found that state judges and child welfare agencies contributed to the wholesale removal of Indian children from Indian Country using inappropriate methods.<sup>46</sup> Congress found that “many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.”<sup>47</sup> Moreover:

An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as grounds for terminating parental rights.<sup>48</sup>

State agencies, Congress found, also engaged in systematic race discrimination. Congress found that “[o]ne of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied to non-Indian parents.”<sup>49</sup> Moreover, Congress found, “Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values.”<sup>50</sup> Finally, Congress found, “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 to or have the supporting testimony of expert witnesses.”<sup>51</sup>

The impact on Indian children, of course, was devastating. The *Holyfield* Court quoted one social psychiatrist: “[Indian children] were finding that society was putting on them an identity which they didn’t possess and taking from them an identity that they did possess.”<sup>52</sup> On the impact of the removal of Indian children from Indian Country on Indian tribes, the Court quoted the Tribal Chief of the Mississippi Band of Choctaw Indians, Calvin Isaac: “Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.”<sup>53</sup> The Act’s primary sponsor, House Representative Morris Udall, stated, “Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.”<sup>54</sup>

Congress’s ultimate conclusion, reached after years of hearings and testimony, is remarkable for its damnation of state courts and agencies: “[T]he States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities.”<sup>55</sup> Congress could have removed state jurisdiction over Indian children, but given that many Indian tribes in 1978 were unprepared to handle the influx of cases, Congress instead opted:

to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal

standards for the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.<sup>56</sup>

The Act established a “dual jurisdiction scheme,” whereby the tribal courts would have exclusive jurisdiction to adjudicate Indian children domiciled in Indian Country and presumptive jurisdiction to adjudicate Indian children domiciled outside of Indian Country.<sup>57</sup>

The Department of Justice argued that the Act, as applied to Indian children living far off the reservation, could violate the Tenth Amendment:<sup>58</sup>

As we understood [25 U.S.C. § 1915], it would, for example, impose those detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedure otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that Congress might impose such requirements on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280, we are not convinced that Congress’ power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so

attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by [25 U.S.C. § 1915].<sup>59</sup>

Of course, Congress attempted to rectify the alleged constitutional infirmity by relying upon more than just the Indian Commerce Clause,<sup>60</sup> but the Department of Justice's Tenth Amendment concerns require additional contemplation.

### **The Strange Case of Indian Tribes and the Tenth Amendment**

The Tenth Amendment has served as both a weak or nonexistent restriction on Congress's authority under the Commerce Clause or a relatively powerful one, depending on the era. From the last decades of the 19th century until 1937, the Supreme Court often relied upon the Tenth Amendment to limit Congressional power to regulate commerce.<sup>61</sup> The strongest statement of states' rights during that period came in *The Child Labor Case* (*Hammer v. Dagenhart*),<sup>62</sup> where the Court struck down a federal statute banning the shipment of good made by children working more than eight hours a day or six days a week. The Court noted that if it upheld federal authority to regulate child labor "all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."<sup>63</sup> But in *United States v. Darby*,<sup>64</sup> the Court noted that the Tenth Amendment's limitation on Congress power under the Commerce Clause was a "truism."<sup>65</sup> From 1937 until 1995, the Court had not struck down a single federal statute regulating commerce, even that which on the surface appeared to be completely internal commerce<sup>66</sup> or involved subject matters often considered to be matters of exclusively state control.<sup>67</sup> The Court adopted a



permissive rule whereby the Court would not inquire into Congressional authority under the Commerce Clause so long as there was a rational basis to link the Congressional action to commerce.<sup>68</sup>

In 1995, the Court struck down aspects of a federal gun control act criminalizing the possession of guns near public schools.<sup>69</sup> In 2000, the Court struck down a federal statute imposing criminal penalties on individuals who committed violence motivated by the gender of the victim.<sup>70</sup> While the Court in both of these cases referenced the Tenth Amendment's reservation of state power to regulate family affairs,<sup>71</sup> neither relied on a Tenth Amendment bar. The Court articulated a new rule: "[T]he proper test requires an analysis of whether the regulated activity 'substantially effects' interstate commerce."<sup>72</sup>

In addition, the Court in recent decades has resurrected the Tenth Amendment from its status as "truism." In *Gregory v. Ashcroft*,<sup>73</sup> the Court noted that the Tenth Amendment, alongside the Guarantee Clause, authorizes the states "to determine the qualifications of their most important government officials"<sup>74</sup> – in that case, state judges, which had the effect of barring the application of the federal Age Discrimination in Employment Act of 1967 to those judges.<sup>75</sup> The next Term, in *New York v. United States*,<sup>76</sup> the Court struck down a federal statute offering incentives to states to adopt a rigorous regulating scheme relating to low-level radioactive waste.<sup>77</sup>

*New York* offered a spin on the *Darby* Court's labeling of the Tenth Amendment as a truism that turned a "tautology" into a relatively powerful limit on Congressional authority, one that only the Court could constitutionally identify. First, the Court agreed with the *Darby* Court.<sup>78</sup> Next, the Court noted that the Tenth Amendment does serve as a "limit" that "restrains the power of Congress."<sup>79</sup> Of course, Justice O'Connor's majority

opinion implicitly reserved to the Supreme Court the authority to determine whether the Federal Government exceeded the limits of the Tenth Amendment.<sup>80</sup> The *New York* Court adopted an “anti-commandeering” rule as the standard for when Congress has violated the Tenth Amendment: “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”<sup>81</sup> The Court added, in an attempt at clarification, that “[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to govern according to Congress’ instructions.”<sup>82</sup> The Court concluded, “We have always understood that even where Congress has authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”<sup>83</sup>

The question, then, under the Court’s Tenth Amendment jurisprudence after *New York* might be whether the Indian Child Welfare Act could be said either to commandeer the regulatory mechanisms of the States or to require the States to adopt a particular regulatory mechanism. It is debatable, perhaps, whether a jurisdictional scheme and minimum federal standards relating to the placement of Indian children amount to a “commandeering” of state regulatory mechanisms, but that statement of the law is incomplete without a reminder that the Tenth Amendment and Congressional authority under the Indian Commerce Clause simply does not match up.

The Tenth Amendment would reserve the powers and authorities of the states absent a particular provision in the Constitution granting that power to the federal government. In many areas, such as commerce or taxation, the federal government and

the states retain a concurrent power, subject to the Supremacy Clause.<sup>84</sup> But what about situations where the Constitution reserves *no* powers and authorities to the states? There are at least two such areas and they are somewhat related: Foreign Affairs and Indian Affairs. It is well-settled that no foreign affairs powers are reserved to the states under the Constitution.<sup>85</sup>

It is equally well-settled that no Indian affairs powers are reserved to the states. As James Madison lamented in Federalist No. 42:

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.<sup>86</sup>

One of the flaws of the Constitution identified by Madison was the problem of the proviso in Article IX, clause 4 of the Articles of Confederation relating to Indian tribes. The whole clause read: “The United States in Congress assembled shall also have the sole and exclusive right and power of ... regulating the trade and managing all affairs with the 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....*”<sup>87</sup> The proviso to the grant of authority to Congress to deal in Indian affairs exclusively undermined the purpose of the exclusive grant, rendering the entire provision “incomprehensible” to Madison.<sup>88</sup> As implied earlier, the solution proposed by Madison during the 1787 Constitutional Convention was to eliminate the states from the question of Indian affairs in the entirety.<sup>89</sup> The Supreme Court’s decisions in the field of the Tenth Amendment and Indian affairs are uniform: The States have no authority (except that expressly granted by Congress) in Indian affairs.<sup>90</sup>

Regardless of whether one views Congressional authority under the Commerce Clause as sufficient to enact the Indian Child Welfare Act, the Tenth Amendment poses *no bar whatsoever* on Congressional authority under the Indian Child Welfare Act. As the Court stated decisively in *Seminole Tribe of Florida v. Florida*, “[T]he States ... have been divested of virtually all authority over Indian commerce and Indian tribes.”<sup>91</sup> In short, in this unique area of federal law, the Supreme Court cannot use its power to interpret the Tenth Amendment to restrict any action of Congress under the Indian Commerce Clause.<sup>92</sup>

Nevertheless, California appellate courts followed the lead of the 1978 Department of Justice letter and applied the Tenth Amendment to hold that ICWA was

unconstitutional as applied to certain off-reservation Indian children.<sup>93</sup> These courts held, as the Justice letter suggested, that Congress's interest (and by logical extension, the tribe's interest) in Indian children domiciled far from their tribe's lands does not outweigh the state's interest in adjudicating the children.<sup>94</sup> But the federal or tribal "interest" in Indian children, regardless of where they are domiciled, is irrelevant in the original understanding of the Indian Commerce Clause.<sup>95</sup> Congress – and only Congress – has the authority to determine who is an Indian or not for purposes of national legislation on Indian affairs.<sup>96</sup> Since the Tenth Amendment reserves nothing to the states and, more importantly, *grants nothing* to the states,<sup>97</sup> its presence in the Commerce Clause equation is eliminated. In fact, several courts have rejected Tenth Amendment challenges to ICWA.<sup>98</sup> But they have done so with little or no analysis of the original understanding of the Indian Commerce Clause and its relationship to the Tenth Amendment.

### **The Constitutionality of ICWA under the Original Public Meaning of the Indian Commerce Clause**

With the Tenth Amendment out of the picture, the question of whether Congress's authority under the Indian Commerce Clause is sufficient to enact the Indian Child Welfare Act becomes a much simpler task. Under the Interstate Commerce Clause, the test applied by the Supreme Court – with the Tenth Amendment's reservation of states' rights built in – is "whether the regulated activity "substantially affects" interstate commerce."<sup>99</sup> But since that test assumed that states' rights have a role to play in the

equation, it should not be applicable in the analysis of whether ICWA is constitutional under the Indian Commerce Clause.

The general test that the Supreme Court adopted and applied as to whether an act of Congress was authorized by the Indian Commerce Clause is the so-called “rational basis test.”<sup>100</sup> According to the Court, so long as the statute is rationally related to the “fulfillment of Congress’ unique obligation toward the Indians...”<sup>101</sup> the exercise of Congressional authority is authorized by the Constitution. If we were to tweak this test to conform to the original public meaning of the Indian Commerce Clause, we would have to take into consideration, for example, how the First Congress understood the extent of Congressional power under the Indian Commerce Clause. The First Congress enacted the Trade and Intercourse Act of 1790, extending federal criminal law and jurisdiction into Indian Country as applied to non-Indian and Indian crimes, which in turn implicitly defined “Indian Commerce” to include not only economic intercourse, but also social interactions between Indians and non-Indians. As explained above, the original understanding of “Commerce” under the Interstate and Foreign Commerce Clauses differs substantially from “Indian Commerce.” The question then is whether Congress could have rationally believed that the removal and placement of Indian children is a question of “Indian Commerce.”

This restatement of the test is not so dissimilar from the Interstate and Foreign Commerce Clause test that the Supreme Court adopted and applied from 1937 to 1995. The Court “defer[red] to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce ‘if there is any rational basis for such a finding.’”<sup>102</sup> According to Justice Souter’s dissent in *Lopez*, the

Court deferred to Congress because “it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices.”<sup>103</sup> Of course, Justice Souter’s formulation of past Commerce Clause doctrine appeared in a dissent to a case that apparently wiped away much of that deference.<sup>104</sup>

But the Indian Commerce Clause is different. Given that the Framers intended and the First Congress understood that the states should have no role whatsoever (absent Congressional consent) in the field of Indian affairs, Supreme Court deference to the actions of Congress under the Indian Commerce Clause should be at its “zenith.”<sup>105</sup> And Supreme Court deference from long before the time of *Kagama* until the advent of the Rehnquist Court was all but absolute, with the Court often refusing to question the exercise of Congressional (and delegated Executive branch) Indian affairs powers, labeling its exercise a non-justiciable political question.<sup>106</sup> It would be a monumental misreading of history for an originalist judge to disregard the difference between the Indian Commerce Clause and the rest of the Commerce Clause. There is no serious doubt that the First Congress would have viewed ICWA as applied on or near reservation land as well within the purview of Indian Commerce.

But the more difficult question is whether the original public meaning of the Indian Commerce Clause supports the application of ICWA to Indian children with a nominal tie to Indian Country. This was the exact concern posed by the Department of Justice in 1978 and by the California appellate court in 2001.<sup>107</sup> The argument goes like this: ICWA applies to an Indian child domiciled far from Indian Country, who is eligible

for membership in an Indian tribe, but who perhaps has never lived in or even visited his reservation.<sup>108</sup> The state or the child’s advocate argues that the definition of “Indian child” is overinclusive, meaning that it includes within its grasp children who are not really Indians. These children should be adjudicated in state courts as would other non-Indian children. ICWA amounts to an intrusion into Tenth Amendment-reserved states’ rights.<sup>109</sup> Of course, this exact theory was advanced by the State of Mississippi in *United States v. John* – and the Court rejected the claim.<sup>110</sup> There, the State “suggest[ed] that since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians.”<sup>111</sup> Moreover, an understanding of the original relationship between the Indian Commerce Clause and the Tenth Amendment undermines this argument.

There is a different way to view this claim from an originalist perspective. Consider that the Constitution assumes at least two classes or categories of Indians – “Indians not taxed”<sup>112</sup> and, presumably, “Indians taxed.”<sup>113</sup> Indians not taxed were excluded from the population count for purposes of representation, but neither class could vote regardless.<sup>114</sup> The claim that some Indians have “assimilated” and are therefore under state jurisdiction (reserved by the Tenth Amendment) ignores the fact that Congress has *exclusive* authority as of the ratification to determine who is an Indian (Not Taxed) and who is not (Taxed).<sup>115</sup> Consider for example the Stockbridge-Munsee Community in Wisconsin.<sup>116</sup> The tribe agreed in 1735 to settle in a small community in western Massachusetts, a praying town.<sup>117</sup> Around 1831, the tribe agreed to remove west to Wisconsin.<sup>118</sup> In 1843, Congress disestablished the tribe and subjected its members to



state jurisdiction.<sup>119</sup> A mere three years later, Congress repealed the 1843 act and restored the tribe's status as an Indian tribe, presumably restoring their "Indians Not Taxed" status.<sup>120</sup> State courts and state officers are simply not authorized to make their own determination about who is an Indian and who is not, especially when the program or policy the states are interpreting is not their own.<sup>121</sup>

## Conclusion

Although Congress hedged its bet when it listed more than the Indian Commerce Clause alone as its stated sources of constitutional authority to enact the Indian Child Welfare Act, there was ample authority in the clause. The Indian Commerce Clause is to be interpreted differently from the Interstate and Foreign Commerce Clauses. Both the original intent of the Framers and the original public meaning of the Indian Commerce Clause compel this result. A resort to the Tenth Amendment reservation of non-enumerated rights does nothing to reduce Congressional authority under the Indian Commerce Clause because all historical evidence points to an inescapable conclusion – the original intent and meaning of the Indian Commerce Clause was to make Congressional authority plenary and *exclusive* as to the states.

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<sup>1</sup> Pub. L. 95-608, 92 Stat. 3069 (1978), *codified as amended at* 25 U.S.C. § 1901 et seq.

<sup>2</sup> 490 U.S. 30 (1989).

<sup>3</sup> *E.g.*, In re Bridget R., 41 Cal. App. 4th 1483, 1510-11 (1996). *Cf.* Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1136-38 (Cal. 2006) (applying the Tenth Amendment in conjunction with the Guarantee Clause to find a waiver of tribal sovereign immunity).

<sup>4</sup> *E.g.*, Carole E. Goldberg, *Decent into Race*, 49 UCLA L. REV. 1373 (2002); Cheyaña L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 755-57 (2006); Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and*

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*Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647, 672-87 (1997). For a view that ICWA violates the due process and equal protection clauses, see Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 543 (1996).

<sup>5</sup> CONST. art. I, § 8, cl. 3.

<sup>6</sup> See 25 U.S.C. § 1901(1) (relying upon the Indian Commerce Clause “and other constitutional authority” for the plenary power of Congress in Indian Affairs); 25 U.S.C. § 1901(2) (“Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources....”).

<sup>7</sup> See Morton J. Horowitz, *Foreward—The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993).

<sup>8</sup> See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

<sup>9</sup> See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 38-39, 179, 213-15 (2007); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 36-37 (2005); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, in *MODERN CONSTITUTIONAL THEORY: A READER* 92, 92-100 (John H. Garvey, T. Alexander Aleinikoff & Daniel A. Farber eds., 5th ed. 2004). Cf. ANTONIN SCALIA, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 137, 139 (1997) (asserting that originalism should be used to prevent the judicial creation of “novel” constitutional rights).

<sup>10</sup> See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 117 (2006).

<sup>11</sup> See Erwin Chemerinsky, *A Well-Regulated Right to Bear Arms*, WASH. POST, March 14, 2007, at A15 (“Each side of the debate marshals impressive historical arguments about what ‘militia’ and ‘keep and bear arms’ meant in the late 18th century. In the past few years, two other federal courts of appeals exhaustively reviewed this history, and one determined that the Framers intended the individual rights approach, while the other read history as supporting the collective rights approach.”).

<sup>12</sup> E.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 100-09 (2004).

<sup>13</sup> See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution* (March 9, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969675](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969675).

<sup>14</sup> E.g., *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring) (quoting several dictionaries contemporaneous to the ratification of the Constitution as evidence of the original meaning of “commerce”).

<sup>15</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885-86 (1985). Professor Powell’s paper is a landmark critique of originalism. See Mary L. Dudziak, *Legal History Blog*, *Remembering Powell on the Original Understanding of Original Intent*, available at <http://legalhistoryblog.blogspot.com/2007/03/remembering-powell-on-original.html>.

<sup>16</sup> 118 U.S. 375 (1886).

<sup>17</sup> *Kagama*, 118 U.S. at 385.

<sup>18</sup> *Kagama*, 118 U.S. at 378-79.

<sup>19</sup> *Kagama*, 118 U.S. at 379-80.

<sup>20</sup> See generally Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203, 223-26 (1981).

<sup>21</sup> JED RUBENFELD, *REVOLUTION BY JUDICIARY* 5 (2006).

<sup>22</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, *supra* note \_\_, at 3, 23-25.

<sup>23</sup> See generally CHARLES BLACK, *STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW* (1969); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

<sup>24</sup> This is a canon of construction known as *ejusdem generis* – “of the same sort.” Scalia, *supra* note \_\_, at 26.

<sup>25</sup> See Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1087-90 (2004); see also Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1167 (2003) (“One might expect that the Indian commerce subpart would be read in a

similar manner as its counterparts.”); *id.* at 1168 (noting that the Court’s Indian Commerce Clause jurisprudence has only been established by “judicial fiat”). *Cf.* *United States v. Lara*, 541 U.S. 193, 215, 224 (2004) (Thomas, J., concurring in the judgment) (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)); *id.* at 584-93 (Thomas, J., concurring))

<sup>26</sup> See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 467-68 (1941); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (noting in dicta that “the Interstate Commerce and Indian Commerce Clauses have very different applications”).

<sup>27</sup> Abel, *supra* note \_\_\_, at 467.

<sup>28</sup> Abel, *supra* note \_\_\_, at 467 (citing ARTICLES OF CONFEDERATION art. IX(4)) (emphasis added). The “qualification” referred to by Professor Abel is the notorious proviso in the Indian Affairs clause reserving some state authority that so infuriated James Madison. See THE FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed. 1961) (referring to the proviso as “absolutely incomprehensible”); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Madison) (Max Farrand rev. ed. 1937) (Yale University Press 1966) (“By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them.”).

<sup>29</sup> See 2 RECORDS, *supra* note \_\_\_, at 324 (Madison).

<sup>30</sup> Abel, *supra* note \_\_\_, at 467-68 (citing 2 RECORDS, *supra* note \_\_\_, at 321 (Journal)) (other footnotes omitted).

<sup>31</sup> Abel, *supra* note \_\_\_, at 468.

<sup>32</sup> See Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1342 (1934).

<sup>33</sup> Stern, *supra* note \_\_\_, at 1342.

<sup>34</sup> Stern, *supra* note \_\_\_, at 1342 n. 27.

<sup>35</sup> Act of July 22, 1790, 1 STAT. 137 (1789-1799), codified as amended at 25 U.S.C. § 177 (hereinafter Trade and Intercourse Act of 1790).

<sup>36</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[2], at 37 (Nell Jessup Newton et al. eds. 2005) (citing FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 30 (1984)).

<sup>37</sup> Akhil Reed Amar, *America’s Constitution and the Yale School of Interpretation*, 115 YALE L. J. 1997, 2004 n. 25 (2006) (citation omitted); see also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 108 n. (2005) (“It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—‘intercourse’—with Indians.... Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands.”) (citing Trade and Intercourse Act of 1790).

<sup>38</sup> Jerry L. Mashaw, *Recovering American Administrative Law, 1787-1801*, 115 YALE L. J. 1256, 1300 (2006).

<sup>39</sup> See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)). See generally *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *Boggs v. Boggs*, 520 U.S. 833, 861 (1997) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 564 (1995).

<sup>40</sup> 490 U.S. 30 (1989); Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J. L. PUB. POL’Y 551, 564 (2000) (citing *Lopez*, 514 U.S. at 564).

<sup>41</sup> *Holyfield*, 490 U.S. at 33-36.

<sup>42</sup> Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and for Other Purposes, H.R. Rep. 95-1386, at 9 (July 24, 1978); see also *Holyfield*, 490 U.S. at 32-33 (citing Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. at 15 (1974) (hereinafter 1974 Hearings) (Statement of William Byler)).

<sup>43</sup> H.R. Rep. 95-1386, at 9; see also *Holyfield*, 490 U.S. at 33 (citing 1974 Hearings, *supra* note \_\_\_, at 75-83).

<sup>44</sup> H.R. Rep. 95-1386, at 9.

<sup>45</sup> H.R. Rep. 95-1386, at 9.

<sup>46</sup> See 25 U.S.C. § 1901(4) (“[A]n 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

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an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions....”).

<sup>47</sup> H.R. Rep. 95-1386, at 10.

<sup>48</sup> H.R. Rep. 95-1386, at 10.

<sup>49</sup> H.R. Rep. 95-1386, at 10.

<sup>50</sup> H.R. Rep. 95-1386, at 11.

<sup>51</sup> H.R. Rep. 95-1386, at 11.

<sup>52</sup> *Holyfield*, 490 U.S. at 33 n. 1 (quoting 1974 Hearings, *supra* note \_\_, at 46 (Statement of Dr. Joseph Westermeyer, University of Minnesota social psychiatrist)).

<sup>53</sup> *Holyfield*, 490 U.S. at 34 (quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2nd Sess. 193 (1978) (Statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen’s Association)).

<sup>54</sup> 124 CONG. REC. 38102 (1978), *quoted in Holyfield*, 490 U.S. at 34 n. 3; *see also* 25 U.S.C. § 1901(3) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children....”).

<sup>55</sup> 25 U.S.C. § 1901(5).

<sup>56</sup> H.R. Rep. 95-1368, at 8.

<sup>57</sup> 25 U.S.C. § 1911.

<sup>58</sup> *See* H.R. Rep. 95-1368, at 38, 40 (reprinting Letter from Patricia M. Wald, Assistant Attorney General, United States Dept. of Justice, to Hon. Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, House of Representatives (May 23, 1978) (hereinafter Wald Letter). Ms. Wald served as a judge on the D.C. Circuit from 1979 to 1991.

<sup>59</sup> H.R. Rep. 95-1368, at 40 (citing H.L.A. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

<sup>60</sup> *See* 25 U.S.C. §§ 1901(1)-(2).

<sup>61</sup> *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.3, at 253 (3rd ed. 2006).

<sup>62</sup> 247 U.S. 251 (1918).

<sup>63</sup> *Hammer*, 247 U.S. at 276.

<sup>64</sup> 312 U.S. 100 (1941).

<sup>65</sup> *Darby*, 312 U.S. at 124 (“The amendment states but a truism that all is retained which has not been surrendered.”); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833) (“Th[e Tenth Amendment] is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.”), *quoted in* *New York v. United States*, 505 U.S. 144, 156 (1992).

<sup>66</sup> *E.g.*, *Katzenbaugh v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Fainblatt*, 306 U.S. 601 (1939).

<sup>67</sup> *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>68</sup> *See Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981); CHERMERINSKY, *supra* note \_\_, § 3.3.4, at 259-63.

<sup>69</sup> *United States v. Lopez*, 514 U.S. 549 (1995)

<sup>70</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>71</sup> *See Morrison*, 529 U.S. at 615-16; *Lopez*, 514 U.S. at 564.

<sup>72</sup> *Lopez*, 514 U.S. at 559; CHERMERINSKY, *supra* note \_\_, § 3.3.5 at 264-69.

<sup>73</sup> 501 U.S. 452 (1991).

<sup>74</sup> *Gregory*, 501 U.S. at 463.

<sup>75</sup> *See Gregory*, 501 U.S. at 470. The Court did not strike down the statute but instead held on narrower grounds that the language of the statute was ambiguous as to its application to state judges, allowing the Court to read the statute narrowly to avoid the constitutional complications. *See id.*

<sup>76</sup> 505 U.S. 144 (1992).

<sup>77</sup> *See New York*, 505 U.S. at 151-54, 188.

<sup>78</sup> *New York*, 505 U.S. at 156 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)); *see also id.* at 156-57 (“The Tenth Amendment ... is essentially a tautology.”).

<sup>79</sup> *New York*, 505 U.S. at 156; *see also id.* at 157 (“[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”).

<sup>80</sup> *See New York*, 505 U.S. at 157 (“The Tenth Amendment thus directs *us* to determine ... whether an incident of state sovereignty is protected by a limitation on an Article I power.”) (emphasis added).

<sup>81</sup> *New York*, 505 U.S. at 161 (bracket in original) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

<sup>82</sup> *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

<sup>83</sup> *New York*, 505 U.S. at 166 (citing *FERC v. Mississippi*, 456 U.S. 742, 762-66 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288-89 (1981); *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)).

<sup>84</sup> *See generally* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>85</sup> *See generally* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 83-148 (2d ed. 1996).

<sup>86</sup> FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed. 1961).

<sup>87</sup> ARTICLES OF CONFEDERATION art. IX, cl. 4 (emphasis added).

<sup>88</sup> FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed. 1961).

<sup>89</sup> *See Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (“The ambiguous phrases which follow the grant of power to the United States, 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 report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. 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 Indiana. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.”). *See generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1098-1164 (1994).

<sup>90</sup> *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985). *Cf. United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) (holding that Congressional authority under the Indian Commerce Clause is exclusive).

<sup>91</sup> *Seminole Tribe*, 517 U.S. at 62.

<sup>92</sup> Of course, the California Supreme Court has interpreted the Tenth Amendment in conjunction with the Guarantee Clause to hold that tribal sovereign immunity is no defense where a tribe refuses to comply with a state campaign contribution law. *See Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1135-39 (Cal. 2006). ICWA could not be construed in any way as implicating the Guarantee Clause. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>93</sup> *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 731 (Cal. App. 2001); *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (1996). The California legislature attempted to overrule *Bridget R.*, *see* CAL. WELF. & INST. CODE § 360.6, but the *Santos Y.* Court reached the same result regardless, *see Santos Y.*, 112 Cal. Rptr. 2d at 722.

<sup>94</sup> *See Santos Y.*, 112 Cal Rptr. 2d at 731.

<sup>95</sup> *Cf. United States v. John*, 437 U.S. 634, 652-53 (1978) (holding that the exercise of state jurisdiction over “assimilat[ed]” Indians does not deprive the federal government of authority under the Indian Commerce Clause).

<sup>96</sup> *See Miami Nation of Indians of Indiana, Inc. v. United States Dept. of Interior*, 255 F.3d 342, 346-47 (7th Cir. 2001) (Posner, J.), *cert. denied*, 534 U.S. 1129 (2002); STEVEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 18 (3rd ed. 2002).

<sup>97</sup> *Agua Caliente Band of Cauhilla Indians v. Superior Court*, 148 P.3d 1126, 1143 (Cal. 2006) (Moreno, J., dissenting) (citing *Carcieri v. Norton*, 290 F. Supp. 2d 167, 189 (D. R.I. 2003); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 153-54 (D. D.C. 2002)).

<sup>98</sup> *E.g.*, *In re Bird Head*, 331 N.W.2d 785, 792-93 (Neb. 1983) (Colwell, D.J., dissenting) (raising Tenth Amendment claim in dissent); *In re A.B.*, 663 N.W.2d 625, 636-37 (N.D. 2003), *cert. denied sub nom.*, *Hoots ex rel. A.B. v. K.B.*, 541 U.S. 972 (2004); *In the Matter of the Guardianship of D.L.L. & C.L.L.*, 291 N.W.2d 278, 280-81 (S.D. 1980). *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note \_\_\_, § 11.06, at 849-850.

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- <sup>99</sup> *United States v. Lopez*, 514 U.S. 549, 559 (1995).
- <sup>100</sup> *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977). *Cf. Morton v. Mancari*, 417 U.S. 535, 555 (1974) (applying rational basis scrutiny to an Indian preference in employment regulation because the regulation was based on a political, rather than racial, classification).
- <sup>101</sup> *Weeks*, 430 U.S. at 85 (quoting *Mancari*, 417 U.S. at 555).
- <sup>102</sup> *United States v. Lopez*, 514 U.S. 549, 603 (Souter, J., dissenting) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964); *Katzenbaugh v. McClung*, 379 U.S. 294, 303-04 (1964).
- <sup>103</sup> *Lopez*, 514 U.S. at 604 (Souter, J., dissenting) (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-16 (1993)).
- <sup>104</sup> *Cf. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 93-94* (2003) (arguing that the Court will defer less to Congress where it acts beyond its explicit enumerated powers).
- <sup>105</sup> *Cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2825 (2006) (Thomas, J., dissenting) (arguing that the Court’s deference to the President during wartime is at its “zenith”).
- <sup>106</sup> *E.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911); *United States v. Kagama*, 118 U.S. 375, 383 (1886); *United States v. Holliday*, 70 U.S. 407, 419 (1865).
- <sup>107</sup> *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 731 (Cal. App. 2001); Wald Letter, *supra* note \_\_.
- <sup>108</sup> 25 U.S.C. § 1903(4) (defining “Indian child”).
- <sup>109</sup> Variants of this argument are the equal protection and due process claims whereby the California courts held that the only reason children in this category are subjected to ICWA’s restriction state jurisdiction and different standards is race, necessitating, in the court’s view, strict scrutiny analysis. *See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra* note \_\_, § 11.06, at 851-52.
- <sup>110</sup> 437 U.S. 634, 652-53 (1978).
- <sup>111</sup> *John*, 437 U.S. at 652.
- <sup>112</sup> CONST. art. I, § 2, cl. 3.
- <sup>113</sup> *See Elk v. Wilkins*, 112 U.S. 94, 112 (1884) (Harlan, J., dissenting) (“At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, § 3, which requires, in the apportionment of representatives and direct taxes among the several states ‘according to their respective numbers,’ the exclusion of ‘Indians not taxed.’ This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country.”).
- <sup>114</sup> *See, e.g., Ann Marie Plane & Gregory Button, The Massachusetts Indian Enfranchisement Act: Ethnic Contest in Historical Context, 1849-1869*, 40 ETHNOHISTORY 587 (1993); Orlan J. Svingen, *Jim Crow, Indian Style*, 11 AM. INDIAN Q. 275, 275 (1987). *Cf. Elk*, 112 U.S. at 109 (holding that an Indian could not become a citizen without an Act of Congress or a treaty right expressly stating so); *Scott v. Sanford*, 60 U.S. 393, 404 (1856) (“[The Indian race], it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws.”).
- <sup>115</sup> *E.g., Caleb Cushing, Relation of Indians to Citizenship*, 7 Op. Atty. Gen. 746, 750 (1856) (citing statutes and treaties making certain Indians American citizens, including the Stockbridge Indians).
- <sup>116</sup> *See Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698 (W.D. Wis. 2003).
- <sup>117</sup> *See Stockbridge-Munsee Community*, 366 F. Supp. 2d at 703.
- <sup>118</sup> *See Stockbridge-Munsee Community*, 366 F. Supp. 2d at 703-04.
- <sup>119</sup> *See Stockbridge-Munsee Community*, 366 F. Supp. 2d at 704; Act of March 3, 1843 § 7, 5 STAT. 645, 647 (1843).
- <sup>120</sup> *See Stockbridge-Munsee Community*, 366 F. Supp. 2d at 704; Act of August 6, 1846, 9 STAT. 55 (1846) (restoring the Stockbridge Indians “to their ancient form of government, with all powers, rights, and privileges, held by them under their customs and usages, as fully and completely as though the [1843] act had never been passed”).
- <sup>121</sup> *Cf. PEVAR, supra* note \_\_, at 18.