GREGG COSTA, *Circuit Judge*, concurring in part and dissenting in part, with whom CHIEF JUDGE OWEN joins as to Parts I and II(A) and the final paragraph of Part II(B), with whom JUDGES WIENER and HIGGINSON join, with whom JUDGE DENNIS joins as to Part II, and with whom JUDGE SOUTHWICK joins as to part I:

Congress passed the Indian Child Welfare Act of 1978 on voice votes, a procedure typically reserved for noncontroversial legislation. The law continues to enjoy bipartisan support. *See* Brief of Members of Congress as Amici Curiae in Support of Defendants-Appellants and Reversal. Leading child welfare organizations believe the law "embodies and has served as a model for the child welfare policies that are [the] best practices generally" and reflects "the gold standard for child welfare policies and practices in the United States." Brief of Casey Family Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae in Support of Appellants at 2; Letter from Child Welfare Advocates to Elizabeth Appel, Off. of Regul. Aff. & Collaborative Action, U.S. Dep't of Interior (May 19, 2015), http://www.nativeamericanbar.org/wp-content/uploads/2014/01/CFP-et-al-Support-Letter-Re-Proposed-ICWA-Regulations.pdf.

Yet more than four decades into its existence, a federal district court held key parts of the law unconstitutional. That facial invalidation is contrary to the longstanding views of state courts, where adoption proceedings of course take place.[1] It is ironic that a federal court saw infringements on state sovereignty that the state courts themselves have not seen.

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[1] *See, e.g., In re K.M.O.*, 280 P.3d 1203, 1214–15 (Wyo. 2012); *In re Phoenix L.*, 708 N.W.2d 786, 795–98 (Neb. 2006); *In re Baby Boy L.*, 103 P.3d 1099, 1106–07 (Okla. 2004); *In re A.B.*, 663 N.W.2d 625, 634–37 (N.D. 2003), *cert. denied*, 541 U.S. 972 (2004); *Ruby A. v. State, Dep't of Health & Soc. Servs.*, 2003 WL 23018276, at *4–5 (Alaska Dec. 29, 2003); *In re Marcus S.*, 638 A.2d 1158, 1158–59 (Me. 1994); *In re Armell*, 550 N.E.2d 1061, 1067–68 (Ill. App. Ct. 1990), *cert. denied*, 498 U.S. 940 (1990); *In re Miller*, 451 N.W.2d 576, 578–79 (Mich. Ct. App. 1990) (per curiam); *In re Application of Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983); *In re Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). *But see In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. Ct. App. 2001) (upholding "as applied" constitutional challenges to ICWA when the child had never been part of an Indian home).

I.

Such ironies abound in this case. The most astonishing irony results from this being a federal court challenge to laws that apply in state adoption proceedings. It will no doubt shock the reader who has slogged through today's lengthy opinions that, at least when it comes to the far-reaching claims challenging the Indian Child Welfare Act's preferences for tribe members, this case will not have binding effect in a single adoption. That's right, whether our court upholds the law in its entirety or says that the whole thing exceeds congressional power, no state family court is required to follow what we say. *See, e.g., Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (noting that Texas state courts are "obligated to follow only higher Texas courts and the United States Supreme Court"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (recognizing that state courts "render binding judicial decisions that rest on their own interpretations of federal law").

There is a term for a judicial decision that does nothing more than opine on what the law should be: an advisory opinion. That is what the roughly 300 pages you just read amount to.

The rule that federal courts cannot issue advisory opinions is as old as Article III. *See Hayburn's Case*, 2 Dall. 409, 410 n.* (1792); 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (Johnston ed. 1891) (August 8, 1793, letter from Chief Justice Jay refusing to give the Washington Administration advice on legal questions relating to war between Great Britain and France); *see also Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" (quoting CHARLES ALAN WRIGHT, FEDERAL COURTS 34 (1963))). Early courts could just call such a case what it was—a request for an advisory opinion, *see, e.g.*, *Muskrat v. United States*, 219 U.S. 346, 361–63 (1911); *United States v. Ferreira*, 54 U.S. 40, 51–52 (1851); *Hayburn's Case*, 2 Dall. at 410 n.*. The modern rise of public law litigation resulted in the development of doctrines likes standing, ripeness, and mootness to enforce

the "case or controversy" requirement. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (noting that the Supreme Court did not use the word "standing" until 1944 (citing *Stark v. Wickard*, 321 U.S. 288 (1944))). This compartmentalization of justiciability law risks losing the forest for the trees. Justiciability doctrines, with their various elements and exceptions, have one underlying aim: ensuring federal courts only hear cases that actually decide concrete disputes. Decide is the key word here. When a judicial opinion does not actually resolve a dispute, it has no more legal force than a law review article.

The modern doctrinal box most concerned with weeding out advisory opinions is the redressability element of standing. "Satisfaction of this requirement ensures that the lawsuit does not entail the issuance of an advisory opinion without the possibility of any judicial relief, and that the exercise of a court's remedial powers will actually redress the alleged injury." *Los Angeles v. Lyons*, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting).

The redressability requirement proves fatal to at least the equal protection claim (which is really a claim under the Fifth Amendment's Due Process Clause because ICWA is a federal law). Nothing we say about equal protection will redress the Brackeens' alleged injury of potentially being subject to preferences that would favor tribe members in the adoption of Y.R.J.[2] Their argument for redressability is that the family court judge may, or even says he will, follow our constitutional ruling. In other words, our opinion may *advise* him on how to decide the adoption case before him. This description of the plaintiffs' argument reveals why it doesn't work. Maybe the opinion will convince the family court judge, maybe it won't. The same is true for law review articles or legal briefs. But what is supposed to separate

[2] The States do not have standing to pursue the equal protection claim because they are not "persons" entitled to the protection of the Fifth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966). They thus cannot suffer an equal protection injury of their own. Indeed, neither the opinion from the three-judge panel nor the en banc majority opinion relies on the States for equal protection standing.

court decisions from other legal writings is that they actually resolve a dispute.

Yet JUDGE DENNIS's Opinion signs off on plaintiffs' redressability theory,[3] finding it sufficient that it is "'substantially likely that [a state court] would abide by an authoritative interpretation' of ICWA."[4] Dennis Op. at 45 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)); *see also id.* at 43 (stating that "the Texas trial court has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from this court"). Finding redressability based on the possibility that another court will consider the opinion persuasive would allow the requirements of standing to be satisfied by advisory opinions—the very thing that the doctrine was designed to prevent. Justice Scalia nailed the problem with this reasoning:

> If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will *always* exist. Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.

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[3] On their own, neither JUDGE DENNIS's Opinion nor JUDGE DUNCAN's Opinion garners a majority of the court to find standing for the equal protection claim. Combining the two opinions, however, a majority concludes there is standing. I thus address both opinions.

[4] Don't overlook the ellipsis—it obscures something critical. The replaced language was not referring to a "state court" that might follow the federal decision, but to "the President and other executive and congressional officials." *Franklin*, 505 U.S. at 803. That lawsuit challenging a decennial reapportionment of congressional seats was brought against the Secretary of Commerce, who was certainly bound by the judgment, and the question was whether a ruling against that Cabinet member who oversaw the census could influence the reapportionment even though the President had ultimate policymaking authority in the executive branch. Holding that the head of the relevant cabinet agency could be sued was hardly extraordinary. What is extraordinary—in fact unprecedented—is to find standing based on the chance that another court might follow the federal decision not because it has to but because it might want to.

Franklin, 505 U.S. at 825 (Scalia, J., concurring in part and in the judgment). It therefore is not enough that the family court judge has indicated he might, or even will, follow what the federal court decides.

This court has no authority to resolve whether the ICWA-mandated burden of proof will apply in the Y.R.J. adoption. The binding effect of a legal decision—in standing lingo, its ability to redress an injury—must flow from the judgment itself. *Id*; *see also United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam) (rejecting the notion that a case could be justiciable because "a favorable decision in this case might serve as useful precedent for respondent in a hypothetical [future] lawsuit"). But the Brackeens would come up short even if a decision's precedential effect could establish redressability. Texas courts do not have to follow the decisions of lower federal courts on questions of federal law.[5] *Penrod Drilling Corp.*, 868 S.W.2d at 296; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (rejecting as "remarkable" the idea that a state court must follow the precedent of lower federal courts); *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring) (explaining that "neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation").

The bottom line is that both before and after the district court held ICWA unconstitutional, the Texas judge in the Y.R.J. adoption case (or any

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[5] Apparently recognizing this problem, the Brackeens argue that "if the Supreme Court affirmed, all courts would be bound by that decision." En Banc Brief of Individual Plaintiffs 63. The argument ignores the principle explained above that redressability must come from the judgment itself as opposed to the precedential force an opinion may have.

And there is another problem with this argument, one again recognized by Justice Scalia. Standing is determined at the outset of a lawsuit, and no one then knows whether the case will be one of the rare ones that makes it to the Supreme Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (explaining that "standing is to be determined as of the commencement of suit" and "at that point it could certainly not be known that the suit would reach this Court"). If standing depended on whether the Supreme Court granted cert, then a cert denial would wipe away the years of litigation in the lower federal courts.

other) could come out either way on an equal protection claim. Indeed, the state court judge has already ruled on some of the constitutional claims presented here. *See In re Y.J.*, 2019 WL 6904728, at *1 (Tex. App.—Fort Worth, Dec. 19, 2019) (noting family court's holding that ICWA violated the anticommandeering doctrine). A petition challenging that ruling is pending with the Supreme Court of Texas. *See In re Y.J.*, Tex. S. Ct. No. 20-0081 (petition available at 2020 WL 750104). Some of the issues the petition asks the state high court to resolve will sound familiar: whether ICWA was "lawfully enacted by Congress" and whether it "discriminate[s] on the basis of race." *Id.* at 9, 13. What we think about those same issues will have no binding effect on the state courts that get to resolve the adoption, whether that be the state supreme court or the family court judge. That irrefutable point means our ruling on the lawfulness of ICWA preferences cannot redress the plaintiffs' injury.

One might wonder if the advisory nature of this case doesn't always characterize declaratory judgments. After all, "ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect." *Fidelity Nat'l Bank & Tr. Co. v. Swope*, 274 U.S. 123, 132 (1927). To be sure, there is an advisory flavor to all declaratory actions: they resolve rights in a future suit that has not yet fully materialized. Concerns that declaratory judgments were advisory led the Supreme Court to refuse to hear some claims for declaratory relief before the enactment of the Declaratory Judgment Act of 1934. *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 286–89 (1928) (Brandeis, J.) (explaining that deciding whether a lessee would have violated a lease by demolishing a building before the demolition occurred would be a "declaratory judgment[, which] relief is beyond the power conferred upon the federal judiciary"); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 76 (1927) (holding there was no jurisdiction over claim under Kentucky's declaratory-judgment law). *But see Nashville, Cent. & St. Louis Ry. v. Wallace*, 288 U.S. 249, 258, 264–65 (1933) (holding that federal courts had jurisdiction over claim brought under state declaratory-judgment law).

What saves proper declaratory judgments from a redressability problem—but is lacking here—is that they have preclusive effect on a traditional lawsuit that is imminent.[6] *See* 10B WRIGHT ET AL., *supra*, § 2771 ("A declaratory judgment is binding on the parties before the court and is claim preclusive in subsequent proceedings as to the matters declared . . . ."); *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 33. Take an insurance coverage dispute, which was the nature of the case upholding the federal Declaratory Judgment Act and remains the prototypical declaratory action today. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). A federal court's declaration, in a case between the insurer and insured, of whether there is coverage will bind those parties in a subsequent lawsuit seeking to recover on the policy. *See id.* at 239, 243–44. That "definitive determination of the legal rights of the parties" is what allows declaratory judgments in federal court. *Id.* at 241. To be justiciable, a declaratory judgment must seek "specific relief through a decree of a conclusive character." *Id.*; *accord MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). In contrast, our resolution of the equal protection question will conclude nothing.

A leading federal procedure treatise recognizes that preclusive effect is what separates a permissible declaratory judgment from an impermissible advisory opinion:

> The federal Declaratory Judgment Act provides that a declaratory judgment shall have the force and effect of a final judgment or decree. The very purpose of this remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata. Denial of any preclusive effect, indeed, would leave a

[6] The more common standing problem for declaratory judgments is whether the second lawsuit "is of sufficient immediacy and reality." *See* 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2757 (4th ed. 2020). That is part of standing's injury requirement, which requires an "actual or imminent" harm. *Lujan*, 504 U.S. at 560 (1992) (quotations omitted). The redressability problem this request for declaratory relief poses is less common but no less fundamental.

> procedure difficult to distinguish from the mere advisory opinions prohibited by Article III.

18A WRIGHT ET AL., *supra,* § 4446. This requirement explains why you will not find a declaratory judgment that lacks preclusive effect.

This case will be the first. There is no mutuality of parties, nor is the state court judge who will decide Y.R.J.'s case a party. The Brackeens have suggested that a ruling in this federal case would bind the Navajo Nation in state court. That is not true for multiple reasons. For starters, the Navajo Nation was not a party in the district court (it intervened on appeal), so standing on that basis would not have existed when the suit was filed or even when judgment was entered. *See Lujan*, 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit.").[7] Relatedly, it is doubtful that issue preclusion applies to a party that does not litigate in the trial court. Apart from these defects relating to the timing of Navajo Nation's entering this lawsuit, issue preclusion does not usually apply to pure questions of law like whether ICWA's preferences violate the Fifth Amendment. *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 288 (Tex. 2002) (explaining that "[d]eterminations of law are not generally given preclusive effect" in refusing to give effect to federal court ruling interpreting old land grant under Mexican civil law); *see also In re Westmoreland Coal Co.*, 968 F.3d 526, 532 (5th Cir. 2020); RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982); 18 WRIGHT ET AL., *supra*, § 4425, at 697-701 (all recognizing same principle). This ordinary reluctance to give preclusive effect to questions of law becomes even stronger when, as here, the two cases are in different forums and neither

[7] *Lujan* is right on point. The plaintiff sought to establish redressability by arguing that "by later participating in the suit" two federal agencies "created a redressability (and hence a jurisdiction) that did not exist at the outset." *Id*. at 569 n.4. That argument did not work because "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Id*. (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). Any claim of postfiling redressability is even weaker here because Navajo Nation did not intervene until the appeal.

jurisdiction's highest court has resolved the issue. RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) cmt. i.

JUDGE DUNCAN'S Opinion states the plaintiffs need only show that the "practical consequences" of a ruling by this court would "significantly increase the likelihood of relief." Duncan Op. at 20. Note the opinion does not say—and can't say because no case does—that redressability can be met when the "practical consequence" is convincing a state court judge to follow our lead. That distinction is critical. As I have recounted, state courts have no obligation to follow a lower federal court's ruling on federal law. In contrast, the executive branch officials sued in cases like *Franklin* would be bound in later litigation by the federal court's declaratory judgment. 505 U.S. at 803 (recognizing that the Commerce Secretary's role in "litigating [the] accuracy" of the census meant that declaratory relief against her would redress plaintiff's injuries). The *Franklin* redressability dispute was about whether the Cabinet member being sued had sufficient influence over the challenged policy even though the President had the ultimate say (as is always the case). On that question, a substantial likelihood that the Commerce Secretary could influence the census conducted by the department she headed established redressability. 505 U.S. at 803 (recognizing that it was the Commerce Secretary's "policy determination concerning the census" that was being challenged); *see also supra* note 4. *Franklin*'s unremarkable reasoning is why there is redressability for the APA claims—a declaratory judgment against the Interior Secretary would bind her when it comes to enforcing the department's challenged regulations.

But contrary to JUDGE DUNCAN'S Opinion, the Plaintiffs' standing to challenge regulations cannot bootstrap the claims challenging ICWA's *statutory* preferences into federal court. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Even without a regulation requiring "clear and convincing" evidence to justify departing from the preferences, the statutory preferences remain and must be applied by state court judges unless they hold them unconstitutional. The benefit the

individual Plaintiffs would receive from a declaration that the "clear and convincing evidence" regulation is invalid establishes redressability for the APA claim challenging that regulation; it does not show how a declaration that the underlying statutory preferences are unconstitutional would redress plaintiffs' injuries. *But see* Duncan Op. at 21–22.

JUDGE DUNCAN'S second stab at redressability also improperly cross-pollinates standing among different claims. Redressability arising from a declaration that any obligations the placement preferences impose on child welfare officials violate anti-commandeering principles at most establishes standing for that "particular claim[]," *Allen v. Wright*, 468 U.S. 737, 752 (1984), not the equal protection claim that seeks to declare unlawful the preferences as they apply in state court proceedings. *But see* Duncan Op. at 21–22. And the statutory preferences remain on the books regardless of federal funding based on ICWA compliance.[8] *But see id.* at 21.

The final redressability theory in JUDGE DUNCAN'S Opinion is that the "requested relief would make the adoptions less vulnerable to being overturned" because it "would declare unenforceable the collateral attack provisions themselves and the underlying grounds for invalidity." Duncan Op. at 21 (citing 25 U.S.C. §§ 1911-1914). This again mixes and matches claims against different provisions instead of requiring the plaintiffs to "demonstrate standing separately" for each claim. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000). More fundamentally, it brings us back to where I started: no state court judge has to follow what we say about ICWA. Consequently, even if standing to challenge the collateral review provisions somehow transfers to support standing for challenging the separate provisions establishing the preferences in the first place, no state court has to follow a "ruling" we make about the collateral review provisions.

[8] CHIEF JUDGE OWEN also correctly notes that the funding issue "was not raised or briefed in the district court or this court." Owen Op. at 5. Nor is it clear how the individual plaintiffs, as opposed to the States which cannot assert a Fifth Amendment claim, are injured by the funding issue.

To a state court judge, our "ruling" is nothing more than pontifications about the law. Perhaps our view persuades the state court, perhaps not.

So both of the opinions that find standing for the equal protection claim end up basing that view, at least in part, on the possibility that a Texas judge might decide to follow our view of the law. Think about the consequences of this unprecedented view of standing. A plaintiff need only find a state court judge who says she would defer to a federal court ruling on the difficult constitutional issue she is facing. Presto! A plaintiff could manufacture standing for a federal lawsuit even when a declaratory judgment would not have preclusive effect on any parties to the federal suit. Talk about upsetting the state/federal balance.

This license to allow outsourcing of traditional state court matters to federal court brings me back to the opening point. To supposedly vindicate federalism, we offend it by deciding questions that state court judges are equipped to decide and have for decades—with the Supreme Court having a chance to review those rulings. *See, e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (case arising in South Carolina courts); *cf. Moore v. Sims*, 442 U.S. 415, 418, 434–35 (1979) (holding that *Younger* abstention applies to family law cases). That we disregard the limits of federal jurisdiction to reach out and decide issues that are raised directly in adoption cases makes our lack of faith in our state court colleagues even more troubling. Why aren't they capable of deciding these issues that are squarely before them? Any historical and institutional concerns about state courts' willingness to vindicate federal constitutional rights are lessened when a federal statute is being challenged. If anything, state court judges would be more receptive to concerns, like the allegations plaintiffs raise here, that a federal law is interfering with constitutional protections for States and individuals.

If the case-or-controversy requirement means anything, it prevents a federal court from opining on a constitutional issue on the mere hope that some judge somewhere may someday listen to what we say. No limitation on Article III is more fundamental than our inability to issue such an advisory opinion.

II.

A.

That brings us to the most tragic irony of today's opinions. After more than two centuries of courts' recognizing sweeping federal power over Indian affairs when that power was often used to destroy tribal life, our court comes within a whisker of rejecting that power when it is being used to sustain tribal life. It would be news to Native Americans that federal authority to wage war against Indian nations, to ratify treaties laying claim to more than a billion acres of Indian land, to remove Indian communities to reservations, and to establish schools aimed at "civilizing" Indian pupils does not reach the Indian family. *See United States v. Lara*, 541 U.S. 193, 201–04 (2004); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.01–03. Contrary to what a near-majority of our court concludes, the same power Congress once relied on to tear Indian children from Indian homes authorizes Congress to enlist state courts in the project of returning them.

Two centuries of federal domination over Indian affairs are enough to sustain ICWA's provisions regulating state domestic relations proceedings. Congress has "plenary and exclusive" authority "to legislate in respect to Indian tribes." *Lara*, 541 U.S. at 200. This "broad power," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), is found in Article I, which authorizes Congress to "regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8. The Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996).

JUDGE DENNIS well articulates how federal supremacy in the field of Indian affairs grew out of the Founding generation's understanding of the relationship between the new nation and tribes. From the outset, the Continental Congress dealt with Indian tribes just as it did foreign nations, wielding an indivisible bundle of powers that encompassed war, diplomacy, and trade. En Banc Brief for Professor Gregory Ablavsky in Support of Defendants-Appellants and Reversal at 5–6. But under the Articles of

Confederation, some states claimed much of the same authority, leaving the state and federal governments jostling for control over Indian relations. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021–22 (2015) (discussing ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4). The Constitution solved this predicament by making federal authority over Indian commerce, treatymaking, and territorial administration exclusive. *Id.* The national government soon claimed, with the apparent assent of state leaders, undivided power over Indian affairs. *Id.* at 1041–44. Dennis Op. at 7–13.

The Framers grounded federal power over Indian affairs in both the explicit constitutional text and in implicit preconstitutional understandings of sovereignty.[9] Brief of Indian Law Scholars as Amici Curiae in Support of Defendants-Appellants at 1. They viewed relations between the United States and Indian tribes as governed by the law of nations. Ablavsky, *supra*, at 1059–67. Many early treaties embraced the idea that the United States, as the more powerful sovereign, owed a duty of protection to tribes. Brief of Indian Law Scholars, at 1–2 (collecting examples). And the Supreme Court emphasized that this responsibility for Indian welfare imbued the federal government with immense power at the expense of the states. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 560–61 (1832); *United States v. Kagama*, 118 U.S. 375, 384 (1886); *United States v. Rickert*, 188 U.S. 432, 437–38 (1903).

How far does this power extend? The Supreme Court has upheld federal authority to enact special criminal laws, in the name of "continued guardianship," affecting U.S. citizens who are Indian tribe members. *United States v. Nice*, 241 U.S. 591, 595–99 (1916) (construing the General Allotment

[9] Just as the Supreme Court has stressed that background principles of state sovereign immunity inform interpretation of the Eleventh Amendment, *Seminole Tribe*, 517 U.S. at 72, the Court has recognized the relevance of the historical context from which the plenary federal Indian power emerged. *See Lara*, 541 U.S. at 201 (tracing federal authority over Indian affairs to "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government"); *Morton v. Mancari*, 417 U.S. 535, 551–53 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

Act of 1887). Congress may violate treaty obligations in its disposal of tribal property, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564, 567–68 (1903) (validating congressional allotment in conflict with treaty between the United States and Kiowa and Comanche Tribes); unilaterally determine tribal membership for the purposes of administering tribal assets, *Del. Tribal Bus. Cmte. v. Weeks*, 430 U.S. 73, 84–86 (1977) (upholding statute appropriating award made by Indian Claims Commission); exercise eminent domain over tribal lands, *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656–67 (1890) (upholding legislation granting railroad right of way through Indian land); and single out Indian applicants for preferred hiring in federal jobs, *Mancari*, 417 U.S. at 551–55 (sustaining constitutionality of Indian Reorganization Act of 1934).[10]

Where do the states stand in relation to the "plenary and exclusive" federal power over Indian affairs? They are "divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe*, 517 U.S. at 62. The states, in ratifying the Constitution, ceded to Congress "the exclusive right to regulate . . . intercourse with the Indians," *Worcester*, 31 U.S. at 590, as clearly as the states gave Congress sole power to "coin money, establish post offices, and declare war," *id.* at 580–81. Even when federal policy favoring state control over Indian affairs reached its height, Congress

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[10] The Supreme Court has recognized the extraordinary breadth of federal power in another area where Congress wields plenary authority: immigration. *See* Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J. L. & PUB. AFF. 1, 34–42 (2020). The foundational cases recognizing plenary federal authority over immigration and Indian affairs were decided just three years apart and rely on similar reasoning. *Compare Chae Chan Ping v. United States*, 130 U.S. 581 (1889), *with Kagama*, 118 U.S. at 375 (1886); *see also* Doran, *supra*, at 34–36 (noting similarities in the reasoning of the cases).

There is also symmetry in the scope of federal power over these two subjects. Just as limited rational-basis review governs classifications involving tribes, the immigration power allows the federal government to discriminate among noncitizens in a way that states may not. *Compare Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (Congress may withhold Medicare eligibility from certain noncitizens), *with Graham v. Richardson*, 403 U.S. 365, 376 (1971) (states may not constitutionally deny welfare benefits to certain noncitizens); *see also* Doran, *supra*, at 36–39 & n.193 (drawing this comparison). And because "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government," "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 66–68 (1941).

withheld from the states "general civil regulatory powers . . . over reservation Indians." *Bryan v. Itasca Cty.*, 426 U.S. 373, 390 (1976) (interpreting Pub. L. 280); COHEN'S § 1.06 & n.32.

Some examples illustrate the limits of state authority to regulate Indian affairs even in core areas of state power like criminal law and taxation. Without Congress's blessing, states cannot exercise criminal jurisdiction over Indian country. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979) (discussing federal authorization of state jurisdiction under Pub. L. 280); *United States v. John*, 437 U.S. 634, 649–54 (1978) (holding state criminal jurisdiction precluded by Major Crimes Act of 1885); *Kagama*, 118 U.S. at 379–80. Congress can exempt Indians from state property taxes. *Bd. of Comm'rs of Creek Cty. v. Seber*, 318 U.S. 705, 715–18 (1943). Even when Congress has not legislated, exclusive federal authority in the domain of Indian affairs may preempt state regulation. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973) (invalidating state tax on tribe member's income earned on reservation); *Bracker*, 448 U.S. at 150–52 (striking down state tax on commercial activities of non-Indians on Indian land).

JUDGE DUNCAN's Opinion proclaims ICWA a novel exercise of congressional power because it interferes with state domestic relations proceedings. But as JUDGE DENNIS recounts, the federal government has been a constant, often deleterious presence in the life of the Indian family from the beginning. And, as will be discussed, ICWA is hardly the only statute to impose federal standards on state courts.

Congress's interest in the destiny of Indian children is older than the Republic itself. The Continental Congress viewed Indian education as a wartime strategy, authorizing a grant to Dartmouth College with the hope that bringing Indian students to the school would deter any possible attack by British-allied tribes. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 911 (2017). Following Independence, more than one hundred treaties provided for Indian education. Brief of Indian Law Scholars, at 4. But early federal

efforts to offer voluntary education programs morphed into a "coercive and destructive" system of boarding schools designed to assimilate Indian children. MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW § 3.6 (1st ed. 2017); Brief of Ablavsky, at 20. The federal government instituted its "civilization" policy by force, punishing Indian families that resisted turning over their children and hunting down the pupils who escaped. FLETCHER, FEDERAL INDIAN LAW § 3.6. At these schools, students were beaten for speaking their native languages. COHEN'S § 1.04; Dennis Op. at 21–24. While these practices have abated, federal involvement in Indian schooling has not. Under today's federal policy of Indian self-determination, Congress provides substantial funding for Indian education and continues to operate some schools with "tribal input and . . . tribal control." Fletcher & Singel, *supra*, at 964; *see also* Brief of Indian Law Scholars, at 4.

In the view of JUDGE DUNCAN's Opinion, this narrative sheds little light on whether Congress can set standards for state adoptions involving Indian children because no Supreme Court decision or "founding-era congressional practice" explicitly blesses federal intervention in state domestic relations proceedings. Duncan Op. at 2, 29. But adoption as we know it today did not exist at common law and did not become the subject of state legislation until the mid-nineteenth century. Stephen B. Presser, *The Historical Background of American Adoption Law*, 11 J. FAM. L. 443, 443 (1971). It would have been "anachronistic . . . and bizarre," in the words of one amicus, for the founding-era Congress to attempt legislative interference with state proceedings that would not exist for another eight decades. Brief of Ablavsky, at 16; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 489–90 (noting that the history of the Fourteenth Amendment was "inconclusive" on the issue of school segregation because "[i]n the South, the movement toward free common schools, supported by general taxation, had not yet taken hold" at the time of enactment). Given that "at least during the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law," it should come as no surprise that the focus of the broad federal power over

Indian affairs has shifted over time. *Lara*, 541 U.S. at 200 (internal citation omitted).

Still, JUDGE DUNCAN's Opinion declares ICWA—as a "federal Indian law [that] governs states' own administrative and judicial proceedings" for domestic relations—to be highly "unusual," and finds no historical analogue for this (highly specific) category of legislation. Duncan Op. at 2, 34. But while family court proceedings typically are governed by state law, they are not a "no fly zone" for federal interests. *See* Brief of Casey Family Programs, at 24–26 (discussing federal laws that apply in domestic relations cases). Take the Servicemember's Civil Relief Act. 50 U.S.C. §§ 3901–4043. The law sets rules governing child custody proceedings in state courts by, among other things, limiting the court's consideration of a servicemember's deployment when determining custody. *See id.* §§ 3931, 3938. In asserting a federal interest in family court proceedings, the Servicemember's Civil Relief Act is not unique. To further the federal government's treatymaking and foreign relations powers, the International Child Abduction Remedies Act charges state courts with administering the Hague Convention on the Civil Aspects of International Child Abduction to ensure "prompt return" of abducted children. *See* 28 U.S.C. §§ 9001–03. And JUDGE HIGGINSON cites several examples of federal laws that preempt state domestic relations law. Higginson Op. at 2-3 (citing cases involving ERISA, the Railroad Retirement Act, the National Service Life Insurance Act, and Homestead Act). If these statutes permissibly "govern[] states' own administrative and judicial proceedings," Duncan Op. at 2, why would Congress lack authority to do the same through its "plenary and exclusive" power over Indian affairs?

When Congress enacted ICWA, it declared the removal of Indian children from their homes by state officials "the most tragic and destructive aspect of American Indian life today." *See* H.R. Rep. No. 95-1386, at 9 (1978). Family-separation policies had "contributed to a number of problems, including the erosion of generations of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional

effects on Indian children caused by the loss of their Indian identity." Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38,864, 38, 780 (June 14, 2016) (citing *Hearing Before the Subcommittee on Indian Affairs of the Senate Comm. on Interior & Insular Affairs on Problems that Am. Indian Families Face in Raising Their Children & How These Problems Are Affected by Fed. Action or Inaction,* 93 Cong., 2d Sess., at 1–2, 45–51 (1974)). Although ICWA can never heal these wounds, it sought to stanch their bleeding. As the culmination of extensive federal involvement in the education and welfare of Indian children, the law falls well within the broad congressional power over Indian affairs.

B.

This leads to today's final irony. JUDGE DUNCAN's Opinion overrides the plenary federal power over Indian affairs, with its deep textual and historical roots, based on a principle that finds support in neither text nor history: the notion that the Constitution prohibits the federal government from granting preferences to tribe members. Rather than credit copious originalist evidence of the sweeping federal power over Indian affairs, JUDGE DUNCAN's Opinion adopts the atextual and ahistorical argument that the Fifth Amendment's implicit equal protection guarantee strips Congress of the power to enact tribal preferences. Duncan Op. at 71; *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1955) (recognizing that the Fourteenth Amendment's guarantee of "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness" than the Fifth Amendment's Due Process Clause). That is nothing new. Originalism usually goes AWOL when the issue is whether the government may grant preferences to historically disadvantaged groups. *See, e.g.,* ERIC J. SEGALL, ORIGINALISM AS FAITH 127–30 (2018); CASS R. SUNSTEIN, RADICALS IN ROBES 131–42 (2005); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 490–91 (2014); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 76 (2013); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1202–03; Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–

32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).[11]

Ignoring the lack of historical support for a constitutional ban on federal preferences to historically-disadvantaged groups is especially flagrant in light of 200-plus years of jurisprudence recognizing vast federal power over Indian affairs. As that authority flows in part from the federal government's plenary power over foreign relations, there is nothing unusual or unconstitutional about exercising it to grant preferences. Preferring some nations over others—through alliances, aid, and treaties, among other things—is the essence of foreign policy. That's why a preference for tribe members "does not constitute racial discrimination." *Mancari*, 417 U.S. 553; *see* Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 627 (2019) ("ICWA's definition of 'Indian children,' which requires either tribal citizenship or that the child has a tribal citizen parent and is eligible for citizenship, rests squarely on the kind of 'political rather than racial' belonging of which *Mancari* approved."). When Congress "single[s] out [Indians] for special treatment," it draws upon its expansive authority to structure relations between the United States and another sovereign. *Mancari*, 417 U.S. at 554–55 (describing Indians as "members of quasi-sovereign tribal entities"); *accord Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (explaining that the jurisdiction of a tribal court "does not derive from [] race . . . but rather from the quasi-sovereign status of [tribes] under federal law"). These preferences further centuries-old interests animating the federal government's "special relationship" with tribes. *Mancari*, 417 U.S. at 541–42, 552.

[11] Although Professor Rappaport recognizes that some court decisions rejecting the constitutionality of affirmative action programs "engage[] in little discussion of the constitutional text and almost no discussion of the history of the Fourteenth Amendment," he tries to push back on the prevailing scholarly view that the original understanding allows *states* to pursue such policies. Rappaport, *supra*, at 76. But even he recognizes that the historical case is much different when it comes to claims that the federal government cannot adopt policies that prefer disadvantaged groups. *Id.* at 71 n.2, 73.

C.

Why bother with these objections to the substantive aspects of today's opinions if, as I have explained, they will have all the binding effect of a law review article?[12] Because the procedural and substantive problems with this case are two peas in the same activist pod.

Judicial restraint is a double victim of today's tome. The court ignores standing requirements that enforce "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). And a willingness, even eagerness, to strike down a 43-year-old federal law that continues to enjoy bipartisan support scorns the notion that "declar[ing] an Act of Congress unconstitutional . . . is the gravest and most delicate duty" that federal judges are "called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

Whither the passive virtues? Alexander Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

Whither the "conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive"? ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 323 (Legal Classics ed. 2000).

Heaped, one must conclude, on the pile of broken promises that this country has made to its Native peoples.

[12] In addition to a federal court's inability to create precedent for state courts, the two equal protection challenges our court upholds will not even be precedential within our circuit because we are affirming the district court's ruling by an equally divided vote.