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## On Indian Children and the Fifth Amendment

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# ESSAY

## ON INDIAN CHILDREN AND THE FIFTH AMENDMENT

Matthew L.M. Fletcher\*

### I. A TALE OF TWO ANISHINAABE FAMILIES

Many of my first memories revolve around my grandmother Laura Mamagona's apartment in Grand Rapids, Michigan. She shared the apartment with my uncle Crockett, who was a college student. Her apartment was the upstairs room of an old house on the side of a hill on College Street. My memories are mostly of domestic activities. Cooking. Sweeping. Sitting around. Playing with trains. Leafing through Crockett's *Sports Illustrated* magazine collection. Laura worked the night shift at the veteran's hospital across from Riverside Park. Early on weekday mornings, June, my mother, would drop me off at Laura's place in her VW bug, the first car I remember. I had my own crib at Laura's, one I can remember escaping pretty easily. Often, Laura would sleep most of the morning while I puttered around the house. Sometimes, Crockett would be there. Family lore tells that once, June dropped me off earlier than usual and Laura had worked a little late, so I was probably there alone for a short while. I heard the story so often growing up that I can seemingly remember that day, too. This was in the mid-1970s, before Congress enacted the Indian Child Welfare Act.<sup>1</sup>

Recently, my wife Wenona Singel discovered documents about Laura's childhood home life in the National Archives in Chicago. Wenona

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1. Pub. L. No. 95-608, 92 Stat. 3069 (1978).

was there to research family boarding school histories. Laura's name as a young woman, Laura Stevens, was listed alongside several of her brothers and sisters as former students at Mount Pleasant Indian Industrial Boarding School. They were all born with the Pokagon surname, but Laura's dad, Peter Stevens, changed their names, thinking it would help the family blend in with white America. Laura never attended the boarding school, and instead spent those years in quarantine in a hospital in Kalamazoo. We think she tested positive for tuberculosis at the boarding school intake and was diverted to quarantine. While Laura was there in the hospital during several of her early teen years, her biological mother walked on. Laura had younger brothers and sisters in her family home in Allegan County, Michigan. So, Peter—who was single then—drove to Kalamazoo and took Laura home. As a young woman, but the oldest sibling left in the house, Laura was forced to replace her mom. The archive documents contain reports by social workers who visited the house, we think, on somewhat random occasions. They were spot checks, of sorts, by the State of Michigan, to see how this Indian family with no mother in the home was coming along.

The social workers detailed every aspect of the Stevens' home in the reports. They noted how many Bibles were in the house and where they were placed. They noted how many portraits of Jesus Christ there were and the location each was hung. They reported Laura's younger siblings were all dressed for company and quietly studying. They focused especially on teenaged Laura. There she was, sweeping the kitchen. There she was, cooking dinner. There she was, folding clothes. The social workers were impressed. Well, they were barely impressed. Laura was, after all, still an Indian. Reading the reports, one can't help but think that young Laura Stevens was the only thing stopping the State from taking Peter Stevens's kids away from him. Imagine if she had been out shopping on the day of the spot visit. The little Stevens kids would have been home alone, dishes in the sink and dirty clothes on the floor. Laura might have come home from shopping, and then later Peter from work, to find a home stripped of its children. However, this never came to be. Perhaps out of sheer luck, Laura was always home when the social workers showed up.

Laura walked on in 2001, but her relations (and mine) are enrolled with Michigan Indian tribes such as the Pokagon Band of Potawatomi Indians (Pokagon) and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake). Some of us are enrolled with the Grand Traverse Band of Ottawa and Chippewa Indians (GTB), our enrollment deriving from my grandfather David Mamagona's line and other relatives on Laura's side. The federal government did not recognize those tribes back when Laura

was young. GTB was recognized in 1980,<sup>2</sup> Pokagon in 1994,<sup>3</sup> and Gun Lake in 1998.<sup>4</sup>

Federal recognition means that a tribe is eligible to receive services from the United States.<sup>5</sup> Most tribes administer their own services in an arrangement rooted in self-determination where Congress appropriates funds to tribes, with the tribes acting as their own service providers.<sup>6</sup> In other words, the tribes are government contractors. Tribes spend federal money, commingled with their own funds, to provide health care, housing, social services, public safety, education, and other services.

Federal recognition also means that a tribe is eligible to take advantage of the Indian Gaming Regulatory Act.<sup>7</sup> All three of these tribes participate in gaming activities on their lands. In 1984, GTB was one of the first tribes in the nation to operate a reasonably successful gaming operation.<sup>8</sup> Pokagon and Gun Lake were forced to litigate for many years before they could break ground on their gaming operations.<sup>9</sup> Gun Lake was dragged to the Supreme Court twice.<sup>10</sup> But now, all three tribes generate governmental revenue to fund tribal services from their gaming operations.

Indian people of these tribes, including my relations, have moved from abject poverty to lower middle class, in large part because of federal recognition. My mother, June Mamagona Fletcher, retired a few years ago. As a tribal citizen, she is eligible for health care services from her tribe, Gun Lake. All of her cousins, most of whom are of retirement age, finally have some semblance of stability. They have health care from the tribes. They have income assistance from tribal per capita payments. Laura's generation didn't have these benefits, and even my mother's generation didn't have them until they reached middle age or later.

I shudder to think about what would have happened to Laura's siblings had she not been there one day when the state social workers showed up. There was a good chance the State would have declared Peter Stevens to be

2. Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321, 19,321–22 (Mar. 25, 1980).

3. An Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, § 2, 108 Stat. 2152, 2153 (1994).

4. Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 63 Fed. Reg. 56,936, 56,936–38 (Oct. 23, 1998).

5. 25 U.S.C. § 1301 (1990); *What is a Federally Recognized Tribe?*, U.S. DEPT. OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, <https://perma.cc/JA7S-78HC>.

6. 25 U.S.C. § 5301; Consultation and Coordination with Indian Tribal Governments, EXEC. ORDER No. 13,175, 65 Fed. Reg. 67,249, 67,249–52 (Nov. 9, 2000).

7. 25 U.S.C. § 1301(1); 25 U.S.C. §§ 2701–2721 (1988).

8. MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA* 168 (2012).

9. *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (Pokagon).

10. *Patchak v. Zinke*, 138 S. Ct. 897 (2018) (Gun Lake); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

an unfit father and taken his youngest children away. We know from the legislative history of the Indian Child Welfare Act<sup>11</sup> that approximately one-quarter to one-third of all Indian children were taken from their homes in the middle decades of the twentieth century.<sup>12</sup>

Laura and her younger siblings were lucky, sort of. Mount Pleasant Indian boarding school closed in 1934.<sup>13</sup> They narrowly avoided removal by the State. But they would be forced to wait another half-century and more before GTB, Pokagon, and Gun Lake would finally be federally recognized.

My wife's family was not so lucky. Wenona's people are from northern lower Michigan. She is a citizen of the Little Traverse Bay Bands of Odawa Indians (LTBB), and a descendant of the Little River Band of Ottawa Indians (LRB), the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians. LTBB and LRB were federally recognized the same day that Congress recognized Pokagon Band in 1994.<sup>14</sup> But Burt Lake and Grand River still are not, despite being signatories to ratified treaties with the United States.<sup>15</sup>

The State of Michigan removed Wenona's mother and all her aunts and uncles from their parents Hank and Lorraine Shananaquet, who lived in Emmet County, back in the 1950s.<sup>16</sup> These Indian children were dispersed to non-Indian families around the country. Wenona's mother, my mother in law, Loretta, and her sister were placed with a non-Indian family in Detroit by Catholic Social Services.

When Wenona was four, her two-year-old sister Christina was taken by church officials in southeast Michigan and marketed to a non-Indian couple for adoption.<sup>17</sup> Wenona's earliest memories are not like mine of bland domestic bliss, but instead she remembers missing Christina. Her memories are of pain, of not understanding why the most important person in her life was suddenly gone. Wenona eventually located her sister, who

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11. Pub. L. No. 95-608, 92 Stat. 3069 (1978).

12. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989) (citing *Indian Child Welfare Act: Problems that American Indian Families Face in Raising their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the S. Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler, Exec. Dir., Ass'n on Am. Indian Affairs)).

13. GEORGE CORNELL, *THE OJIBWAY*, IN *PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI, AND OJIBWAY OF MICHIGAN* 75, 100 (1986).

14. Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, §4(a), 108 Stat. 2153, 2157 (1994).

15. *Burt Lake Band of Ottawa and Chippewa Indians v. Zinke*, 217 F. Supp. 2d 76, 78 (D.D.C. 2002); *Grand River Band of Ottawa Indians Disposition of Judgment Funds*, S. Rep. 94-577, at 2 (1975).

16. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 887 (2017).

17. *Id.*

was living in Columbus, Ohio, where she grew up with the adoptive family. Wenona's sister is not enrolled at LTBB, even though she is eligible. Accordingly, tribal services are not available to her. She isn't part of the tribal community here in Michigan. She is a lost bird.

Wenona and I didn't know each other growing up. I grew up in Allegan County. She grew up in Wayne County. We went to college and law school in different states. We came together because we shared a client, the Grand Traverse Band, that was involved in gaming-related litigation in federal court.<sup>18</sup> We eventually married and became parents. We have two boys, Owen and Emmett. After Owen was born, we knew that he was eligible for citizenship with as many as 6 of the 12 federally recognized tribes in Michigan. We joked that if we had enough kids, we could enroll them throughout Michigan and attend tribal membership meetings all year around. For one year we thought about where to enroll Owen. We eventually settled on GTB, my tribe. Some days we regret our decision, and some day Owen or his brother Emmett might try to change their enrollment. But it was a choice we made as parents. A political choice.

In *Brackeen v. Zinke*,<sup>19</sup> a federal judge held that federal laws like the Indian Child Welfare Act (ICWA) that benefit Indian people who are not tribal citizens but merely eligible for enrollment, must be held to a strict scrutiny analysis under the equal protection component of the Fifth Amendment.<sup>20</sup> This holding means that prior to their formal enrollment with GTB, any government services that GTB or the federal government provided to Owen and Emmett because of their relationship to their tribal citizen parents or their eligibility for citizenship at GTB and other tribes, are probably unconstitutional. The court held that ICWA, a statute that applies to all Indian children who are tribal citizens or eligible for enrollment with a federally recognized tribe, created legal classifications based on race, which triggered strict scrutiny analysis under the equal protection component of the Fifth Amendment's Due Process Clause.<sup>21</sup> Until this decision, the courts had held that when a federal statute creates legal standards for Indians, Congress is acting in accordance with its political relationship with Indian tribes, irrespective of race.<sup>22</sup> The court nevertheless concluded that any federal statute that establishes legal standards for Indian children who are not citizens of federally recognized tribes creates a classification based purely

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18. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y for W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

19. Order Partially Granting Plaintiffs' Motion for Summary Judgment, *Brackeen v. Zinke*, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018) (No. 4:17-CV-00868-O).

20. *Id.* at \*13–14.

21. *Id.* at \*12.

22. *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

on race.<sup>23</sup> And because ICWA applies to tribal members and non-enrolled persons eligible for membership, the court decided the entire statute was unconstitutional.<sup>24</sup>

## II. MY PLSI FIFTH AMENDMENT CLASS

The Fifth Amendment of the United States Constitution is a truly fateful provision for Indian people. On occasion, Wenona and I teach at the Pre-Law Summer Institute (PLSI) for American Indians.<sup>25</sup> It's an eight-week program that serves a little bit like a summer boot camp for Indian people who are planning to matriculate to law schools in the fall. Wenona teaches Property and I teach Indian Law. Compared with the regular law school survey-the-field course in Federal Indian Law, the short class I teach at PLSI is even more truncated. I can only assign a cross-section of the "greatest hits" of Indian law Supreme Court decisions because I don't have time to conduct a full survey. I also try to assign cases where tribal interests prevailed. It turns out tribal interests and Indian people prevail more than not when the Fifth Amendment is in play. However, there are cases where tribal interests painfully and dramatically suffer under the Supreme Court's interpretation of the Fifth Amendment.

Here is the Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>26</sup>

Early in PLSI, I teach *Talton v. Mayes*,<sup>27</sup> an 1896 case where a Cherokee man sentenced to death for capital murder by the Cherokee Nation of Oklahoma brought a habeas claim rooted in the Fifth Amendment to the Supreme Court.<sup>28</sup> The Fifth Amendment requires a grand jury, and Congress had determined that a grand jury must consist of more than six persons.<sup>29</sup> According to *Talton*, the man on death row, the Cherokee grand jury

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23. Order Partially Granting Plaintiffs' Motion for Summary Judgment at \*12, *Brackeen v. Zinke*, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018) (No. 4:17-CV-00868-O).

24. *Id.* at \*13.

25. Jordan Oglesby, *Pipeline to Tribal Sovereignty: Celebrating the Pre-Law Summer Institute's 50th Class*, INDIAN LAW TIMES: STATE BAR OF NEW MEXICO INDIAN LAW SECTION, Fall 2018, at 6, <https://perma.cc/JQ89-K3UV>.

26. U.S. CONST. amend. V.

27. 163 U.S. 376 (1896).

28. *Id.* at 376–77.

29. U.S. CONST. amend. V; *Talton*, 163 U.S. at 378.

consisted of only five persons, and therefore violated federal law.<sup>30</sup> The Supreme Court rejected the argument and affirmed the capital conviction.<sup>31</sup> According to the Court, there was no Fifth Amendment grand jury requirement for the Cherokee Nation to follow, because the Constitution is inapplicable to tribal governments.<sup>32</sup>

A little later on, I teach *United States v. Wheeler*,<sup>33</sup> where a Navajo man sentenced to a lengthy federal prison sentence for statutory rape under federal law argued to the Supreme Court that the Fifth Amendment's Double Jeopardy Clause barred the prosecution.<sup>34</sup> Wheeler had already pled guilty to statutory rape in the courts of the Navajo Nation and challenged the subsequent federal prosecution under the Fifth Amendment.<sup>35</sup> The Supreme Court rejected the claim because (remember *Talton v. Mayes*) the Constitution is not applicable to Indian tribes.<sup>36</sup> Therefore, the Court reasoned, a tribal conviction is not rooted in the Constitution.<sup>37</sup> Wheeler further argued that it wasn't so simple: The Navajo Nation is an arm of the federal government because the United States (remember self-determination?) funds the Navajo tribal justice system, at least in part.<sup>38</sup> Therefore, for Wheeler, the subsequent federal prosecution was actually the second time the United States had prosecuted him for the same crime.<sup>39</sup> The Court rejected that argument too, explaining that Indian tribes are separate sovereigns possessing inherent powers not derived from the Constitution.<sup>40</sup> Tribal sovereignty and federal sovereignty are derived from different sources.<sup>41</sup> Applying this rationale, when a person punches a tribal police officer cross-deputized by the federal and state governments, that person is punching all three sovereigns, and can be prosecuted by all three under the Fifth Amendment.

I also teach *Morton v. Mancari*,<sup>42</sup> which is one of the most famous Indian law decisions and constitutes the foundation of much of federal Indian affairs laws. Mancari was a non-Indian grade school teacher employed by the Bureau of Indian Affairs (BIA) in the 1970s.<sup>43</sup> In 1934, Congress

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30. *Talton*, 163 U.S. at 379.

31. *Id.* at 385.

32. *Id.* at 381–84.

33. 435 U.S. 313 (1978).

34. *Id.* at 316.

35. *Id.* at 315–16.

36. *Id.* at 329–30.

37. *Id.*

38. *Id.* at 319–20.

39. *Id.* at 315–16.

40. *Id.* at 321–24.

41. *Id.* at 327–28.

42. 417 U.S. 535 (1974).

43. *Id.* at 539.



required the BIA to enact Indian preference in employment regulations.<sup>44</sup> The idea was that since the BIA was the primary agency administering Indian affairs programs, a significant number of people who worked for the BIA should also be Indians.<sup>45</sup> Prior to 1934, few Indians worked for the BIA. By the 1970s, way more Indians worked for the BIA and other Indian affairs offices, most notably the Indian Health Service, which Congress also required to adopt Indian preference regulations.<sup>46</sup> The claim in *Mancari* arose when an Indian was hired over a non-Indian. The non-Indian person brought a suit which claimed the Indian preference regulations violated the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>47</sup>

The Supreme Court rejected the Fifth Amendment claim.<sup>48</sup> The Court concluded that when Congress is acting in accordance with its trust responsibility to Indians and Indian tribes, it is not acting on the basis of race.<sup>49</sup> Instead, Congress is acting in accordance with its political obligations to Indian tribes, who are domestic sovereigns acknowledged in the Commerce Clause<sup>50</sup> alongside foreign nations and states as governmental entities.<sup>51</sup> Indian tribes are entities with which the United States has a long and deep treaty relationship.<sup>52</sup> The President doesn't negotiate treaties with states or corporations or the Boy Scouts, but does (or did) negotiate with Indian tribes. In those treaties, the United States promised to undertake a duty of protection to Indians and tribes.<sup>53</sup> That treaty relationship is a purely political relationship.<sup>54</sup> As the Court announced in *Mancari*, the Indian preference requirement wasn't a racial preference, it was a political preference. Indian preference is a tool to create a bureaucracy best suited to administering the federal government's duty of protection. It is not a racial giveaway.

The Fifth Amendment is not always the friend of Indian people and Indian tribes. In the PLSI class, after *Mancari*, I jump backward in chronology to discuss *Lone Wolf*, decided in 1903, and *Tee-Hit-Ton Indians v. United States*,<sup>55</sup> decided in 1955. In *Lone Wolf*, the federal government planned to confiscate Indian reservation lands guaranteed by treaty and allot the lands out to individual Indians (and later, non-Indians) parcel-by-par-

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44. *Id.* at 537–38.

45. *Id.* at 541–43.

46. *Id.* at 545.

47. *Id.* at 539.

48. *Id.* at 554–55.

49. *Id.* at 553–55.

50. *Id.* at 551–52.

51. U.S. CONST. art. I, § 8, cl. 3.

52. *United States v. Lara*, 541 U.S. 193, 201 (2004).

53. *Morton*, 417 U.S. at 552.

54. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903).

55. 348 U.S. 272 (1955).

cel.<sup>56</sup> The Supreme Court rejected the Fifth Amendment takings argument made by the tribal citizens that objected to this process, reasoning that while the reservation land was arguably a vested property interest, individual Indians were compensated adequately because they would receive an allotment of land.<sup>57</sup> It mattered little to the Court that the Indians didn't want the allotments and preferred the reservation lands, or that individual Indians likely would not receive much more than pennies on the dollar in actual compensation. For the Court, Indian affairs matters were political questions, and the Court was loathe to interfere.

In *Tee-Hit-Ton*, the Department of the Interior had confiscated lands in Alaska, and from those lands later established the Tongass National Forest from the aboriginal homelands of the Tlingit people.<sup>58</sup> The Alaskan Native nations never ceded the land to the United States by treaty, and Congress never compensated the tribes for the taking of their aboriginal title.<sup>59</sup> In prior similar circumstances, Congress did on occasion allow Alaska Native nations to sue in the federal claims courts for the taking of aboriginal property interests.<sup>60</sup> The same line up of justices that decided *Brown v. Board of Education*<sup>61</sup> (minus three dissenters) held that the federal government's taking of aboriginal property interests, also known as aboriginal title, was not a compensable taking under the Fifth Amendment.<sup>62</sup> In short, the only way for Indian people and Indian tribes to bring a valid property rights taking claim against the federal government was if the federal government recognized the title.

I place these early cases later in the semester for the PLSI students so that I don't hit them so hard with such terrible decisions and demoralize them. *Lone Wolf* and *Tee-Hit-Ton* are part of the dark side of the federal government's duty of protection—if the government chose not to recognize Indian property interests, or chose not to adequately compensate them for property takings, then there was little Indian people could do about it.

A few years later, the Supreme Court decided another case with Fifth Amendment implications that pushed back on the *Tee-Hit-Ton* decision: *Menominee Tribe v. United States*.<sup>63</sup> In that case, Congress had terminated

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56. *Lone Wolf*, 187 U.S. at 554–55.

57. *Id.* at 568.

58. *Tee-Hit-Ton Indians*, 348 U.S. at 266–67 (explaining that in 1951, the Secretary of Agriculture “contracted for sale to a private company of all merchantable timber in the area claimed by [the Tee-Hit-Ton Indians],” which the Tribe “allege[d] constitute[d] a compensable taking by the United States of a portion of its proprietary interest in the land.”).

59. *Id.* at 277.

60. *Id.* at 282.

61. 347 U.S. 483 (1954).

62. *Tee-Hit-Ton Indians*, 348 U.S. at 285.

63. 391 U.S. 404 (1968).

its trust relationship with the Menominee Tribe, leading the State of Wisconsin to conclude that the tribe's treaty rights had been abrogated.<sup>64</sup> That caused the tribe to sue the United States in the federal claims court for the taking of its vested property rights to hunt and fish in accordance with its treaty.<sup>65</sup> When the case proceeded to the Supreme Court, the United States switched its position to avoid the taking claim by arguing that the termination of the tribe did not affect an abrogation of the treaty rights.<sup>66</sup> The Court did not directly address the question of whether the taking of a treaty right is compensable under the Fifth Amendment, but the federal government's implicit admission that it was, by switching its legal position to avoid the question, is compelling.<sup>67</sup>

I usually teach *United States v. Sioux Nation*<sup>68</sup> at PLSI too, but not always. *Sioux Nation*, decided in 1980, undid much of the damage of *Lone Wolf* to the status of tribal property interests.<sup>69</sup> There, the tribe won a large monetary award from the United States for the taking of the Black Hills without tribal consent or just compensation.<sup>70</sup> The government attempted to defeat the claim under the *Lone Wolf* precedent, demanding the deference on Indian property takings and compensation matters that *Lone Wolf* afforded the government.<sup>71</sup> However, the Court was not so impressed when the government admitted that the only compensation offered the Sioux Nation for the taking of the Black Hills was a few years of rations, that is, rancid meat.<sup>72</sup> The *Sioux Nation* majority rejected the government's demand for deference.<sup>73</sup>

These cases constitute a decent survey of most of the jurisprudence arising from the Fifth Amendment—grand juries, double jeopardy, due process, and just compensation. The only big issue missing is the right against self-incrimination. It's remarkable that a single constitutional provision contains within it the fount of so many civil and criminal rights matters.

The most recent Indian law decision involving Fifth Amendment principles is *United States v. Lara*,<sup>74</sup> decided in 2004. *Lara* may one day be heralded as the beginning of a sea change in federal Indian law. Or not. There, the Supreme Court reconfirmed the *Wheeler* holding applying the

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64. *Id.* at 407.

65. *Id.*

66. *Id.* at 411.

67. *Id.*

68. 448 U.S. 371 (1980).

69. *Id.* at 423–24.

70. *Id.* at 424.

71. *Id.* at 409–10.

72. *Id.* at 417–19.

73. *Id.* at 414.

74. 541 U.S. 193 (2004).

dual sovereignty exception to the prohibition on two prosecutions for the same offense under the Double Jeopardy Clause.<sup>75</sup> The *Lara* matter arose from an act of Congress<sup>76</sup> that was intended to undo a Supreme Court decision from 1990, *Duro v. Reina*<sup>77</sup>—hence, the *Duro* fix.<sup>78</sup> In *Duro*, the Court held that Indian tribes did not possess inherent sovereign authority to prosecute nonmembers.<sup>79</sup> In a previous case, the Court had held that Congress could authorize tribes to do so.<sup>80</sup> So, Congress did exactly that.

The *Duro* fix was a kind of constitutional anomaly. In its report, Congress specifically stated that *Duro* was incorrectly decided by the Supreme Court, and it intended to reverse the Court.<sup>81</sup> Normally when Congress overrules a Supreme Court precedent, it only has power to fix what it deems incorrect interpretations of federal statutes.<sup>82</sup> Congress does not have the power to correct the Court on interpretations of the Constitution, at least not since *Marbury v. Madison*.<sup>83</sup>

But what if there is no interpretation of a federal statute and there is no constitutional provision to interpret? In *Duro*, the Supreme Court held that Indian tribes did not possess inherent powers to prosecute nonmembers.<sup>84</sup> But there is no constitutional provision that governs the scope of tribal inherent authority. So, the Court could not—and did not—point to a provision there in ruling on inherent tribal sovereignty. And Congress had never expressly barred Indian tribes from prosecuting nonmembers, at least according to the Court.<sup>85</sup> So there was no statute to interpret either. In the *Duro* fix, Congress said it was reaffirming inherent tribal authority.<sup>86</sup> Congress could have delegated federal power to prosecute, but that would prevent the United States from prosecuting those who had already been prosecuted by the tribe. So Congress effectively told the Supreme Court either that it simply disagreed with the Court’s understanding of tribal inherent authority, or that Congress was correcting the federal government’s understanding of the scope of inherent tribal authority, which it can do as a func-

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75. *Id.* at 197.

76. *Id.* (citing 25 U.S.C. § 1301(2) (1990)).

77. 495 U.S. 676 (1990).

78. *Lara*, 541 U.S. at 215–16.

79. *Duro*, 495 U.S. at 694.

80. *Id.* at 693–94 (citing *United States v. Mazurie*, 419 U.S. 544 (1975) (approving an Indian tribe’s authority to enact laws that may be litigated criminally in federal court)).

81. *Lara*, 541 U.S. at 199 (citing H.R. REP. NO. 102-261, at 3–4 (1991)).

82. *Dickerson v. United States*, 530 U.S. 428, 428 (2008) (“While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, it may not supersede this Court’s decisions interpreting and applying the Constitution.” (internal citations omitted)).

83. 5 U.S. 137 (1803).

84. *Duro*, 495 U.S. at 694.

85. *Id.* at 684.

86. H.R. REP. NO. 102-261, at 3–4 (1991).

tion of federal plenary power in Indian affairs.<sup>87</sup> The constitutional anomaly was that no one knew whether the *Duro* decision was a non-reversible constitutional decision.

Ultimately, the Court in *Lara* held that Congress was exercising its plenary power over Indian affairs to alter the scope of inherent tribal powers.<sup>88</sup> Another way to cast the line is to say that Congress was reaffirming tribal powers that were always there, but indicating that the Supreme Court incorrectly described those powers. However, the Court definitely concluded that the *Duro* fix did not delegate federal powers to the tribes.<sup>89</sup> The United States' merits brief framed the case to make clear the government's position was that the *Duro* fix either served as a reaffirmation of the tribal inherent powers that authorized the tribe's prosecution of Lara, or that the initial tribal criminal conviction of Lara was invalid—all to protect the federal government's subsequent conviction of Lara.<sup>90</sup> This was a complicated case.<sup>91</sup>

### III. THE INDIAN FIFTH AMENDMENT

I propose that the judiciary adopt a method of interpreting the Fifth Amendment in Indian affairs cases in light of the political origins of the amendment, rather than the more modern individual rights and equal protection focus that the courts tend to give the amendment. Below I will explain why the equal protection component of the Fifth Amendment's Due Process Clause<sup>92</sup> has little or no relevance to Indian affairs. This is my attempt to conclusively ground the political classification doctrine of *Morton v. Mancari*<sup>93</sup> in the Due Process Clause of the Fifth Amendment.

The Fifth Amendment was ratified in 1791,<sup>94</sup> the year after the First Congress began its Indian affairs journey in the Trade and Intercourse Act

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87. *Id.*

88. *United States v. Lara*, 541 U.S. 193, 202 (2004).

89. *Id.* at 199.

90. Brief for the United States at \*43–45, *United States v. Lara*, 541 U.S. 193 (2004) (No. 03-107).

91. Justices Kennedy and Thomas each wrote separately to suggest that Indian tribes don't have the power to prosecute *anyone* because they are not really sovereigns. *Lara*, 541 U.S. at 211 (Kennedy, J., concurring in the judgment); *Id.* at 215 (Thomas, J., concurring in the judgment). Of course, they were still hamstrung by the reality that nothing in the Constitution affirmatively forbids tribal criminal law enforcements powers. So, they both suggested in an alternative attack that Congress didn't have the power to authorize tribes to prosecute nonmembers, with Justice Thomas arguing the old saw that the Commerce Clause jurisprudence should be rewritten from the start. Still, all of this begs the question of the source of power in the Constitution to govern tribal powers. Greg Ablavsky's commerce clause paper effectively rebutted Justice Thomas' theory of the commerce clause. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1019–20 (2015).

92. U.S. CONST. amend. V.

93. 417 U.S. 535 (1974).

94. U.S. CONST. amend. V.

of 1790<sup>95</sup> and two years after the ratification of the Constitution.<sup>96</sup> There's a canon of statutory construction in American law that legal provisions should be construed as a whole. The Fifth Amendment is a long, agrammatical confluence of disparate legal principles entirely contained in a single sentence. As far as I can tell, courts compartmentalize these principles all of the time without reasoning why. Unlike the First Amendment,<sup>97</sup> for example, which has an overarching theory and tenor about protecting ideas from governmental intrusion, or the Second Amendment's militia provision,<sup>98</sup> the Fifth Amendment, at first glance, looks like a random grab bag. It contains an incredibly broad and vague principle of due process: an undefined protection from the government that undergirds every action implicating individuals' rights to life, liberty, and property. That principle alone is enough for an entire provision in the Bill of Rights,<sup>99</sup> but no. Instead, the Fifth Amendment starts with relatively specific protections relating to grand juries, and then hits on self-incrimination and double jeopardy before it gets to the general and nonspecific protections of the Due Process Clause. But that's not the end, because then, as almost an afterthought, the provision adds a property takings and just compensation provision.<sup>100</sup> The Fifth Amendment doesn't even limit itself to criminal versus civil rights.

There's another canon of statutory construction that holds laws enacted in close temporal proximity should be interpreted consistent with each other.<sup>101</sup> The 1790 Act<sup>102</sup> is a fateful statute for legal historians obsessed with the original public understanding of the Commerce Clause. The Act barred anyone—American citizens, States, foreign nations and nationals—from entering Indian country, trading with Indians, and buying Indian lands.<sup>103</sup> The Act imposed a criminal penalty on anyone who violated the

95. An Act to Regulate Trade and Intercourse with the Indian Tribes, 1 Stat. 137 (1790).

96. U.S. CONST. (1788) (the United States Constitution became the official governing document of the United States on June 21, 1788, when New Hampshire became the ninth of thirteen States to ratify it).

97. U.S. CONST. amend. I.

98. *Id.* amend. II.

99. *Id.* amend. I–X.

100. James Madison's original draft of what would become the Fifth Amendment includes all five of these major clauses, though in slightly different order:

No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.

*Annals of Congress: Amendments to the Constitution: Debates Before the H.R.*, 1st Cong., 1st Sess. 452 (1789).

101. Pullen v. Morgenthau, 73 F.2d 281, 283 (1934); see also SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23:18 (Norman J. Singer ed., 7th ed. 2018).

102. AN ACT TO REGULATE TRADE AND INTERCOURSE WITH THE INDIAN TRIBES, 1 Stat. 137 §§1–7 (1790).

103. *Id.* § 4.

prohibition.<sup>104</sup> The Supreme Court's jurisprudence teaches us that Congress's authority to enact the 1790 Act derives primarily from the Indian Commerce Clause and the Treaty Power.<sup>105</sup> The Court interpreted the 1790 Act in light of the Supremacy Clause,<sup>106</sup> holding that the trade and intercourse acts preempt state laws that conflict with federal Indian affairs statutes.<sup>107</sup>

The temporal proximity of the Fifth Amendment to both the Indian Commerce Clause and the 1790 Trade and Intercourse Act requires courts to understand and apply the original public understanding of the Fifth Amendment as a whole, rather than a series of individual provisions. As a whole, the Fifth Amendment is a bundle of political rights protecting groups, not merely individuals. In fact, with the exception of the *Lone Wolf* and *Tee-Hit-Ton* decisions, the Court's application of the Fifth Amendment as applied to Indian affairs legislation already tracks my proposed analysis. The *Wheeler* Court acknowledged the sovereign characteristics of Indian tribes expressly provided for in the Indian Commerce Clause.<sup>108</sup> The *Talton* Court held that tribal sovereign powers are not governed by the Fifth Amendment.<sup>109</sup> The *Menominee Tribe* Court implicitly acknowledged that federal laws can vest or recognize Indian and tribal property interests that are protected from federal takings by the Due Process and Just Compensation Clauses.<sup>110</sup> The *Mancari* Court interpreted federal Indian affairs statutes under the Fifth Amendment in light of the federal government's duty of protection to Indian tribes and individual Indians.<sup>111</sup>

Most, if not all, American legal commentators compartmentalize the various provisions of the Fifth Amendment. We lawyers treat the principles articulated in the Fifth Amendment as disparate and separate rights. We even have a practice of capitalizing them as if they were separate mountains in a range of legal rights—the Due Process Clause, the Double Jeopardy

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104. *Id.* §§ 5–6.

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

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

107. *Worcester v. Georgia*, 31 U.S. 515, 531 (1832).

108. *United States v. Wheeler*, 435 U.S. 313, 324–28 (1978).

109. *Talton v. Mayes*, 163 U.S. 376, 382 (1896).

110. *Menominee Tribe v. United States*, 391 U.S. 404, 407–12, (1968) (Justice Douglas, writing for the majority, separately invoked this temporal canon when comparing the 1953 Public Law 280 with the 1954 Menominee Termination Act. The issue there was whether the 1954 Act terminated the tribe's treaty rights. The 1953 Act specifically referenced treaty rights—and preserved them generally—but the 1954 Act did not mention treaty rights at all. Justice Douglas concluded that since Congress was fully aware of treaty rights in 1953, Congress was also aware of treaty rights in 1954. And, so, for the *Menominee Tribe* Court, the 1954 Act's silence could not support the abrogation of the tribe's treaty rights).

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

Clause, the Takings and Just Compensation Clause, and so on. It's not that this is a mistake. But it's not the only way to look at the Fifth Amendment.

At bottom, the Fifth Amendment originally was a series of political statements that led to individual legal rights protections. The Founders were preoccupied with three matters—keeping away the King of England; maintaining, regulating, and perhaps later on banning slavery; and Indians.<sup>112</sup> The English monarchy worried the American legal elite because it maintained the power (and sometimes exercised it) to confiscate private property, summarily incarcerate political opponents, or do so without adequate rights protections, and generally ruin the lives of Americans by fiat.<sup>113</sup> Not wishing to allow the new federal government to follow that same terrifying path, the Framers of the Fifth Amendment—that is, James Madison and his contemporaries—put together this list of political rights that really are individual rights protections.<sup>114</sup>

The Fifth Amendment's Due Process Clause seems to be inspired by the worry of the abuse of governmental power for political purposes. The equal protection component of the Due Process Clause that requires courts to apply strict scrutiny whenever Congress or a federal actor creates racial classifications<sup>115</sup> did not come into play until well after the ratification of the Fourteenth Amendment.<sup>116</sup> This is when the principle of equal protection entered the American polity. It wasn't until *Bolling v. Sharpe*,<sup>117</sup> decided in 1954, that the Court held the Fifth Amendment also included an equal protection requirement imposed on the federal government.<sup>118</sup>

In the context of Indian affairs legislation, the Fifth Amendment should be analyzed in light of these concerns about the abuse of federal political power. This is not the place to go into a survey of the abuses of political power by the United States in relation to Indian tribes and individual Indians, but the historical context of the cases arising from the Fifth Amendment described in this paper offer an adequate survey. The *Talton* Court impliedly acknowledged that Indian tribes and individual Indians were never invited to the constitutional polity, were not allowed to participate in the Constitutional Convention, and were not allowed to consider

112. See No author, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 *YALE L.J.* 1403 (1982); Jeff Broadwater, *George Mason, James Madison, and the Evolution of the Bill of Rights*, 15 *GEO. J.L. & PUB. POL'Y* 547 (2017).

113. See Broadwater, *supra* note 112.

114. See *id.*

115. Order Partially Granting Plaintiffs' Motion for Summary Judgment at \*12, *Brackeen v. Zinke*, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018) (No. 4:17-CV-00868-O).

116. U.S. CONST. amend. XIV (ratified July 28, 1868).

117. 347 U.S. 497 (1954).

118. *Id.* at 500.



ratifying the Constitution.<sup>119</sup> So, to apply the Fifth Amendment to tribal government actions was politically improper, in addition to legally wrong. The *Menominee Tribe* case arose from the political act by a terminationist-era Congress that wished to eliminate its Indian affairs programs<sup>120</sup>—arguably an abuse of power that the Supreme Court (and the Department of Justice) at least impliedly blocked in the context of treaty rights. The *Mancari* case is the most specifically political of all these cases in that it involved an Act of Congress designed to limit, but sadly not eradicate, the political abuses that federal bureaucrats had perpetrated on Indian people since the establishment of the Office of Indian Affairs in the early nineteenth century.<sup>121</sup> In the Indian affairs context, the Fifth Amendment should be interpreted in light of its original political focus.

Some might argue that the political cast to the Fifth Amendment should take a back seat to the Reconstruction Amendments,<sup>122</sup> particularly the Equal Protection Clause, and that the Fifth Amendment's equal protection component must take precedent over the political rights. In the context of Indian affairs, this could leave all of Title 25<sup>123</sup> subject to strict scrutiny as a series of racially based statutes. To those critics, I point to Section 2 of the Fourteenth Amendment, the Indians Not Taxed Clause, which expressly leaves Indian people out of this legal regime.<sup>124</sup> The current equal protection focus of the Fifth Amendment derives from the sea change in American law brought on by the Reconstruction Amendments, but that sea change was never extended to Indians and tribes in the actual text of the Constitution. In short, it is more than likely that the political protections afforded Indian people and Indian tribes in the Fifth Amendment are actually far more important than the equal protection component of the Fifth Amendment.

There is also the canon of construction that requires courts to interpret written laws relating to Indian affairs in a manner that respects the federal government's duty of protection to Indian tribes and Indian people.<sup>125</sup> The rules of interpreting Indian treaties require courts to take the history of treaty negotiations into context, usually noting that the treaties were executed in the English language, not in the language of the Indian people; that the treaties were often dictated to Indian tribes without them having much

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119. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

120. *Menominee Tribe v. United States*, 391 U.S. 404, 407 (1968); see also Kristy Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2009).

121. *Morton v. Mancari*, 417 U.S. 535, 541–42 (1974).

122. U.S. CONST. amends. XIII–XV.

123. Indians, 25 U.S.C. §§ 1–5506.

124. U.S. CONST. amend. XIV, § 2.

125. *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

say about the content of the treaties given the unequal bargaining power present in many (but not all) treaty negotiations; and the lengthy and deep history of bad faith on behalf of the American treaty negotiators and the United States in general.<sup>126</sup> Courts are required to interpret treaty provisions as the Indians understood them at the time.<sup>127</sup> Courts are required to interpret ambiguous treaty terms to the benefit of the Indians and Indian tribes.<sup>128</sup> Courts are required to allow parol evidence about the historical context of the treaty negotiations and interpretations both before and after the treaty execution.<sup>129</sup> Rights guaranteed by treaty are not abrogated or modified unless an act of Congress makes express Congress' intention to do so.<sup>130</sup> Similarly, courts are required to interpret federal Indian affairs statutes to the benefit of the Indians and Indian tribes.<sup>131</sup>

In sum, the Fifth Amendment's political origins remain incredibly meaningful in Indian affairs. The Fifth Amendment, like much of the Constitution, shifted in character away from its political origins initially following the Reconstruction Amendments, and then again after the mid-twentieth century civil rights era. But in the text of the amended Constitution, Indians and Indian tribes were not immediately and automatically included in that shift. In particular, the Due Process Clause of the Fifth Amendment remains primarily a political protection provision, rather than an equal protection or an individual protection provision. For Indians and Indian tribes, the Fifth Amendment remains political.

#### IV. APPLYING THE INDIAN FIFTH AMENDMENT

Imagine an Indian child, eligible for enrollment with the fictional Lake Matchimanitou Band of Anishinaabe Indians, who has been removed by state child protection service officials from their home in Traverse City, Grand Traverse County, Michigan. The Indian child's mom and dad are also tribal citizens, but they have fallen on difficult economic times. State officials receive a report about a "dirty home," as some practitioners call this type of case, and use the report as justification to take the Indian child out of public school in Traverse City in the middle of the school day. The state workers know of a non-Indian family interested in becoming foster parents with an eye toward adoption and place the Indian child with this family. The foster family lives in Grand Rapids, Kent County, Michigan,

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126. See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1) (Nell Jessup Newton et al. eds., 2012).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

about 140 miles away. The tribe intervenes but the state court rejects the tribe's motion to transfer the case to tribal court under the Indian Child Welfare Act or place the child in accordance with the Act's placement preferences. State workers, rejecting the tribe's workers' recommendations, impose culturally inappropriate obligations on the parents, including a mandate they attend self-help meetings rooted in Catholic philosophy; this, despite both parents having been abused at Holy Childhood boarding school as children. The parents have no success in meeting the state officials' requirements for reunification of the family. They have trouble traveling the 140 miles to visit their child. Those visits don't go well anyway because the foster parents are doing whatever they can to undermine them. Meanwhile, the non-Indian foster parents begin the transition to adoptive parents. As the state's Title IV-E<sup>132</sup> funds will expire in about a year, the state court terminates the parental rights of the Indian parents. Shortly thereafter, the same state court confirms the adoption of the Indian child by the foster parents.

This Indian child grows up in a non-Indian family, far from the service area of the Lake Matchimanitou Band. Because the child lives away, they are not eligible for tribal health services, tribal gaming per capita payments, public housing, land assignment, higher education scholarships, and other governmental services provided to tribal citizens and their children residing within the tribe's service area.

On appeal, the parents and the Lake Matchimanitou Band argue that the state court failed to comply with several provisions of the Indian Child Welfare Act on numerous occasions. The adoptive parents respond with a challenge to the constitutionality of the Act rooted in the Order Partially Granting Plaintiff's Motion for Summary Judgment in *Brackeen v. Zinke*.<sup>133</sup> That court applied the strict scrutiny test derived from the equal protection component of the Fifth Amendment to the Indian Child Welfare Act and held key portions of it facially unconstitutional.<sup>134</sup> The court reasoned that a facial attack on the Act was justified, because the Act establishes a legal classification of "Indian child" that includes both tribal citizens and those merely eligible for membership.<sup>135</sup>

Under my characterization of the Fifth Amendment, the Indian Fifth Amendment, the application of strict scrutiny to a federal law designed to regulate the removal of Indian children from Indian custodians is completely wrong. The Indian Fifth Amendment prioritizes the political rights of Indians and Indian tribes. Indian children who are tribal members are

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132. 42 U.S.C. § 679(c) (2009).

133. Order Partially Granting Plaintiffs' Motion for Summary Judgment, *Brackeen v. Zinke*, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018) (No. 4:17-CV-00868-O).

134. *Id.* at \*12–14.

135. *Id.* at \*12.

tribal members for political reasons. Recall my family's decision to enroll our children in one tribe over another, or even to enroll our children at all. Those decisions are inherently political, as are the tribes' decisions to allow us to enroll. Similarly, Indian children who are eligible for membership are in that political gray area in which perhaps the parents and custodians, or the tribe or tribes, have yet to make that political decision on enrollment.

Secondly, the Indian Fifth Amendment—and even the mainstream Fifth Amendment—should require the courts and the state actors to consider the property rights implications of the removal of Indian children from Indian custodians, and the physical removal of (or the prevention of the return of) Indian children from the tribal homelands. Indian children have a legal entitlement to federal government services that are administered by tribes or federal agencies on or near Indian country.<sup>136</sup> Indian children often have a legal entitlement to share in governmental economic development enterprises, sometimes in the form of direct per capita payments or minors' trust accounts.<sup>137</sup> Removal by states jeopardizes those entitlements.

Finally, recall that the Indian Child Welfare Act is rooted in the political decision-making of governmental actors throughout the nation to remove Indian children as a means of “saving” them from their Indianness. ICWA was an attempt to put a stop to that state-sanctioned political act of gutting Indian tribes by taking their children. The current attacks on ICWA are similarly politicized. There is no bipartisan effort to attack ICWA. In fact, eight states (a majority of which were red states in the last presidential election) have codified versions of the Indian Child Welfare Act,<sup>138</sup> and others may soon follow. The vanguard of the opposition is the Goldwater Institute, an openly right-wing organization, and the deep-red states of Texas, Louisiana, and Indiana.<sup>139</sup> The opposition's quieter ally is the private adoption industry, which supports these attacks on ICWA in order to manage and protect a \$16 billion and growing market in private adoption.<sup>140</sup> This isn't about benefitting Indian children at all. The apolitical organizations dedicated to the enhancement of child welfare, Indian and

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136. 25 U.S.C. § 1931.

137. *E.g.*, Pokagon Band of Potawatomi Indians, Pokagon Minors Trust (n.d.), available at <http://www.pokagon.com/sites/default/files/assets/minors-trust-information-389-196.pdf> (last visited May 10, 2019).

138. Indigenous Law and Policy Center Blog, Michigan State University, College of Law, *ICWA Appellate Project*, [TURTLETALK.WORDPRESS.COM](https://perma.cc/77PA-SUVF), <https://perma.cc/77PA-SUVF> (last visited Dec. 19, 2018).

139. Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, [THENATION.COM](https://perma.cc/G8UX-STFV), April 24–May 1, 2017, <https://perma.cc/G8UX-STFV>.

140. IBISWorld, *Adoption & Child Welfare Services Industry in the US*, [IBISWORLD.COM](https://perma.cc/QUF6-UR3N), March 2018, <https://perma.cc/QUF6-UR3N>.

non-Indian alike, on the other hand, strongly support the Indian Child Welfare Act.<sup>141</sup>

It was then, and remains now, primarily political acts that remove Indian children from their Indian families and tribes. Yes, these political acts are rooted in racism, but the solution, which includes the Indian Child Welfare Act, is political, just like every other Indian affairs law. If there is a right time to rethink the Fifth Amendment and recast its application in the Indian affairs context, it is now.

#### V. THE TALE OF AN ANISHINAABE MOTHER

One of my favorite Anishinaabe sacred stories—the old Indians called a sacred story *aadizookaan*—is the story of the Anishinaabe mother and Toad Woman. There was an Anishinaabe family that lived a little bit apart from the village, at the edge of the woods, just far enough so as to be easy pickings for someone bad like Toad Woman. The family consisted of two young parents and an infant child. One day, Toad Woman snuck into the lodge and took the infant child, stole him from right under their noses, cradleboard and all. The young parents were devastated and quickly, and sadly, turned to blaming each other for being negligent parents. They looked and looked for their child, but being so close to the dense forest, they could not find him. The father gave up after a time and left his wife. But the mother never stopped looking. She never gave up in her quest to find her child. She delved deeper and deeper into the woods. Much time passed.

Eventually, the mother came across Toad Woman's lodge. It was immaculate. The coverings were brand new deer hides and birch bark. There was what seemed to be an entire trader's lodge full of dried meat and fish all over. There was a bountiful store of dried berries and corn. Toad Woman was blessed. The Anishinaabe mother approached the lodge and called out. Toad Woman knew exactly who this woman was and responded coldly, "There's nothing for you here."

The mother knew of Toad Woman. She recalled that Toad Woman had been cast out from the main village many years earlier, but they had never met. "Oh, I want nothing," the mother responded gently. "I admit I am impressed by your bounty. How do you manage it?"

Toad Woman proudly boasted, "My son is a tireless and gifted hunter and fisher. He logs birch trees for the lodge. He helps me gather berries and corn. He loves his mother." Toad Woman beamed.

"You must be so proud," the mother said.

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141. Brief of Casey Family Programs, et al. at \*5, *Adoptive Couple v. Baby Girl*, 537 U.S. 637 (2013), 2013 WL 1279468 (No. 12-399).

Just then, a young Anishinaabe man appeared at the lodge, coming out of the woods. He was carrying an impossible load of deer meat and fresh fish. The mother gasped—and Toad Woman noticed. This young man looked like the spitting image of the mother's husband, the one who had left her out of despair. The mother immediately guessed she had found her child.

The rest of the story is about the competitive game the mother and Toad Woman played for a long time that eventually led the young man to realize he had been kidnapped by Toad Woman, and fraudulently raised as Toad Woman's son. That part is interesting but not the point of the story I want to highlight here.

I want to highlight that Indian people, especially Indian women, have been fighting for their children for centuries. They don't stop, no matter how much pain they suffer, no matter how long it takes. They never give up.

I am reminded of the night ten days after Owen was born in 2006. We were living in Grand Forks, North Dakota when Wenona gave birth, but we planned to relocate to Michigan as soon as Owen and his mother were ready to travel. We rented a large, fancy, brand new SUV to drive from Grand Forks to East Lansing. On the first day of travel, that fancy SUV broke down on the side of I-94 at the top of a massive highway interchange, in the middle of the night, in the rain. We were stuck there for hours because the rental company didn't operate very quickly in the middle of the night. As a new dad, I sat there nervous and sweating for those hours, imagining that every vehicle coming up behind us would be the one to crash into the back of our stalled vehicle and wipe Owen's parents off the earth. We have a strong family who would take care of Owen, but not every Indian family has that. Some Indian kids are lost that way into a child welfare system that follows funding sources like water running downstream. I'm still terrified by that feeling of helplessness I felt for those hours.

Reading the *Brackeen* ruling made me think of that night. Owen was less than two weeks old. There was no chance we could have enrolled him in such a short time frame, especially since we were moving from North Dakota to Michigan. If, for some impenetrable political reason, Minnesota child welfare officials took Owen, placed him in emergency care, and applied that decision, our Indian families would have lost a critical legal tool to bring him back. I find it unimaginable given the history of Indian removals in our families that the Indian Child Welfare Act, at least as interpreted by that federal judge in Texas, would not help. Indian people have come to depend on ICWA, even when it doesn't work as well as it could or should.

But it wasn't so long ago that there was no Indian Child Welfare Act. I think of Laura cleaning house and cooking for her family, carefully dusting

the portraits of Jesus and placing Bibles around the house. I think of how close the Stevens family must have come to losing everything. I think of Wenona and Christina that day when the church took Christina and gave her away to a white family, how close Wenona might have been to suffering that same fate. It's such a thin line, the line that Indian people walk between safety and disaster.