STEPHEN A. HIGGINSON, *Circuit Judge*, concurring in part, with whom JUDGE COSTA joins:

I concur in Judge Dennis's comprehensive opinion except for Discussion § I.A.2 and write separately to highlight lessons I draw from two Supreme Court cases.

"Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). Engaging in this type of policy weighing, the dissent would strike a statute that has garnered support from Congressional members on both sides of the aisle, a large number of states, and at least 325 federally recognized Indian tribes and has been the law of the land for over four decades.

Specifically, the dissent would hold that the "structural guarantee of state sovereignty" limits Congress's authority to regulate state child custody proceedings involving Indian children. It bases this on two observations: "[n]o Supreme Court decision supports Congress deploying its Indian affairs power to govern state government proceedings," and there is no "comparable founding-era exercise[ ] of Congress's Indian affairs power."

Yet, in *Garcia*, the Court explained why it rejected, "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'": (1) "it prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions"; (2) it "results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated"; (3) it is "unworkable," in part "because of the elusiveness of

objective criteria for 'fundamental' elements of state sovereignty"; and (4) "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 543–52. Contrary to this Supreme Court instruction, the dissent risks resuscitating a misunderstanding of state sovereignty that entangles judges with the problematic policy task of deciding what issues are so inherent in the concept and history of state sovereignty that they fall beyond the reach of Congress.

"[T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies." *Id.* at 550. Instead, it is the nature of our federalist system that states retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Id.* at 549. As Judge Dennis comprehensively explains, the Indian Commerce Clause has done exactly that with respect to Indian Affairs.

But it is not only the dissent's test that diverges from Supreme Court authority—it would also be its result. The Supreme Court has repeatedly recognized that Congress *can* preempt state law that applies in state domestic relations proceedings. *See, e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001) (holding that ERISA preempted application of Washington statute in state probate proceedings); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (holding that ERISA preempted application of Louisiana community property law in state probate proceedings); *McCarty v. McCarty*, 453 U.S. 210, 232–33 (1981) (holding that federal law preempted application of California community property law in state divorce proceedings); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that the Railroad Retirement Act preempted application of California community property law in state divorce proceedings); *Free v. Bland*, 369 U.S. 663, 670 (1962) (holding that federal law preempted application of Texas community property law in state probate proceedings); *Wissner v. Wissner*, 338 U.S. 655, 658–59 (1950) (holding that the National Service Life Insurance Act preempted application

of California community property law in state probate proceedings); *McCune v. Essig*, 199 U.S. 382, 389–90 (1905) (holding that the Homestead Act preempted application of Washington community property law in state probate proceedings); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Congress may legislate in areas traditionally regulated by the States."). That is exactly what Congress did here. *See* 25 U.S.C. § 1902 (declaring Congress's intent to establish "minimum Federal standards" to be applied in state child custody proceedings involving Indian children).

The dissent relies primarily on *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), to support a contrary result. But even Chief Justice Rehnquist—the author of *Seminole Tribe* and perhaps the most faithful proponent of state's rights—explicitly recognized that Congress *may* preempt state domestic relations law. *See McCarty*, 453 U.S. at 237 (Rehnquist, J., dissenting) ("[T]he authority of the States should not be displaced *except pursuant to the clearest direction from Congress*." (emphasis added)); *see also Bond v. United States*, 572 U.S. 844, 858 (2014) ("'[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" (quoting *Gregory*, 501 U.S. at 460)). Although Chief Justice Rehnquist's position was narrower than the dissent's here, *see McCarty*, 453 U.S. at 232 (finding state community property law preempted where (1) there was a conflict between the federal and state laws and (2) the consequences of the state law sufficiently injured the objectives of the federal program), I highlight it to demonstrate how consequential the dissent's retort to clearly stated congressional authority actually is. Even applying Chief Justice Rehnquist's dissenting position, the Indian Child Welfare Act ("ICWA") stands. The ICWA establishes "minimum Federal standards" to be applied in state child custody proceedings involving Indian children—it is hard to image a clearer indication of Congress's intent to preempt state law. 25 U.S.C. § 1902.

Just as "[n]one can dispute the central role community property laws play in . . . community property States," *Boggs*, 520 U.S. at 839–40, it is irrefutable that states have a compelling interest in their child custody

proceedings. Nevertheless, important, longstanding, and binding Supreme Court precedent recognizes both the United States' unique and compelling obligation to Indians, *see United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" (citations omitted)); *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations."), and dictates that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail," *Free*, 369 U.S. at 666.