

Politics, Indian Law, and the Constitution

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The question of whether Congress may create legal classifications based on Indian status under the Fifth Amendment's Due Process Clause is reaching a critical point. Critics claim the Constitution allows no room to create race- or ancestry-based legal classifications. The critics are wrong.

*When it comes to Indian affairs, the Constitution is not colorblind. I argue that, textually, the Indian Commerce Clause and Indians Not Taxed Clause serve as express authorization for Congress to create legal classifications based on Indian race and ancestry, so long as those classifications are not arbitrary, as the Supreme Court stated a century ago in *United States v. Sandoval* and more recently in *Morton v. Mancari*.*

Should the Supreme Court reconsider those holdings, I suggest there are significant structural reasons as to why the judiciary should refrain from applying strict scrutiny review of congressional legal classifications. The reasons are rooted in the political question doctrine and the institutional incapacity of the judiciary. Who is an Indian is a deeply fraught question that judges have no special institutional capacity to assess.

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INTRODUCTION

As a young attorney in the White House Office of Legal Counsel, now-Chief Justice John Roberts wrote memoranda to the President critiquing acts of Congress ratifying tribal claims settlements, calling one settlement “another Indian giveaway.”¹ In a memorandum regarding another Act of Congress settling an Indian claim, Roberts complained yet again on similar grounds, but in both

1. Memorandum from Assoc. Counsel to the President John G. Roberts to Counsel to the President Fred F. Fielding 6, 6 (Sept. 26, 1984), <https://turtletalk.files.wordpress.com/2007/10/roberts092684-shoalwater-bay.pdf> [<https://perma.cc/3B9M-T96L>].

instances, young Mr. Roberts could not recommend the President veto the bill because there was “no *legal* objection.”²

A few years later, while in private practice building a reputation as “the finest appellate lawyer of his generation,”³ Mr. Roberts represented the State of Hawai‘i (alongside Gregory Garre, who would later serve as Solicitor General) in a matter before the Supreme Court, *Rice v. Cayetano*.⁴ As an advocate, Mr. Roberts wrote that Indian affairs laws like the ones he once reviewed for President Reagan were “based on the unique legal and political status of indigenous groups that enjoy a congressionally recognized, trust relationship with the United States.”⁵ In compelling prose, Mr. Roberts pointed out to the Court that Indian affairs laws “singl[ing] out Natives for special treatment” are perfectly allowable under the Constitution, specifically citing the Indians Not Taxed Clause:

The conclusion that laws singling out indigenous groups are not race-based within the meaning of the Civil War Amendments surely would come as no surprise to the Reconstruction Congress. Between 1866 and 1875, Congress singled out Natives for special treatment in scores of statutes and treaties . . . In addition, *the Fourteenth Amendment itself acknowledges that Indians may continue to be singled out, excluding “Indians not taxed” for apportionment purposes.* U.S. CONST. amend. XIV, § 2.⁶

Mr. Roberts failed to persuade the Court in that case that Native Hawaiians were already a class of American citizens for which the United States recognizes this special kind of relationship, but the Court did reconfirm the “obvious” point about federally recognized tribes.⁷

In a few short years, Chief Justice Roberts will likely be called upon to address matters of Indian law that raise fundamental questions. Opponents to Indian affairs legislation abound. In *Brackeen v. Zinke*, a federal district court

2. Memorandum from Assoc. Counsel to the President John G. Roberts to Counsel to the President Fred F. Fielding 1, 1 (Nov. 30, 1983), <https://turtletalk.files.wordpress.com/2007/10/roberts113083-las-vegas-paiute.pdf> [<https://perma.cc/P7VU-EECY>].

3. Nina Totenberg, *Looking at Roberts' Record Before the Court*, NAT'L PUB. RADIO (July 22, 2005), <https://www.npr.org/templates/story/story.php?storyId=4765617> [<https://perma.cc/V9YY-BCHS>].

4. 528 U.S. 495 (2000).

5. Brief for Respondent at 25, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557073, at *8 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)).

6. *Id.* at *26 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 840–41 (1982)) (emphasis added).

7. *Rice*, 528 U.S. at 519 (“Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs . . . As we have observed, ‘every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians.’” (quoting *Mancari*, 417 U.S. at 552)).

recently concluded that the Indian Child Welfare Act (ICWA),⁸ which creates legal classifications of Indian children based on their tribal membership status or based on the membership status of their biological parents,⁹ is race-based legislation that cannot survive strict scrutiny.¹⁰ A partially split Fifth Circuit panel reversed that decision,¹¹ but the Fifth Circuit's decision will certainly be appealed.¹² Other cases like *Brackeen* are percolating in the federal courts.¹³ These cases will determine whether Indian affairs laws will survive at all. If *any* Indian affairs statute is struck after an equal protection challenge, *every* Indian affairs statute is vulnerable. Assuming a case like *Brackeen* reaches the Supreme Court, both tribal advocates and opponents will be strategizing on the best way to win Chief Justice Roberts's vote. Which John Roberts will we see? The young, hyper-partisan lawyer suspicious of "Indian giveaways"? Or the apolitical, institution-protecting "Umpire in Chief"?¹⁴

* * *

Ask any one hundred Americans "Who is an Indian?" and you are likely to receive one hundred different answers. The same is true if you ask one hundred American Indians. The indeterminacy plagues federal Indian law advocates and confounds policymakers and judges.¹⁵ But it shouldn't. The Constitution's text and structure require that the political branches of the federal government establish legal classifications based on Indian and tribal status. In recent decades, the federal government's political branches have made the smart choice to defer to tribal governments on the question.¹⁶

8. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. § 1901 (2018) *et seq.*).

9. 25 U.S.C. §§ 1903(3), (4) (2018).

10. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

11. *Brackeen*, 937 F.3d 406.

12. The state and individual plaintiffs have sought en banc review. Andrew Westney, *5th Circ. Asked to Rethink Indian Child Welfare Act Ruling*, LAW360 (Oct. 2, 2019), <https://www.law360.com/texas/articles/1205106/5th-circ-asked-to-rethink-indian-child-welfare-act-ruling> [<https://perma.cc/R7QZ-SB5Z>].

13. *E.g.*, Complaint, *Whitney v. United States*, No. 1:19-cv-00299-JDL (D. Me. June 27, 2019).

14. Jeffrey Rosen, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html> [<https://perma.cc/7PB3-XKSR>].

15. Tribal law is relatively simple. Indian tribes have the power to establish their own membership or citizenship criteria. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

16. *E.g.*, *Aguayo v. Jewell*, 827 F.3d 1213, 1217 (9th Cir. 2016) ("This appeal analyzes whether the Bureau of Indian Affairs (BIA) acted arbitrarily and capriciously when it concluded that, according to tribal law, it had no authority to intervene in a tribal membership dispute, in which more than 150 people were disenrolled from the Pala Band of Mission Indians (Pala Band or Band). We conclude that it did not . . ."); *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1230 (9th Cir. 2013) (holding federal agency would have jurisdiction to review membership decisions only if tribal law authorized it); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) ("Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs were wrongfully denied

The problem identified by critics is that the legal classification of Indians requires governments to make classifications on the basis of race. In the last few decades, legal elites—courts, legislators, and executive branch officials—have expressed consistent doubt that federal laws creating classifications based on American Indian or tribal status are valid under the equal protection component of the Fifth Amendment of the Constitution,¹⁷ classifications that the Supreme Court has nonetheless consistently upheld.¹⁸ Commentators and courts most especially wring their hands over legislative definitions of “Indian” that are rooted in Indian ancestry or blood quantum.¹⁹

For the most part, the political branches do their jobs recognizing Indians and tribes without judicial interference. Congress and the executive branch have created and enforced classifications based on Indian and tribal status since before the Framing of the Constitution.²⁰ Until the civil rights era of the mid-twentieth century, courts understood that federal power to create and enforce such classifications was rooted in the foreign affairs powers of the Constitution, not to be disturbed or questioned by Article III judges absent unusual circumstances.²¹ Congress has power to regulate and govern Indians and Indian

enrollment in the Tribe.”); *see also* Dept. of the Interior, Office of the Solicitor, Memorandum on Implementation of the Indian Child Welfare Act by Legislative Rule, M-37037, at *2 & n.18 (June 8, 2016), 2016 WL 11200999 (citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32). *But cf.* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 888 (2d Cir. 1996) (“While Congress has deferred with regularity to tribal membership determinations, . . . there is little question that the power to define membership is subject to limitation by Congress . . .”) (citations omitted).

17. *E.g.*, Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 594–95 (1996) (arguing that federal legislation aimed at protecting Native Hawaiians violates equal protection); Allison S. Ercolano, *Gambling with Equal Protection: Connecticut’s Exploitation of Mancari and the Tribal Gaming Framework*, 48 CONN. L. REV. 1269, 1297–98 (2016) (arguing that state gaming laws benefitting Indian tribes violate equal protection); John Robert Renner, Comment, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 131 (1992) (arguing that expansion of the Indian Child Welfare Act’s definition of “Indian child” would violate equal protection); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 761–62 (1991) (arguing that all Indian affairs laws violate equal protection).

18. *E.g.*, *United States v. Antelope*, 430 U.S. 641, 646 (1977) (federalization of Indian country criminal jurisdiction); *Fisher v. District Court*, 424 U.S. 382, 388–89 (1976) (exclusive tribal jurisdiction over domestic affairs of reservation Indians); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480–81 (1976) (tax immunity of reservation Indians); *Morton v. Mancari*, 417 U.S. 535, 545–55 (1974) (Indian preference in employment with federal government).

19. *E.g.*, L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 771–72 (2001).

20. *See, e.g.*, NORTHWEST ORDINANCE OF 1787, art. III (1787) (“The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.”); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (referencing “merciless Indian Savages”); Treaty with the Delawares, U.S.–Delaware Nation, art. III, Sept. 17, 1778, 7 Stat. 13 (treaty of alliance with “Delaware nation”).

21. *See Baker v. Carr*, 369 U.S. 186, 215–17 (1962).

tribes through the Indian Commerce Clause, the Treaty Power, other constitutional provisions like the Property Clause,²² and the general trust relationship with Indians and tribes (originally known in American law as the duty of protection²³). These powers are bolstered by the Supremacy Clause and the Necessary and Proper Clause.²⁴ Indian affairs legislation, by definition, creates classifications based on the racial and ancestral status of Indian people and the tribal membership criteria of Indian tribes.²⁵ The Supreme Court faithfully applies a sort of rational basis test instead of strict scrutiny to Fifth Amendment equal protection challenges to Indian affairs laws.²⁶ It is the settled law of the land that when Congress legislates to fulfill its trust relationship with Indian tribes, Congress is entitled to significant deference under this test, usually known as the political classification doctrine.²⁷

It would be easy enough to argue that the *Brackeen* district court decision therefore simply runs afoul of Supreme Court decisions to the contrary, and that the federal judge who decided it was simply wrong.²⁸ But conservative Supreme Court Justices have signaled that they are willing to reconsider the political classification doctrine.²⁹ Moreover, the current presidential administration casually declared Indian affairs legislation providing services to individual

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

23. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832).

24. *Id.* at 561–62 (invalidating state laws conflicting with “treaties” and with “the acts of congress for regulating this intercourse, and giving effect to the treaties”); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 201–02 (1984).

25. *E.g.*, 25 U.S.C. § 163 (2018) (“The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood”); 28 U.S.C. § 1353 (2018) (“The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.”).

26. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

27. *Id.*

28. The *Brackeen* judge, Reed O’Connor, is known by some as the “go-to judge” for political conservative impact litigation. Mark Curriden, *Judge Reed O’Connor is the ‘Go-to Judge’ for Political Conservatives*, DALLAS BUS. J. (Dec. 19, 2018), <https://www.bizjournals.com/dallas/news/2018/12/19/judge-reed-o-connor-political-conservatives.html> [https://perma.cc/3FRM-LKNM].

29. Justice Alito’s opening line in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013)—“This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee”—is a statement of fact, a disparagement of the Cherokee Nation’s citizenship criteria, and possibly a broad, opening salvo against the political classification doctrine. Justice Thomas has criticized the foundations of Indian law primarily by attacking the scope of congressional power under the Commerce Clause. *E.g.*, *Baby Girl*, 570 U.S. at 666 (Thomas, J., concurring) (“Because adoption proceedings like this one involve neither ‘commerce’ nor ‘Indian tribes,’ there is simply no constitutional basis for Congress’ assertion of authority over such proceedings.”). Justice Thomas’s invocation of congressional Indian affairs powers as “race-based” is a strong signal that his skepticism of Indian affairs laws would extend to *Morton v. Mancari*. *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

Indians as improperly based on race in a signing statement involving appropriations for housing block grants.³⁰ The Centers for Medicare and Medicaid Services, an agency of the Department of Health and Human Services, followed that up by declaring that “tribes cannot be exempted from state work requirements as a condition of receiving Medicaid benefits.”³¹

The statute at issue in *Brackeen*, the Indian Child Welfare Act,³² now appears to be the battleground for the decisive determination about the political classification doctrine,³³ and therefore, the future of Indian law.³⁴ Four States have challenged the constitutionality of ICWA under the Equal Protection Clause of the Fifth Amendment—Texas, Louisiana, and Indiana are plaintiffs in *Brackeen*, and Ohio filed an amicus brief in support.³⁵ If the Indian Child Welfare Act is struck down under the Fifth Amendment, then every federal statute not explicitly limited to federally recognized Indian tribes or their members would be subject to strict scrutiny, a mode of review famously

30. Andrew I. Huff & Robert T. Coulter, *Defending Morton v. Mancari and the Constitutionality of Legislation Supporting Indians and Tribes* 14, INDIAN L. RESOURCE CTR. (Nov. 19, 2018), <https://turtletalk.files.wordpress.com/2018/12/mancari-11-19.pdf> [http://perma.cc/U4Q2-KXES]. According to Huff and Coulter, “[n]o previous administration has ever characterized statutes or programs benefiting tribal governments as racial preferences.” *Id.*

31. *Id.* at 14–15. The agency did signal later that it might back down under tribal pressure.

32. 25 U.S.C. § 1901 et seq. (2018).

33. In a previous case involving the Indian Child Welfare Act, a party represented by prominent litigator Paul Clement asked the Supreme Court to treat the Act as a race-based classification. Response of Guardian Ad Litem in Support of Petition for Writ of Certiorari at 12, *Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2012 WL 5209997. At that time, the same prominent lawyer was counsel to a company challenging a state gaming law giving preference to Indian tribes as violative of equal protection. *KG Urban Enterprises v. Patrick*, 693 F.3d 1, 16–28 (1st Cir. 2012).

34. Justice Blackmun’s majority opinion explained the stakes in *Morton v. Mancari*, 417 U.S. 535 (1974):

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552 (citation omitted). Justice Blackmun’s concerns derived from the statement of a federal district court judge, who first identified the threat to Indian affairs in a prior case:

A logical application of plaintiffs’ position respecting the unconstitutionality of a “criterion of race” would cast doubt on all such legislation. Defendants have made this point as follows: “Let us assume that every statute which has race as the basis of its classification violates the Fifth Amendment as alleged by the Plaintiffs. If this be so, then every statute relating to Indians, qua Indians, is unconstitutional. The trust established over ‘Indian’ lands is unconstitutional. The allotment to Lucy Simmons, and the authorization of the inheritance of Joseph Simmons, Sr., are each based on the determination that the individual in question is an Indian. The plaintiffs say this is unconstitutional—so be it. By what right do plaintiffs claim any right to this land?”

Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff’d*, 384 U.S. 209 (1966), (cited in *Mancari*, 417 U.S. at 552–53).

35. *Brackeen v. Bernhardt*, 2019 WL 3759491, at *3 (5th Cir. Aug. 9, 2019) (Texas, Louisiana, and Indiana); *id.* at *4 (Ohio).

described as “‘strict’ in theory,” but “fatal in fact.”³⁶ The worry that all of Title 25 would be vulnerable now is a real-world concern.³⁷

There is a spectrum of argument against the *Mancari* rule. The most concerted attack—what I call the compromise position—is on the surface an effort to be reasonable, and has therefore caught the attention of many observers. This attack concedes that Congress can legislate in relation to federally recognized Indian tribes and the members of those tribes. That is a concession to the overwhelming reality that Indian tribes are sovereigns—domestic sovereigns, yes, but sovereigns that the Constitution itself acknowledges in the Commerce Clause.³⁸ Compromise position advocates claim that some regulatory and legislative acts targeting unacknowledged tribes create a purely racial classification that should be subject to strict scrutiny.³⁹ The district court in

36. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

37. Possibly the first statute to be subjected to a concerted attack would be the Major Crimes Act (MCA), 18 U.S.C. § 1153 (2018). Relying on the district court decision in *Brackeen*, a convicted criminal is challenging their conviction in the Tenth Circuit by attacking the constitutionality of the MCA. See Appellant’s Opening Brief at 53, *United States v. Jim* (10th Cir. 2019) (No. 18-2144).

38. U.S. CONST. art. I, § 8, cl. 3; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” (citing *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897))).

39. Former Judge Kozinski was a champion of that position, and fleshed it out in dicta in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). In that case, the Department of the Interior interpreted the Reindeer Industry Act of 1937, Act of Sept. 1, 1937, 50 Stat. 900, to exclude all non-Indians from the reindeer industry. *Williams*, 115 F.3d at 659. Kozinski failed to make a coherent argument as to why the government’s interpretation merited strict scrutiny review. Kozinski opened with an effort to limit *Mancari*’s holding to Indian “life in the immediate vicinity of Indian land.” *Id.* at 665. Kozinski had to quickly retreat, because *Mancari* involved federal employment preferences, *Mancari*, 417 U.S. at 537, and many federal Indian affairs employees work in Washington, D.C., far from Indian land. Kozinski then restated his rule limiting *Mancari*’s scope to “those statutes that affect *uniquely* Indian interests.” *Williams*, 115 F.3d at 665 (citing *United States v. Antelope*, 430 U.S. 641, 646 (1977)). Kozinski does not retreat from the uniqueness qualifier in this restated rule, though he should have: the whole point of the political classification doctrine is that federal interests in tribal self-determination are unique in American law, and therefore Article III courts must defer to the political branches. All Indian interests are unique.

Kozinski then moved to justify this ad hoc misstatement of the political classification doctrine by invoking hypotheticals that are classic logical fallacies. Kozinski states, “[W]e seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts.” *Id.* This is the straw man fallacy writ large (arguing against a phony and ludicrous position in order to knock it down), the false dichotomy fallacy (reducing an argument to one of two possible positions when there are many others to choose from), and the false or weak analogy fallacy (where two concepts that are similar must both have the same properties). First of all, there are no such statutes that do any such thing for Indians or Indian tribes (straw man). Secondly, if such monopoly-creating statutes existed, I imagine the courts would review the statutes under *Mancari* and conclude Congress was acting unreasonably or arbitrarily to strike down the law as irrational (false dichotomy). Third, it is quite possible that Indian tribes do receive preferences that grant effective monopolies over casinos and government contracts, at least limited monopolies—in certain states, like Connecticut and Michigan, Indian tribes do or did possess a monopoly on gaming, a situation that arose because of negotiated settlements between the states and the tribes; some Alaskan Native corporations do business with the

Brackeen adopted the compromise position, holding that ICWA’s definition of Indian children (who are not automatically enrolled as tribal citizens at birth) as “eligible for membership” in an Indian tribe and having a “biological Indian parent” and thus “related to a tribal ancestor by blood” was a race-based classification subject to strict scrutiny.⁴⁰

* * *

Legal scholars have long defended federal legislative classifications in Indian affairs, focusing on how Indian affairs is a unique field to which equal protection doctrine is a poor fit, typically referring to Indian law as “exceptionalism.”⁴¹ Some scholarship (including, to this point, my own⁴²) is willing to compromise on the question of race, more or less agreeing with the critics of *Mancari* that legal classifications based on Indian blood quantum might be improper for some purposes. More recently, Professor Greg Ablavsky concluded—as Indian people, persons of color held in slavery, and persons of color denied the right to vote, testify in court, or sit on a jury, and all of their descendants have always known—that the Constitution is not at all colorblind.⁴³ Ablavsky parsed the meaning of “Indian” and “tribe” at the Framing of the Constitution, finding that the white political elite of the Framing Generation used the term “Indian” to distinguish their race from that of Indian people and the term “tribe” as an understanding (mostly) that Indian tribes were nations.⁴⁴ Ablavsky’s research is a game-changer.

I now disagree substantively and strategically with many of the scholars who concede that some legal classifications based on Indian blood quantum might be improper and also, as should be obvious, with the critics of the political

federal government on a no-bid contracting basis, taking advantage of contracting preferences benefitting Indian-owned businesses (false analogy).

Kozinski’s opinion in *Williams* is an oft-cited and influential opinion, especially among those who advocate for the overruling or significant limitation of political classification doctrine, but it does not deserve acclaim. The better analysis would have been to apply the controlling precedent of *Morton v. Mancari*, which requires lower courts to assess whether the “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . .” 417 U.S. at 555. See also *id.* at 554 n.24 (describing the agency rule). If “the preference is reasonable and rationally designed to further Indian self-government,” then the court is not authorized to “distur[b]” the judgment of Congress or the executive branch. *Id.*

40. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

41. E.g., Philip P. Frickey, (*Native*) *American Exceptionalism in American Public Law*, 119 HARV. L. REV. 431 (2005) (cited in Alex Tallchief Skibine, *From Foundational Law to Limiting Principles in Federal Indian Law*, 80 MONT. L. REV. 68, 68 (2019)); see also Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017).

42. Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011); Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1 (2012).

43. Gregory Ablavsky, “*With the Indian Tribes:*” *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1074–75 (2018).

44. *Id.* at 1025–26.

classification doctrine. I take up the academic commentary where Professor Ablavsky leaves off. Ablavsky's comprehensive historical scholarship showed us that there was no single, definitive understanding by the white, male American political, cultural, and legal elite of what the term "Indian" meant around the time of the ratification of the Constitution.⁴⁵ Given that the American polity is now far less exclusionary than it was at the Founding, how a twenty-first-century American citizen would define the term "Indian" is even more diffuse. While I agree with Ablavsky's historical conclusions, I argue that the search for the meaning of the term "Indian" in the Constitution is only tangentially relevant to the greater question affecting Indian affairs then, now, and in the future.

I conclude that for purposes of federal law, Congress first and foremost as a political matter decides which persons are Indians, and must do so in deference to tribal membership or citizenship criteria. I argue further that congressional legal classifications made in furtherance of that political choice are subject to a very deferential standard of review from Article III courts. Congress and the executive branch share authority in determining which entities constitute "Indian tribes," another political decision not subject to plenary review by Article III courts. The text of the Constitution leaves for Congress and the executive branch (and likely in limited circumstances, state governments) the power to decide as a political matter which persons are Indians under the Constitution, so long as they are reasonable decisions. In my view, Professor Ablavsky's research is most relevant for assessing whether the political branches have made reasonable classifications of which the Founders would have approved; in other words, Ablavsky's research is useful for originalist judges. Regardless, I conclude that federal (and state) legal classifications based on tribal membership and citizenship criteria based purely on Indian blood quantum and ancestry are valid under the Constitution for both federal and state laws, so long as they are rationally related to the fulfillment of the United States' general trust responsibility to Indians and Indian tribes. My goal is to marry the holding in cases like *Morton v. Mancari* to the text and structure of the Constitution.

Part I introduces the foundation of federal Indian law and policy and the duty of protection owed by the United States to Indians and Indian tribes in bargained-for, sovereign-to-sovereign relationships. This Part describes in broad strokes the history and reality of federal Indian affairs legislation—that legal classifications based on race and ancestry are inherent to the field but have always been understood as political classifications first.

Part II explains how the constitutional structure and text leave Congress, and to a lesser extent the executive branch, with the exclusive power to decide what entities qualify as "Indian tribes" and which persons are "Indians." First, I show that the political branches of the federal government possess exclusive power to recognize foreign nations and Indian tribes, and to incorporate new

45. *Id.* at 1067–76.

states into the Union. These decisions are political decisions over which Article III courts possess no power to review. I go on to show that the text of the Constitution requires Congress (and likely and in limited circumstances the States) to determine which persons are “Indians Not Taxed.” I argue that the federal government’s recognition of persons as “Indians” is analogous to the government’s recognition of foreign nations, States, and Indian tribes. The political branches’ recognition of Indians, which necessarily requires racial and cultural classifications, is thus similarly not subject to onerous review from Article III courts.

Part III details the practical reasons why Article III courts should defer to the political branches. The federal government’s relationship with Indians and Indian tribes is, in fact, special, and rooted in foreign affairs. Under the structure of the Constitution, Article III courts have little to say about foreign affairs. Moreover, they have limited institutional capacity to review the political judgments made by Congress and the executive branch. I describe many instances where state and federal courts struggle with Indian status questions better left to the political branches.

Part IV delves into the broader implications of the thesis of this paper. Even federal definitions of “Indian” that rely on blood quantum, for example, should be adjudged according to whether the classification is rationally related to the duty of protection owed by the United States to Indians and Indian tribes. The duty of protection extends to Indian people who are not members of federally recognized tribes, so long as they can trace lineage to tribes to which there exists a federal duty of protection. Similar state definitions should also survive muster for the same reasons under the Fourteenth Amendment.

I.

THE FEDERAL-TRIBAL RELATIONSHIP

The relationship between the United States and Indian tribes is an ancient relationship and well-settled under American law. Prior to the formation of the United States, the relationship was one between foreign nations. That relationship shifted from a relationship between foreign nations to a relationship between domestic nations when Indian tribes entered into treaties with the United States in which they each agreed to come under the protection of the federal government.

Similarly, the relationship between the United States and individual Indians shifted over time. For purposes of American citizenship, the Constitution leaves out “Indians not taxed,” without defining that term.⁴⁶ Congress enacted various

46. U.S. CONST. amend. XIV, § 2.

statutes authorizing certain Indians to become citizens.⁴⁷ But Indians remained tribal citizens, too.

This Section details the origins and relevant contours of federal Indian law, the types of legal classifications created by those laws, and the general rule adopted by the Supreme Court when it comes to challenges to those laws.

A. *The Duty of Protection (The General Trust Relationship)*

Federal Indian law in essence involves the relationship between the United States and Indian tribes. In the modern era, that relationship is characterized by the federal government as the “general trust relationship.”⁴⁸ The legal origin of the general trust obligation is a combination of the Constitution, Indian treaties, and federal acknowledgment of Indian tribes. In this article, the general trust relationship will be characterized as it was originally labeled, the duty of protection.⁴⁹

From the Framing and Ratification of the Constitution, the federal government’s powers in Indian affairs were always considered plenary and exclusive as to states and other nations.⁵⁰ Collectively, the Constitution’s Indian Commerce Clause, Treaty Power, Supremacy Clause, Indians Not Taxed Clause (repealed but restored in the Fourteenth Amendment), and other clauses ensured the federal government’s plenary and exclusive powers, and acknowledged a unique political relationship between the United States and Indian tribes and individual Indians.⁵¹ The First Congress preempted the field in 1790 by enacting the first Trade and Intercourse Act, which forbade state and individual American citizen intercourse with Indians and tribes.⁵² And, in all, the United States entered

47. See MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* § 3.8, at 92–97 (2016) [hereinafter FLETCHER, *FEDERAL INDIAN LAW*].

48. See *id.* at § 5.2, at 181–94. Of course, the United States holds or manages billions of dollars in assets in trust for Indian tribes and individual Indians—a different kind of trust. See *id.* § 5.2, at 194–209 (describing litigation to enforce the federal government’s trust obligations).

49. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting) (“[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state.”); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 *UCLA L. REV.* 1615, 1621 (2000) (“The European sovereigns assumed a duty of protection toward the Indian nations, which, as Chief Justice John Marshall held in *Worcester v. Georgia*, did not imply a ‘dominion over their persons,’ but merely meant that the Indians were bound ‘as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.’”) (footnotes omitted).

50. FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 47, § 1.2, at 4–5.

51. See *United States v. Lara*, 541 U.S. 193, 200–01 (2004) (listing the Commerce Clause, Treaty Power, and other sources of congressional powers). See generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012 (2015).

52. See FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 47, § 3.1, at 51–53; cf. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) (acknowledging exclusive federal right to extinguish

into approximately 400 treaties with Indian tribes⁵³—treaties that formed an additional legal basis for the federal government’s duty of protection to Indian tribes and individual Indians.⁵⁴

The Supreme Court confirmed the federal government’s plenary and exclusive powers in Indian affairs in the Marshall Trilogy, a series of cases decided in the 1820s and 1830s.⁵⁵ The Court also confirmed that the United States owed a duty of protection to Indians and tribes, but because that relationship was akin to a sovereign-to-sovereign political relationship, the Court deferred to the United States on the scope and contours of that duty.⁵⁶

American policymakers began cynically and, at times, viciously exploiting the duty of protection against Indians and tribes, rhetorically adopting dicta from the Marshall Trilogy referring to Indians and tribes as incompetents and dependents.⁵⁷ Utilizing the Marshall Court’s phrase “domestic dependent nations” as a political cudgel, Congress and the executive branch declared Indians and tribes dependent and imposed a guardian-ward paradigm on Indian affairs.⁵⁸ From this political model came assimilation programs targeted at individual Indians and dispossession of tribal and Indian lands and resources.⁵⁹ The Supreme Court followed suit, adopting the guardianship characterization of the duty of protection as justification for its deference to Congress and the executive branch on Indian affairs policies, and doing so well into the twentieth century.⁶⁰

Since at least the 1970s, the federal government turned away from characterizing the duty of protection as a guardianship and now characterizes its

Indian title); *Warren Trading Post Co. v. Ariz. Tax Comm’n*, 380 U.S. 685, 688–89 (1965) (acknowledging exclusive federal right to regulate Indian traders).

53. FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 5.3, at 213.

54. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

55. *See M’Intosh*, 21 U.S. 543; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See generally* FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 2.1–2.2, at 21–37.

56. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); *Kagama*, 118 U.S. at 384 (“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”). *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25–81 (2002).

57. *Compare Cherokee Nation*, 30 U.S. at 17 (Marshall, C.J.) (referencing Indians and tribes as “dependent” and “in a state of pupilage”), *with United States v. Sandoval*, 231 U.S. 28, 40 (1913) (affirming applicability of federal liquor regulations by referring to Indian people as “simple, uninformed and inferior”), *Ex Parte Kan-gi-shun-ka*, 109 U.S. 556, 571 (1883) (referring to the “strongest prejudices of their savage nature” of Indian people), *and Lone Wolf*, 187 U.S. at 565 (affirming allotment acts affecting Indians as an “ignorant and dependent race”).

58. *See generally* FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 5.2, at 178–81.

59. *Id.*

60. *Id.* at § 5.2, at 179.

relationship as a trusteeship.⁶¹ Federal-tribal relations are again considered government-to-government relationships. Indian tribes serve as federal government contractors providing their own federally funded government services.⁶² Indian tribes operate business enterprises and use the proceeds to additionally fund tribal government services.⁶³ For the last half century, the policy of tribal self-determination guided federal-tribal relations. Now federal laws tend to support tribal interests and individual Indians. Sadly, anti-Indian and anti-tribal groups have proliferated with the decline of *open* political, legal, and economic war with Indians.⁶⁴

B. Federal Indian Affairs Classifications

In exercising the duty of protection (the general trust relationship), the United States must decide as a political matter which entities and which persons are eligible for federal protection.

1. Federal Acknowledgment of Indian Tribes

There are 573 federally recognized Indian tribes in the United States.⁶⁵ The United States recognizes a trust relationship only with federally recognized Indian tribes.⁶⁶ There are several methods by which an Indian tribe may gain federal recognition or acknowledgment.⁶⁷

61. See generally *id.* at § 5.1, at 181–94.

62. See generally Danielle A. Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, 5 AM. INDIAN L.J. 308 (2017); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014).

63. See generally Randall K.Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185 (2015); Randall Akee & Miriam Jorgensen, *Property Institutions and Business Investment on American Indian Reservations*, 46 REGIONAL SCI. & URB. ECON. 116 (2014).

64. See generally MATTHEW L.M. FLETCHER, *GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN-HATING* 171–87, 207–21, 222–32 (forthcoming 2020) (describing how organizations like the Emmet County Lakeshore Association and Citizens Equal Rights Alliance and individuals, like Monte Wells, rely on racialized rhetoric to attack Indians and tribes).

65. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).

66. 25 U.S.C. § 5131(a) (2018).

67. *Id.*; Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(3), 108 Stat. 4791 (1994) (“Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;’ or by a decision of a United States court.”).

a. The Treaty Process

The earliest method of federal acknowledgment of Indian tribes is through the treaty process.⁶⁸ The fact of negotiating, ratifying, and proclaiming Indian treaties by the executive branch and the Senate is legal acknowledgment of tribal sovereignty with a given tribe.⁶⁹ The United States does not enter into treaties with states, corporations, or organizations like the Boy Scouts. The Treaty Power only extends to foreign nations and Indian tribes.⁷⁰ However, as a matter of policy, in 1871, Congress stated it would no longer consider agreements with Indian tribes under the Treaty Power.⁷¹

Within the federal government, only Congress can terminate or abrogate a treaty.⁷² However, at times, the Department of the Interior has improperly terminated a given treaty relationship without authorization from Congress.⁷³

b. Acknowledgment by Act of Congress

Congress may acknowledge Indian tribes through simple legislation.⁷⁴ Congress terminated and restored dozens of Indian tribes legislatively throughout the mid-twentieth century.⁷⁵

At times, the process of legislative recognition is tortuous and lengthy. Consider the history of the Mississippi Band of Choctaw Indians, described in detail in *United States v. John*.⁷⁶ The Mississippi Choctaw Indian people were signatories to an 1830 treaty wherein the United States forced the federally recognized Indian tribe now known as the Choctaw Nation of Oklahoma to move

68. The first treaty between a tribe and the United States was the 1778 Treaty of Fort Pitt, also known as the Treaty with the Delawares. Treaty with the Delawares, U.S.-Delaware Nation, Sept. 17, 1778, 7 Stat. 13.

69. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 538–39 (1832).

70. U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty”); *id.* art. II, § 2, cl. 2 (President’s treaty powers).

71. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (2018)). The Act preserved then-extant Indian treaty terms: “[N]o obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired” *Id.*

72. See *United States v. Dion*, 476 U.S. 734, 738 (1986) (“As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress.”); see also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968) (applying a clear statement rule to the termination of Indian treaties by Congress).

73. *E.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att’y for the W. Dist. of Mich.*, 369 F.3d 960, 961–62 & n.2 (6th Cir. 2004).

74. *E.g.*, *Restoration of Federal Services to the Pokagon Band of Potawatomi Indians*, Pub. L. No. 103-323, 108 Stat. 2152 (1994); *Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act*, Pub. L. No. 103-324, 108 Stat. 2156 (1994); *An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes*, Pub. L. No. 95-375, 92 Stat. 712 (1978).

75. See *United States v. Lara*, 541 U.S. 193, 203 (2004).

76. See generally 437 U.S. 634, 638–47 (1978).

out of Mississippi.⁷⁷ In the Court's telling of the story, "During the 1890's, the [f]ederal [g]overnment became acutely aware of the fact that not all the Choctaws had left Mississippi."⁷⁸ Congress acknowledged the Mississippi Choctaw people in the 1910s, holding hearings and providing limited funding to purchase lands, partially implementing the government's duty of protection.⁷⁹ However, it took the Department of the Interior's decision in 1934 to allow the Mississippi Choctaw people to vote on whether to opt into the Indian Reorganization Act for the group to gain federal recognition as an Indian tribe.⁸⁰ Congress in 1939 eventually formally instructed the Secretary of the Interior to hold Mississippi Choctaw lands in trust.⁸¹

c. Executive Branch Acknowledgement (Until 1978)

When the United States chose to end the practice of formally entering into treaties with Indian tribes as a matter of policy in 1871, Congress left the obligation to recognize Indian tribes with the executive branch. That process was muddled and confused, to say the least. Some tribes benefitted from federal agency largesse, while others did not. For example, the Upper Skagit Indian Tribe of Washington, the Sauk-Suiattle Indian Tribe of Washington, and the Sault Ste. Marie Tribe of Chippewa Indians achieved federal recognition through decisions of the Deputy Commissioner for Indian Affairs in 1972.⁸² That same year, the federal government acknowledged the Passamaquoddy Tribe of Maine and the Penobscot Tribe of Maine by intervening in federal court suits brought by the tribes for restoration of their homelands.⁸³ But the American Indian Policy Review Commission's 1977 report detailed the administrative and political complexities of federal recognition prior to 1978.⁸⁴ The injustices and inequities of that process left hundreds of Indian tribes non-recognized.⁸⁵ The report noted

77. *Id.* at 640–41 (citing Treaty of Dancing Rabbit Creek, U.S.-Choctaw Nation, Sept. 27, 1830, 7 Stat. 333 (1830)).

78. *Id.* at 643.

79. *Id.* at 644–45.

80. *Id.* at 645–46.

81. *Id.* at 646 (citing 76 Cong. Ch. 235, June 21, 1939, 53 Stat. 851 (1939)).

82. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25 (2001).

83. *Id.* at 25 & 26 n. ("We determined the dates the tribes were recognized based on the Department of the Interior's position that the tribes were recognized on the date the U.S. Attorney's Office filed an action against the state of Maine on behalf of the Passamaquoddy and the Penobscot in U.S. v. Maine (Civ. Action No. 1969 N.D.) and U.S. v. Maine (Civ. Action No. 1960 N.D.), respectively.").

84. See 1 AMERICAN INDIAN POLICY REVIEW COMM'N, 92-185, FINAL REPORT 457–84 (1977) (detailing the Commission's findings on "nonrecognized tribes").

85. See *id.* For example, the federal government subjected numerous Michigan Indian tribes to "administrative termination," where despite no Act of Congress terminating the federal-tribal relationship, which was established by treaty, the Department of the Interior terminated the relationship. *E.g.*, Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W. Dist. of Michigan, 369 F.3d 960, 961–62 n.2 (6th Cir. 2004) (describing how the federal government administratively terminated the tribe).

that the Department of the Interior exercised the recognition power without any express authorization from Congress, which it probably does not need, and without articulating formal standards.⁸⁶ Instead, the Department of the Interior relied on the ambiguous “Cohen criteria” in recognizing twenty tribes from the 1940s to the 1970s.⁸⁷

d. Federal Acknowledgment Process (1978 to Present)

The executive branch now exercises formal authority to acknowledge Indian tribes through the Federal Acknowledgment Process (FAP), established within the Department of the Interior in 1978.⁸⁸ A petitioning tribal organization may demonstrate tribal status under this rigorous and expensive process.⁸⁹ Several tribes have been successful under the FAP.⁹⁰ Because the Secretary’s decision is a final agency decision, it is subject to administrative review under the Administrative Procedure Act.⁹¹

Federal acknowledgement of Indian tribes remained a messy affair under the FAP, so much so that Congress in 1994 found that the Department of the Interior was arbitrarily creating additional classifications of federally recognized Indian tribes based on how they were acknowledged.⁹² Congress forced the Secretary of the Interior to publish a list of federally recognized tribes, keep that list updated, and to stop making more classifications.⁹³ The 1994 Act did formally ratify the executive branch’s power to acknowledge tribes under 25

86. The federal government first created a formal regulatory basis for the acknowledgment of Indian tribes in 1978. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,743 (June 1, 1978) (codified at 25 C.F.R. pt. 54, now codified as amended at 25 C.F.R. pt. 83 (2019)).

87. William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 476–77 (2016).

88. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,743 (June 1, 1978) (codified at 25 C.F.R. pt. 54, now codified as amended at 25 C.F.R. pt. 83 (2019)).

89. Compare the acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians, the first tribe acknowledged under the federal regulatory process in 1980, and that of the Little Traverse Bay Bands of Odawa Indians in 1994 by Act of Congress: “[U]nlike the quick two-year process enjoyed by the Grand Traverse Band in 1978-1980, current petitioners ‘spend[] six to ten years collecting and transcribing oral histories, drawing maps, and researching county records as it documents its claims. The BAR staff spend . . . another six to ten years, on average, evaluating a petition and moving it through bureaucratic channels[.]’” Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. Rev. 487, 504–508, 511–15 (2006) (quotation omitted).

90. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 82, at 25–26.

91. *E.g.*, *Nipmuc Nation v. Zinke*, 305 F. Supp. 3d 257, 270–77 (D. Mass. 2018) (applying arbitrary and capricious standard under 5 U.S.C. § 706 (2018)).

92. See H.R. REP. 103-781, at 3–4 (1994).

93. 25 U.S.C. § 5131 (2018).

C.F.R. Part 83.⁹⁴ The government updated and amended the regulations in 2015.⁹⁵

2. *Federal Acknowledgment of Individual Indians*

While federal acknowledgment of Indian tribes is a truly complicated matter, federal acknowledgment of individual Indians is even more so. Federal statutes authorizing the provision of services to individual Indians must define which persons are eligible for those services. Federal statutes authorizing the United States to take action for the benefit (or the arguable detriment) of individual Indians must also identify persons to which those laws apply. Federal statutory definitions of “Indian” primarily come in three forms: (1) no definition at all, (2) blood quantum, and (3) tribal membership. Loosely, these three forms came to federal law chronologically, and so I will survey them briefly as such.

a. *No Definition*

Federal Indian affairs statutes originally did not define “Indian” at all, as exemplified by the Constitution itself. Article I, Section 2, paragraph 3 of the original text of the Constitution, which covers the apportionment, provides that the “Numbers” of “free Persons” must exclude “Indians not taxed.”⁹⁶ The first federal enactment on Indian affairs, the Trade and Intercourse Act of 1790, also uses the term “Indians” without definition.⁹⁷ Several extant federal statutes, most notably the key four federal statutes involving Indian country criminal jurisdiction, still do not “have a specific definition of ‘Indian.’”⁹⁸ The Indian Civil Rights Act, also, protects individual “Indians” without defining which persons constitute Indians.⁹⁹

In the criminal jurisdiction context, the United States prosecutes “Indians” for Indian country crimes.¹⁰⁰ This requires proving to a jury that a defendant is an Indian beyond a reasonable doubt.¹⁰¹ However, this is made difficult by the reality that some defendants are not members of federally recognized tribes. The

94. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(3), 108 Stat. 4791 (1994).

95. See Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862, 37,887 (July 1, 2015). The purpose of these amendments is to update the earlier regulation due to the prior regulation’s inefficiencies. *Id.* at 37,862 (“This rule revises regulations governing the process and criteria by which the Secretary acknowledges an Indian tribe. The revisions seek to make the process and criteria more transparent, promote consistent implementation, and increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process.”).

96. U.S. CONST. art. I, § 2, cl. 3.

97. An Act to Regulate Trade and Intercourse with the Indian tribes, ch. XXXIII, 1 Stat. 137 (1790).

98. Alex Tallechief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 49 (2017).

99. 25 U.S.C. § 1301(4) (2018).

100. *E.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2018); Indian Country Crimes Act, 18 U.S.C. § 1152.

101. *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009).

lower courts have adopted common law tests to determine whether a person is an “Indian” under the statute.¹⁰²

b. Blood Quantum

Many federal statutes define who is an Indian by blood quantum. For example, the Indian Reorganization Act of 1934 offered three definitions of “Indian,” one of which was “persons of one-half or more Indian blood.”¹⁰³ There are other examples of blood quantum classifications in federal statutes. “American Indians” born in Canada who possess “50 per centum of blood of the American Indian race” may pass the borders of the United States.¹⁰⁴ Whether a person was eligible for an allotment of land depended on whether that person was “in whole or in part of Indian blood or descent.”¹⁰⁵ Other tribe-specific statutes and many treaties created classifications of persons based on blood quantum.¹⁰⁶

Many congressional blood quantum-based legal classifications are nineteenth-century treaties and allotment statutes,¹⁰⁷ but there are relatively recent examples. One of the more controversial statutes was the 1954 Act dividing the Ute Tribe into two groups, mixed-blood and full-blood members, and terminating the federal government’s duty of protection to the mixed-blood group.¹⁰⁸ The House report accompanying the law, enacted during the termination era of the mid-twentieth century, asserted that “the majority of the mixed-blood group feel that they are ready for a termination of [f]ederal supervision over their property and full-blood Indians believe that they are not ready for such action.”¹⁰⁹ Despite criticism comparing the mixed-blood Ute

102. *E.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) (“We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe.”). *See generally* Jacqueline F. Langland, *Indian Status Under the Major Crimes Act*, 15 J. GENDER RACE & JUST. 109 (2012); Brian L. Lewis, *Do You Know What You Are? You Are What You Is; You Is What You Am: Indian Status for the Purpose of Federal Criminal Jurisdiction and the Current Split in the Courts of Appeals*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 241 (2010); Skibine, *supra* note 98, at 55–59.

103. 25 U.S.C. § 5129 (2018).

104. 8 U.S.C. § 1359 (2018).

105. 25 U.S.C. § 345.

106. *E.g.*, 25 U.S.C. § 355 (2018) (“full-blooded members”; “full-blood Indian”); Treaty with the Pottawatomies, U.S.-Pottawatomie Nation, Nov. 15, 1861, 12 Stat. 1191, 1192 (“persons then being members of the Pottawatomie tribe and of Indian blood”).

107. *See generally* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

108. Act of August 27, 1954, 68 Stat. 868 (1954); *see also* *Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst*, 428 F.2d 491, 495–96 (10th Cir. 1970) (“The [1954] Act was intended to distribute tribal property and terminate federal supervision over the mixed-bloods.”), *cert. denied*, 400 U.S. 926 (1970).

109. H.R. REP. 83-2493, at 2 (1954) (quoted in *United States v. Felter*, 752 F.2d 1505, 1506 n.2 (10th Cir. 1985)).

people to “lambs of sacrifice”¹¹⁰ and extensive litigation deriving from that legislation,¹¹¹ I can find no determination by the federal judiciary disparaging the constitutionality of this arrangement. The 1954 Act creating classifications based on blood quantum is very likely a valid legal classification enacted by Congress because it is rationally related to fulfilling the trust responsibility, and any criticism is more political and economic than legal.

c. Tribal Membership

Modern era federal statutes focus on the status of a person as a tribal citizen or tribal member when determining Indian status. Tribal citizenship or tribal membership status is often determinative of whether a person is an “Indian” under federal law.¹¹² As noted earlier, the Indian Reorganization Act of 1934 offers three definitions of “Indian,” one of which is “all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction.”¹¹³

For the purposes of this paper, the definition of “Indian child” in ICWA is critically important: “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”¹¹⁴ The district court in *Brackeen* concluded that the second portion of the definition, which includes persons who are not yet enrolled as tribal members, is a race-based definition that dooms the entire statute to strict scrutiny review.¹¹⁵ Congress reasonably extended its definition of Indian children to include children eligible for membership because tribes do not (and possibly cannot¹¹⁶) automatically enroll Indian children at birth. Moreover, many Indian children are eligible for membership with more than one tribe, and almost all tribes prohibit

110. *E.g.*, R. Warren Metcalf, *Lambs of Sacrifice: Termination, the Mixed-blood Utes, and the Problem of Indian Identity*, 64 UTAH HIST. Q. 322 (1996).

111. *E.g.*, *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir. 1987) (acknowledging rejection of equal protection claims by the district court).

112. *E.g.*, 13 C.F.R. § 124.103 (2019) (defining “Native Americans” as “Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe”).

113. 25 U.S.C. § 5129 (2018).

114. 25 U.S.C. § 1903(4). The definition of “Indian” in ICWA is “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation.” 25 U.S.C. § 1903(3).

115. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 533 (N.D. Tex. 2018) (“This means one is an Indian child if the child is related to a tribal ancestor by blood.”), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

116. *Cf.* *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (“The tribe cannot expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child of a nonmember of the tribe.”).

dual enrollment.¹¹⁷ The federal government usually forces tribal members to choose one tribe for federal purposes.¹¹⁸

d. Non-Indians

At times, Congress and the executive branch have recognized classes of non-Indians as Indians for tribal membership and citizenship purposes. Among the largest groups of persons include those held as slaves, and their descendants, by the citizens of several Indian tribes, most notably the “Five Civilized Tribes” in Oklahoma, the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole nations.¹¹⁹ Following the Civil War, the United States negotiated new treaties with these Indian tribes, which had fully or partially sided with the Confederacy during the war.¹²⁰ The treaties required the tribes to accept the Freedmen as tribal citizens, their descendants also becoming eligible for tribal citizenship.¹²¹

In a case involving the Seminole Nation of Oklahoma, *Goat v. United States*,¹²² the Court found that fully one-third of tribal citizens were non-Indian Freedmen. There, the Supreme Court confirmed by implication that Congress possessed the power to regulate the property interests of all tribal citizens, both Indian and non-Indian.¹²³ There, the Court addressed whether the Seminole Freedmen could alienate the allotments they acquired from the division of the Seminole reservation in 1898.¹²⁴ In 1908, Congress lifted the federal restriction of alienation burdening the Seminole Freedmen allotments. This included allotments held by “enrolled . . . intermarried whites” and “mixed-blood Indians having less than half Indian blood.”¹²⁵ In 1904, however, Congress removed the

117. See, e.g., *Crocker v. Tribal Council for the Confederated Tribes of Grand Ronde Community of Oregon*, 13 Am. Tribal Law 58 (Grand Ronde Community Tribal Ct.2015) (affirming removal of dually enrolled member); *LaRock v. Wisconsin Dept. of Revenue*, 621 N.W.2d 907, 915 (Wis. 2001) (“The tribes do not grant dual-memberships.”; referencing Wisconsin Oneida and Menominee tribes).

118. *Akers v. Hodel*, 871 F.2d 924, 933 n.16 (10th Cir. 1989).

119. See generally Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 414 n.20 (2007) (“This Article rejects any notion that these tribes are or ever were ‘uncivilized,’ and will subsequently refer to them as ‘the tribes’ or ‘the Five Tribes.’ This Article uses the phrase ‘Five Civilized Tribes’ here because this is the term that historians have used to refer collectively to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole tribes.”); see also Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 75 (2005).

120. E.g., Arrell M. Gibson, *Constitutional Experiences of the Five Civilized Tribes*, 2 AM. INDIAN L. REV. 17, 38 (1974) (characterizing the 1866 treaties as “imposed by the victorious Union government on the Five Civilized Tribes”).

121. See generally Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National Identity: The Trials and Tribulations of the Cherokee Freedmen*, 22 AM. INDIAN Q. 230 (1998).

122. *Goat v. United States*, 224 U.S. 458, 468 (1912) (quoting Report of the Dawes Commission 13 (1898)).

123. See *id.*

124. *Id.* at 459; *id.* at 462 (citing Act of July 1, 1898, 30 Stat. 567 (1898)).

125. *Id.* at 465 (citing Act of May 27, 1908, 35 Stat. 312 (1908)).

restrictions upon alienation on allotments held by “allottees . . . who were not of Indian blood.”¹²⁶ The Court concluded that the Freedmen were persons “not of Indian blood,” and so the 1904 Act lifted the restriction upon alienation first.¹²⁷ The Court held that conveyances before the 1908 Act but after the 1904 Act by the Freedmen were valid.¹²⁸ The federal power to impose and lift restrictions upon alienation on lands held by non-Indian citizens of the Seminole Nation went unchallenged. Important for our purposes is the fact that fully one-third of the population of the Seminole Nation’s citizenship was not of Indian blood, and still the United States acknowledged the tribe as Indian.

C. *The Indian Affairs Rational Basis Test*

The Supreme Court’s recognition of an equal protection anti-discrimination principle applicable to the federal government, housed in the Fifth Amendment’s Due Process Clause,¹²⁹ coupled with the civil rights movement of the 1960s, naturally led to scrutiny of Indian affairs statutes in the 1970s.¹³⁰ The Court concluded that so long as the statute is rationally related to the fulfillment of the federal government’s trust responsibility to Indians and tribes, the statute is valid under the equal protection component.¹³¹ This rule is typically called the political status or classification test, though I argue it is more properly called a rational basis test applicable to Indian affairs statutes.

The leading case on the Indian law rational basis test, *Morton v. Mancari*,¹³² was decided during this time. *Mancari* involved an employment preference granted to Indians initially authorized in 1934.¹³³ The Indian New Deal of the 1930s, highlighted by the Indian Reorganization Act of 1934,¹³⁴ likely was the first time Congress had enacted a statute designed to encourage and support Indian tribes to assert the power of self-determination.¹³⁵ Prior to the self-determination era of the 1970s, the Supreme Court’s jurisprudence regarding Indian and tribal challenges to federal laws involved almost complete deference to the policy choices of the other branches.¹³⁶

126. *Id.* at 467 (citing Act of April 21, 1904, 33 Stat. 189, 204 (1904)).

127. *Id.* at 468.

128. *Id.* at 469–71.

129. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

130. *E.g.*, *United States v. Antelope*, 430 U.S. 641 (1977) (rejecting equal protection challenge to Indian country criminal jurisdiction); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (rejecting challenge to state law granting preference to Indian artists).

131. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

132. *Id.*

133. 25 U.S.C. § 5116 (2018).

134. Act of June 18, 1934, c. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 5101 *et seq.* (2018)).

135. *See generally* FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 1.3, at 12.

136. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–84 (1977).

In *Mancari*, a Fifth Amendment equal protection challenge to Indian preference in employment laws and regulations¹³⁷ allowed the Supreme Court to answer the question of whether and how the Supreme Court would intervene in federal Indian affairs laws. Congress mandated Indian preference in employment with the federal Indian Affairs Office in the 1934 Indian Reorganization Act.¹³⁸ “Indian preference,” as a matter of practice, means that if there were two candidates for a job in the Bureau of Indian Affairs, Bureau of Indian Education, or Indian Health Service that had the same qualifications, the government should hire the Indian person. The statute requires the Secretary of the Interior to promulgate regulations regarding “Indians.”¹³⁹ The statute defines “Indians” as “all persons of Indian descent who are members of any recognized Indian tribe now under [f]ederal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.”¹⁴⁰ The regulations at issue in *Mancari* defined persons eligible for the preference to “be one-fourth or more degree Indian blood and be a member of a [f]ederally-recognized tribe.”¹⁴¹ The *Mancari* Court described the Indian preference as “political” rather than “directed toward a ‘racial’ group consisting of ‘Indians.’”¹⁴² The Court concluded that there was a long history of affording special treatment to Indians and tribes, and so long as an Indian affairs law “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians” (i.e., the duty of protection) then those judgments “will not be disturbed.”¹⁴³

137. *Mancari*, 417 U.S. at 537.

138. 25 U.S.C. § 5116.

139. *Id.*

140. *Id.* § 5129.

141. *Mancari*, 417 U.S. at 553 n.24.

142. *Id.* (“The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

143. *Id.* at 555. That entire conclusion is worth reprinting in the margin:

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. See, e.g., Board of County Comm’rs v. Seber, 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (federally granted tax immunity); McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); Simmons v. Eagle Seelatsee, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966), *aff’g* 244 F.Supp. 808 (ED Wash.1965) (statutory definition of tribal membership, with resulting interest in trust estate); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974) (federal welfare benefits for Indians ‘on or near’ reservations). This unique legal status is of long standing, see Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831); Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse. See generally U.S. Dept. of Interior, Federal Indian Law (1958); Comment, The Indian Battle for Self-Determination, 58 Calif. L. Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the

Applying the standard, the Court concluded the Indian preference was reasonable and upheld the law.¹⁴⁴ Congress initially supported Indian preference in the federal agencies charged with implementing Indian law because those laws and those implementation decisions directly affected Indians and tribes.¹⁴⁵ It made sense then, and makes sense now, to involve Indian people with those federal agency decisions and actions. The Court, when pressed to intervene in Indian affairs legislation and apply civil rights revolution-type analyses, absolutely declined to do so.

In the years following *Mancari*, the Supreme Court rejected Fifth Amendment equal protection claims related to the exclusive jurisdiction of tribal courts in *Fisher v. District Court*,¹⁴⁶ and to federal criminal jurisdiction in Indian country in *United States v. Antelope*.¹⁴⁷ The Court even extended the doctrine to state law classifications in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*.¹⁴⁸

The Indian affairs rational basis test is particularly important in the self-determination era. Congress has enacted numerous self-determination statutes acknowledging Indian tribes as sovereign entities.¹⁴⁹ Congress now treats Indian tribes as partners in the administration of Indian affairs programs and services formerly handled exclusively by the Bureau of Indian Affairs, Bureau of Indian Education, and Indian Health Service.¹⁵⁰ Congress has granted preferences in contracting to tribes and tribal corporations under the Small Business Act and other statutes.¹⁵¹ Congress allows Indian tribes to be treated the same as states for purposes of administering and enforcing federal environmental laws.¹⁵² Congress has authorized casino-style gaming on Indian lands.¹⁵³ Congress has

preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

Id. at 554–55.

144. *See id.* at 554.

145. *See id.* at 544–45.

146. 424 U.S. 382, 382 (1974).

147. 430 U.S. 641, 641 (1977).

148. 443 U.S. 658, 660 (1979).

149. *See generally* Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191 (Kenneth R. Philp ed., 1986); Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy*, 56 TEX. L. REV. 1195 (1978).

150. 25 U.S.C. § 5301 *et seq.* (2018); *see also* Executive Order No. 13175, 65 F.R. 67249 (2000) (“Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the [f]ederal [g]overnment and Indian tribal governments.”).

151. *See generally* Do Indian Tribes and Alaska Native Corporations Have Any Special Rules for Applying to the 8(a) BD Program?, 13 C.F.R. § 124.109 (2019).

152. *E.g.*, 42 U.S.C. § 7601(d) (2018) (Clean Air Act); 33 U.S.C. § 1377(e) (2018) (Clean Water Act).

153. 25 U.S.C. § 2701 *et seq.* (2018).

settled many claims for money damages by Indians and tribes,¹⁵⁴ settled land claims,¹⁵⁵ settled water rights cases,¹⁵⁶ regulated tribal powers,¹⁵⁷ and acknowledged tribes as sovereigns.¹⁵⁸ Modern-day tribal self-determination is an enormous undertaking. As one federal judge stated pre-*Mancari*, all of Title 25 of the United States Code is dependent on the political classification doctrine.¹⁵⁹

There is no room for lower courts to tinker with *Mancari*'s definitive statement. Though I describe the *Mancari* test as a rational basis test, that nomenclature is slightly, but significantly, different than other rational basis tests. The rational basis the Supreme Court is looking for in Indian affairs statutes is the "fulfillment" of the duty of protection.¹⁶⁰ If the Court finds that these statutes have a "preference" that is "reasonable and rationally designed to further Indian self-government," then the statute is valid and the analysis ends there.¹⁶¹ At that point, as I will show, the discretion of Congress is akin to the discretion granted to the political branches in foreign affairs matters, effectively a political question not subject to judicial review. If, for example, Congress has decided to provide government services to Indians, and defines eligible Indians by blood quantum, then the courts may only inquire as to whether those services and that eligibility determination are rationally related to the duty of protection. If the court can find a rational relationship, *the inquiry ends*.¹⁶²

154. *E.g.*, Michigan Indian Land Claims Settlement Act of 1997, Pub. L. No. 105-143, 111 Stat. 2652 (1997).

155. *E.g.*, Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978).

156. *See generally* Robert A. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133 (2010).

157. Indian Law -- Tribal Courts -- Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction Over Non-Indian Defendants. -- the Violence Against Women Reauthorization Act Of 2013, Pub. L. No. 113-4, Title IX, § 904, 127 Stat. 120 (codified at 25 U.S.C. § 1304; 18 U.S.C. § 2265(e) (2018)).

158. *See, e.g.*, Restoration of Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, 108 Stat. 2152 (1994) (acknowledging the Pokagon Band of Potawatomi Indians and granting it jurisdiction over its members); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994) (recognizing the sovereignty of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians); An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes, Pub. L. No. 95-375, 92 Stat. 712 (1978) (recognizing the sovereignty of the Pascua Yaqui Tribe of Arizona).

159. *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 n. 13 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966) ("A logical application of plaintiffs' position respecting the unconstitutionality of a 'criterion of race' would cast doubt on all such legislation" applying exclusively to Indians).

160. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

161. *Id.*

162. Notably, the *Mancari* Court did not hedge its holding one iota: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555 (emphasis added).

II.

THE STRUCTURAL AND TEXTUAL ARGUMENT

Both the text and the structure of the Constitution grant Congress, the executive branch, and, to a limited extent, the states the power to recognize and classify individual Indians. The Constitution denies Article III courts the power to review decisions made by Congress and the executive branch recognizing state sovereignty (after the original thirteen), foreign nations, and Indian tribes. I argue the Constitution also denies Article III courts the full power to review decisions made by Congress and the executive branch recognizing and classifying individual Indians. The relevant Constitutional texts are the Indians Not Taxed Clause and the Commerce Clause. The structural argument rests with the fact that the Constitution leaves the concurrent powers to define “Indians not taxed” and “Indian tribes” to the federal and state political branches.

The notion that the Constitution is colorblind as to Indians and Indian tribes (and to those covered by the notorious euphemism “all other persons”) is flat wrong.¹⁶³ The Constitution authorizes and requires the federal government to define who is Indian.

A. The Constitution’s Political Triad

Like recognizing a foreign nation or admitting a new state, the decision to acknowledge a tribal sovereign is a political choice. Because this is a political decision, Article III courts hold a limited role in reviewing it.

The Commerce Clause provides in relevant part: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”¹⁶⁴ The main thrust of the clause is to vest in Congress powers to regulate commerce with these three types of sovereign entities. This, in turn, grants Congress plenary power over commerce.¹⁶⁵ The Framers’ decision to treat these three sovereign entities together suggests that decisions related to this grouping should receive similar treatment under judicial review.

I will show that the executive branch possesses the power to recognize which governmental entities qualify as foreign sovereigns. Congress possesses the exclusive power to admit states to the Union. As such, Congress and the executive branch share the power to acknowledge tribal sovereigns. It is

163. Ablavsky, *supra* note 43, at 1074–75; *see also* Sarah Krakoff, *supra* note 41, at 523–26 (2017) (describing how “colorblindness” is an unhelpful methodology for reviewing Indian affairs statutes).

164. U.S. CONST. art. I, § 8, cl. 3.

165. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (“[W]hile the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs”) (citations omitted).

hornbook law that Article III courts are forbidden from reviewing those political choices to recognize which entities are sovereign. There is only one exception to the judicial review of federal recognition of Indian tribes and it is extremely narrow. It has never resulted in a reversal.

1. *Foreign Nations*

According to the Supreme Court, the President possesses exclusive power to recognize foreign sovereigns. Recently, the Court confirmed its prior holdings on the exclusive power of the President in *Zivotofsky ex rel. Zivotofsky v. Kerry*.¹⁶⁶ There, the Court reviewed the source and scope of the “recognition power” of the United States to acknowledge foreign nations.¹⁶⁷ The Court noted that, under international law, the recognition power is an important power all sovereigns possess, but that the Constitution is silent as to which federal branch or branches may exercise the recognition power.¹⁶⁸ Article II, Section 3 of the Constitution extends to the President the power to “receive” foreign ambassadors, which the Court suggested was evidence of the greater power to recognize.¹⁶⁹ The Court added that the President also possesses the power to negotiate and (once ratified by the Senate) proclaim treaties and to send ambassadors to foreign nations.¹⁷⁰ The Court asserted, however, that the President’s power to acknowledge foreign nations is concurrent with Congress. The Court held that Congress also possesses certain powers in relation to foreign nations, including the power to regulate commerce with foreign nations.¹⁷¹ Whatever the contours of the shared recognition power possessed by the executive branch and Congress, the Court stated that Article III judges have no say in the ultimate decision: “[T]he Judiciary is not responsible for recognizing foreign nations.”¹⁷²

2. *States*

The Constitution more directly vests power to acknowledge state sovereignty by expressly authorizing Congress—and only Congress—to admit states to the Union. Article IV, Section 3 of the Constitution provides,

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.¹⁷³

166. 576 U.S. 1 (2015).

167. *Id.* at 2084–88.

168. *Id.* at 2084.

169. *Id.* at 2085.

170. *Id.*

171. *Id.* at 2087.

172. *Id.* at 2091.

173. U.S. CONST. art IV, § 3.

I can find no cases holding that Congress possesses the exclusive power to admit states in the Union, but as the Constitution directly grants that power to Congress, it seems reasonable that this question would not be presented to the Court. It seems apparent that since the Constitution vests only Congress with this power, there is a “textually demonstrable constitutional commitment of the issue to” Congress, rendering those decisions nonjusticiable political questions.¹⁷⁴ While the decision to admit a new state into the Union may be adjudicated, the political choice of Congress to do so is not reviewable by the judiciary.¹⁷⁵

3. *Indian Tribes*

The federal government’s decision to acknowledge Indian tribes as sovereigns to which the United States owes a duty of protection is akin to a nonjusticiable political question. Article III courts apply a deferential test similar to a rational basis test in determining whether Congress or the executive branch acted reasonably in recognizing a tribe. In dicta, the Court has suggested that Congress may not arbitrarily create Indian tribes,¹⁷⁶ but in practice federal recognition by Congress has never been reviewed by the judiciary on the merits. Congress also acknowledges that the executive branch possesses the power to recognize Indian tribes. The Department of the Interior created an administrative process in 1978 to do exactly that.¹⁷⁷ That administrative process necessarily allows judicial review of administrative recognition decisions on the arbitrary and capricious standard.¹⁷⁸

The leading Supreme Court case on the question of the scope of Congress’s political discretion to acknowledge Indian tribes is *United States v. Holliday*.¹⁷⁹ *Holliday* involved the criminal indictment under federal law for the illegal sale of liquor to an Indian outside of the boundaries of Indian country.¹⁸⁰ The congressional purpose was to “protect[t]” Indians “under the pupillage of the government”¹⁸¹ The Court held that the Commerce Clause authorized Congress to regulate commerce with Indians and Indian tribes both within and outside of Indian country.¹⁸² The Indian who purchased the liquor lived on fee land and voted in state and local elections, but he also continued to participate in

174. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

175. *Cf. Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.”).

176. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

177. *See* 25 C.F.R. pt. 83 (2019) (establishing procedures for federal acknowledgment of Indian tribes).

178. *See* 5 U.S.C. § 706 (2018) (dictating that courts may set aside agency actions found to be “arbitrary” or “capricious”).

179. 70 U.S. (3 Wall.) 407 (1866).

180. *Id.* at 415.

181. *Id.* at 415–16.

182. *Id.* at 417–18.

tribal government and receive treaty annuities.¹⁸³ The Court concluded he remained a tribal member under federal jurisdiction.¹⁸⁴ Importantly, the Court also held that the Indian's tribe, now known as the Saginaw Chippewa Indian Tribe, continued to be federally recognized by both Congress and the Department of the Interior.¹⁸⁵ The Court expressly held that those determinations are political decisions subject only to the authority of Congress and may not be reviewed by an Article III court:

In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. *If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.*¹⁸⁶

The Court additionally held that the Supremacy Clause barred any state law or action that would interfere with the federal government's political choices regarding the acknowledgment of Indian tribes.¹⁸⁷ It is difficult to see any room here for judicial review.

A half century later, the Supreme Court acknowledged that it was possible for Congress to inappropriately acknowledge an Indian tribe by "arbitrarily calling them an Indian tribe."¹⁸⁸ When Congress does not act arbitrarily, however, Article III courts have no authority to second-guess those political choices. That case, *United States v. Sandoval*, involved a similar fact pattern to the *Holliday* case as it questioned the congressional power to bar liquor sales to Indians.¹⁸⁹ The Court analogized the admission of new states into the Union to the acknowledgment of Indian tribes, stating that both are political questions not subject to review by Article III courts.¹⁹⁰

Modern-day executive branch decisions to acknowledge Indian tribes are subject to the arbitrary and capricious standard of the Administrative Procedure Act.¹⁹¹ Judge Richard Posner's opinion in *Miami Nation v. Department of the Interior* held that the political question doctrine does not apply to agency

183. *Id.* at 418.

184. *Id.* at 418–19.

185. *Id.* at 419.

186. *Id.* (emphasis added).

187. *Id.* at 419–20.

188. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

189. *Id.* at 36.

190. *Id.* at 38 (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 574 (1911)).

191. *Miami Nation of Indians of Ind., Inc. v. Dept. of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

determinations of tribal status. Instead, Judge Posner, like the vast majority of agency decisions authorized by and appropriately cabined by Congress and the executive branch, deferred greatly to the agency's decision.¹⁹² In my research, I was able to uncover only two cases in which an Article III court reversed a federal agency's decision to acknowledge an Indian tribe.¹⁹³ The reversed agency recognition decisions involved a tribe recognized by the government outside of the normal recognition process set forth in 25 C.F.R. Part 83. This deviation from the established recognition process rendered the decisions arbitrary and capricious.¹⁹⁴

Federal courts apply a rational basis standard of review, which is analogous to the Indian affairs rational basis test, to equal protection challenges brought against the government to challenge federal acknowledgment of Indian tribes. In *Kahawaiolaa v. Norton*, the Ninth Circuit affirmed that congressional recognition of Indian tribes is a political classification that is not subject to judicial review. There, Native Hawaiians challenged a federal rule prohibiting them from seeking federal acknowledgment as an Indian tribe.¹⁹⁵ The court initially noted that federal recognition decisions were uniquely political decisions; for example, "a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question."¹⁹⁶ However, once a federal agency makes a determination related to federal recognition of Indian tribes, an Article III court possesses some authority to review that decision.¹⁹⁷ Native Hawaiians claimed the decision to exclude their group violated the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁹⁸

The court rejected the claim that the classification should be subject to heightened scrutiny as a race-based classification, holding instead that the federal rule was a political classification and that the proper standard of review was the

192. *Id.* at 349–51. *See also* *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013) (upholding the Department of the Interior's decision not to recognize Muwekma Ohlone Tribe); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009) (affirming the Department of the Interior's refusal of Schaghticoke Tribal Nation's petition for acknowledgment); *Ramapough Mountain Indians v. Norton*, 25 F. App'x 2 (D.C. Cir. 2001) (upholding the Assistant Secretary for Indian Affairs' decision to not recognize Ramapough Mountain Indians as a tribe); *Nipmuc Nation v. Zinke*, 305 F. Supp. 3d 257 (D. Mass. 2018) (affirming the Department of the Interior's decision not to grant recognition to Nipmuc Nation).

193. Contrary to the Secretary of the Interior's interpretation of the Indian Reorganization Act, the Supreme Court in *Carcieri v. Salazar* did hold that the Department of the Interior could acquire land in trust for the Narragansett Tribe under 25 U.S.C. § 5108 (2018). *Carcieri v. Salazar*, 555 U.S. 379, 382–83 (2009). However, the Court left alone the federal acknowledgement decision.

194. *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997); *Greene v. Babbitt*, 64 F.3d 1266, 1275 (9th Cir. 1995).

195. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (2004).

196. *Id.* at 1276 (citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913)).

197. *Id.* (citing *Miami Nation of Indians of Ind., Inc. v. Dept. of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002)).

198. *Id.* at 1272.

rational basis test.¹⁹⁹ The Native Hawaiians objected on the grounds that the agency's decision was a racial classification, which the Supreme Court had held in *Rice v. Cayetano*²⁰⁰ and *Adarand Constructors, Inc. v. Peña*²⁰¹ must be subject to strict scrutiny.²⁰² *Rice*, which now forms a part of the basis for attacking Indian affairs legislation, held that a state-wide election on Native Hawaiian issues could not be limited to Native Hawaiians on the basis of race or ancestry under the Fifteenth Amendment.²⁰³ The Ninth Circuit held that *Rice* was inapplicable because the "claim challenges the very regulations that acknowledge the quasi-sovereign, government-to-government relationship between the United States and Indian tribes."²⁰⁴ The circuit noted that the Supreme Court in *Rice* explicitly confirmed the political classification doctrine as applied to Indian tribes.²⁰⁵ The court concluded, "Recognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny."²⁰⁶

Like foreign nations and individual states, Indian tribes are sovereign entities. Legislative and executive decisions about the scope of the federal government's relationship with those entities are political questions. As a result, they are subject only to limited judicial review. Article III courts are effectively barred from reviewing and reversing congressional and executive branch decisions to acknowledge Indian tribes unless the decision is made by the relevant federal agency and is arbitrary. While agency decisions have been reversed for procedural error, no Article III court has reversed the government on the merits of a recognition decision.

B. Regulating Individual Indians: The Indian Commerce and the Indians Not Taxed Clauses

In relation to Indians and Indian tribes, the Constitution requires determinations as to which persons are Indians and which entities are Indian tribes. It is not obvious which persons are Indians: it requires a judgment. For purposes of federal law, Congress must exercise that judgment, with assistance from both the executive branch and occasionally, state governments. Because those judgments are political judgments, the Supreme Court has correctly held that Article III courts have an extremely limited role in assessing those judgments. The judiciary's role is, again, to determine whether the judgments are arbitrary. As it is when recognizing Indian tribes, when it comes to recognizing Indians, deference to political branches is paramount.

199. *Id.* at 1278 (citing *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974)).

200. 528 U.S. 495 (2000).

201. 515 U.S. 200 (1995).

202. *Kahawaiolaa*, 386 F.3d at 1279.

203. *Rice*, 528 U.S. at 514–17.

204. *Kahawaiolaa*, 386 F.3d at 1279.

205. *Id.* (quoting *Rice*, 528 U.S. at 519–20).

206. *Id.*

1. *The Commerce Clause*

The Commerce Clause authorizes Congress to regulate commerce with “the Indian tribes.” In order to implement this power, Congress must first determine which government entities qualify as Indian tribes and are thereby subject to its authority. As recognition of Indian tribes is a political act, Article III judges must defer to the political branches of government. When Congress or the executive branch recognizes an Indian tribe, those branches of government typically are also recognizing the members or citizens of that Indian tribe as *Indians*.

The *Holliday* and *Sandoval* cases, while the leading cases on the question of federal recognition of tribes, are also leading cases on the federal recognition of individual Indians.²⁰⁷ In those cases, the Supreme Court held that members or citizens of federally recognized tribes are Indians to which the duty of protection applies.²⁰⁸ Importantly, in both cases, the federal government’s recognition of tribal status meant recognition of the membership or citizenship determinations by those tribes.²⁰⁹ In other words, if the tribes at issue in those cases decided that only persons with Indian ancestry that lived on the respective reservations were tribal members, then the Article III court reviewing the legal classification would be deferring to the political choice made by Congress or the executive branch to accept that criteria.²¹⁰ If the tribes at issue used a blood quantum rule to determine membership or citizenship, then the Article III court must accept that political choice.

While there are some limits to the deference an Article III court must grant, these limits should be narrowly construed. Consider *United States v. Rogers*,²¹¹ where a white man who was adopted by the Cherokee Nation into tribal membership attempted to avoid federal prosecution by claiming to be an Indian.²¹² Chief Justice Roger Taney’s opinion, hardly the exemplar of enlightened thought when it comes to racial classifications, found it logically impossible for a white man to avoid federal criminal jurisdiction by claiming to

207. *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865).

208. *Sandoval*, 231 U.S. at 45–46 (“Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.”); *Holliday*, 70 U.S. at 415–16 (referencing “the protection of those Indians who are, by treaty or otherwise, under the pupilage of the government”).

209. *Sandoval*, 231 U.S. at 40 (quoting congressional language regarding “lands now held . . . by individual [tribal] members,” which implicitly acknowledged the Pueblo Indians’ tribal membership determinations); *Holliday*, 70 U.S. at 418 (noting that “if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress”).

210. The Supreme Court in later years specifically acknowledged that Indian tribes have “power to make their own substantive law in internal matters” such as “membership.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

211. 45 U.S. (4 How.) 567 (1846).

212. *Id.* at 571.

be Indian because he was “still a white man, of the white race.”²¹³ Still, Taney’s torturous opinion attempted to detail why Congress would not have presumed to allow white men to claim tribal citizenship as a means to avoid the application of federal laws, where those men “will generally be found the most mischievous and dangerous inhabitants of the Indian country.”²¹⁴ Taney also worried that these white men would be encouraged to seek out adoption into an Indian tribe in order to avoid their personal responsibility to the United States.²¹⁵ In the same opinion, however, Taney acknowledged that Congress (and, presumably, tribes) could allow white men to undertake “obligations . . . upon himself by becoming a Cherokee by adoption.”²¹⁶ But the Court would not excuse Rogers from his obligation to the United States merely by taking on Cherokee citizenship. The Court concluded that the Constitution vested the federal government with superintendency over Indian tribes.²¹⁷

The import of the *Rogers* case, assuming Taney’s racially tinged, antebellum-era reasoning survived the Reconstruction Amendments, is that Congress is free to create legislative classifications based on race. The *Rogers* Court did not believe Congress was intending to allow a white man to escape federal prosecution by claiming tribal membership. The Court, at least implicitly, acknowledged that Congress *could* do so if it chose; after all, if white men could benefit from being tribal members and citizens, the converse must also certainly be true.²¹⁸

2. *The Indians Not Taxed Clauses*

The federal government’s deference to and perception of tribal membership and citizenship criteria also necessitated the introduction of explicit federal statutory and administrative definitions of “Indian” based on race and ancestry.

213. *Id.* at 573.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 572 (“It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices . . . [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.”).

218. In fact, the Court has justified the extension of federal criminal jurisdiction into Indian country on the grounds that federal prosecutions are for the benefit of Indians and Indian tribes, *United States v. Kagama*, 118 U.S. 375, 383–85 (1886), even though Indians are convicted at higher rates than non-Indians to federal prison, sentenced to disproportionately longer prison sentences than non-Indians for the same crimes, and Indian children constitute a disproportionately high percentage of children in the federal prison system. See generally INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, ch. 5–6 (2013).

These definitions were often independent of tribal membership or citizenship. I argue that the Constitution's text implicitly authorizes Congress, the executive branch, and, likely, the states to create legal classifications of race and ancestry in order to define who is an "Indian." Judicial review of those inherently political classifications invites absurdity and injustice.²¹⁹

In the original text of the Constitution, now repealed by the Reconstruction Amendments, Article I, Section 2, provided in relevant part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding *Indians not taxed*, three fifths of all other Persons²²⁰

The passive voice of the Constitution authorizes an unnamed entity to determine apportionment of congressional representatives and direct taxes by counting "free Persons" and "three fifths" of the persons who were then enslaved, and excluding "Indians not taxed." The entity, government, or official that "shall . . . determine" is unnamed in the text, but since the requirement is included in Article I, presumably Congress must make the enumeration.²²¹ Professor Thomas Lee's article, for example, glosses over the passive voice in the text by inserting Congress as an entity via brackets into his own text: "To be sure, the Census Clause goes on to vest in Congress the authority to effect the actual enumeration 'in such Manner as [it] shall by Law direct.'"²²² For purposes of this argument, it would be helpful to have a definitive statement as to which entity enjoys the sole authority for making that determination. I am left with the reasonable presumption that Congress defines which persons are to be counted and, thus, ultimately determines population numbers. And if Congress is making that determination, then it must be authorized and mandated to determine which "persons" are "Indians not taxed."

The meaning of the phrase "Indians not taxed" was never definitively determined by the Supreme Court, nor could it have been. The Framers never defined the phrase, and there is virtually no discussion in the political world of the ratification era parsing through its terminology. However, the Court in the notorious *Dred Scott* case²²³ arguably added a gloss to the meaning of the Indians

219. See *infra* Part III.A.

220. U.S. CONST. art. I, § 2 (emphasis added).

221. Scholars reasonably presume that this is so. See, e.g., Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration,"* 77 WASH. L. REV. 1, 5–6 (2002) (describing congressional delegation of the responsibility to conduct the census).

222. *Id.* at 21 n.94 (brackets in original). The brackets replace the word "they" in the text of the Constitution, which likely means the collected individuals that form Congress, but in either characterization, the passive voice of the text remains.

223. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

Not Taxed Clause. *Dred Scott* involved a claim to individual rights by a Black person, a former slave, alleging his freedom. Justice Taney's opinion held that the Constitution contained no text authorizing Black persons, enslaved or free, to become American citizens eligible for individual rights protections.²²⁴ Taney compared Black persons to Indians.²²⁵ Taney asserted that Indians were loyal to their tribes and not the United States or any State, and savage.²²⁶ Taney argued, however, that Congress possessed the power, if it chose, to recognize Indians as citizens.²²⁷ Out of this horror show of legal analysis, there is a gloss on the meaning of the Indians Not Taxed Clause: *Dred Scott* generally implies that the "taxed" language of the clause is akin to American (or federal) citizenship.

States and lower courts in the antebellum era tended to acknowledge a difference between Indians as well, usually focusing on the relative civilization of an Indian person, whether the Indian person had abandoned their tribal relations, and whether the Indian person had given up their treaty rights.²²⁸ State citizenship and federal citizenship were separate questions under the Constitution before the Reconstruction Amendments and, in regards to Indian citizenship, after the Reconstruction Amendments. Under that regime, states could, and occasionally did, extend the suffrage or other rights to Indians, offering up their own definitions of "Indian."²²⁹ The State of Michigan, for example, in 1850 recognized Indians as citizens, so long as they became "civilized."²³⁰

224. *Id.* at 404.

225. *Id.* at 403–04.

226. *Id.*

227. *Id.* at 404. Justice Taney is presumably referring to "taxable" Indians. *See also id.* at 420 (arguing that Congress could have naturalized Indians, but chose not to).

228. *See, e.g.,* United States v. Elm, 25 F. Cas. 1006, 1007 (N.D.N.Y. 1877) ("If defendant's tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear . . ."); Anderson v. Mathews, 163 P. 902, 906 (Cal. 1917) ("Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico."); Bd. of Comm'rs of Miami County v. Godfrey, 60 N.E. 177, 180 (Ind. App. 1901) ("So long as he remained an Indian, he was under the control of the United States as an Indian. But he voluntarily does what the law says makes him a citizen. This change of his tribal condition into individual citizenship was primarily his own voluntary act. He cannot be both an Indian, properly so called, and a citizen."); *In re Liquor Election in Beltrami County*, 163 N.W. 988, 989 (Minn. 1917) (noting that the right to vote in state and local elections extended to "[p]ersons of mixed white and Indian blood, who have adopted the customs and habits of civilization" and "[p]ersons of Indian blood . . . who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state").

229. *See generally* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880 (2007).

230. MICH. CONST. art. 7 § 1 (1850); *see also* ROSEN, *supra* note 229, at 133–36 (recounting the process by which the Michigan constitution was amended to extend citizenship rights to Indians).

The original Article I text that included the Indians Not Taxed Clause was repealed by the Reconstruction Amendments. However, Section 2 of the Fourteenth Amendment retained the Indians Not Taxed language. That section provides, “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*.”²³¹ If the Constitution authorized the federal government to make legal classifications of persons based on Indian ancestry before the Reconstruction era, then retention of the Indians Not Taxed Clause in the Fourteenth Amendment should be sufficient to maintain that authority.

The Framers of the Fourteenth Amendment certainly understood that the Amendment was never intended to change the legal status of Indians. This is why Section 2 retains the “Indians Not Taxed” phrase. Congress debated the status of Indians extensively during the debates around the 1866 bill that granted citizenship to freed slaves, with the large majority of the members refusing to extend citizenship to Indians.²³² During the debates on the Fourteenth Amendment that followed shortly thereafter, Congress reconfirmed its intent to preclude Indian citizenship.²³³ Finally, after the ratification of the Fourteenth Amendment, the Senate issued a report confirming its understanding that the ratification did not affect Indians at all.²³⁴ The main conclusion of that report was that the Fourteenth Amendment did not unintentionally abrogate Indian treaties. The Committee on the Judiciary, the authors of the opinion, concluded that Indian tribes, still listed in the Commerce Clause, remained sovereign nations with which the United States might still enter into treaties.²³⁵ Thus, the

231. U.S. CONST. amend. XIV, § 2 (emphasis added).

232. See FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 3.8, at 93; George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,”* 28 AM. INDIAN CULTURE & RES. J. 37, 37–38 (2004); R. Alton Lee, *Indian Citizenship and the Fourteenth Amendment*, 4 S.D. HIST. 198, 212 (1974).

233. FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 3.8 at 93.

234. S. Rep. 41-268 (Dec. 14, 1870):

It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, “and subject to the jurisdiction,” and that such has been the universal understanding of all our public men since that amendment because a part of the Constitution . . .

During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause “three-fifths of all other persons” is wholly omitted; but the clause “excluding the Indians not taxed” is retained.

Id. at 10.

235. The report states:

To maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, to annul treaties then existing between the United States as one party, and the Indian tribes as the other parties respectively, would be to charge upon the United States repudiation of national obligations . . .

Id. at 11.

sovereign-to-sovereign relationship remained intact and undisturbed by the Fourteenth Amendment, even if there was still no consensus about the meaning of the Indians Not Taxed Clause. The primary purpose was to deny citizenship to Indians.

The Supreme Court confirmed that understanding in *Elk v. Wilkins*.²³⁶ In the case, an Indian person who lived among white people, spoke English, and was educated attempted to vote.²³⁷ The Court held that Indians could not vote unless Congress enacted a statute authorizing Indians to vote, or, perhaps, extending citizenship to Indians.²³⁸ Just as the *Dred Scott* Court assumed Congress had the power to create a class of taxable Indians, the *Elk* Court agreed that Congress had that power. The Court listed numerous treaties and statutes that conferred American citizenship on Indian people.²³⁹ Unfortunately, Congress had not done so for John Elk. When Congress did extend citizenship to all Indian people born in the United States by statute in 1924 to “member[s]” of “tribe[s],”²⁴⁰ the law survived constitutional challenges based on non-equal protection grounds.²⁴¹

In my view, the existence of the undefined term “Indians Not Taxed” in the Constitution’s provisions on apportionment *requires* a definition of which persons are “Indians” by a government entity delegated with the power to do so. The power of Congress to take a census, coupled with the obligation to not count Indians not taxed, necessitates definition by the government. Professor Ablavsky’s historical research on the Founding Generation is a good start, but what we mostly learned from that research and that Generation is that white men in power knew who was an Indian mostly by sense, rather than legal definition.²⁴² Of course, that’s not helpful at all for a census taker. For example, as was discovered in the case of the Mashpee Wampanoag Tribe, census takers determined the race based on the “eye and attitude” of the census taker, leading to circumstances where an Indian person was counted as multiple different races

236. 112 U.S. 94 (1884).

237. *Id.* at 98–99.

238. *Id.* at 109.

239. *Id.* at 103–07.

240. 8 U.S.C. § 1401(b) (2018).

241. *E.g., Ex parte Green*, 123 F.2d 862 (2d Cir. 1941) (rejecting a challenge by Six Nations Haudenosaunee Indian to federal selective service law applicable to all American citizens); *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1971) (rejecting a challenge by county in voting rights context).

242. *See Ablavsky, supra* note 43, at 1049–50 (“[T]he definitions of ‘Indian’ that Anglo-Americans employed in the late eighteenth century reflected this oppositional quality: What made people ‘Indians’ was their difference from Anglo-Americans. But which difference was most salient depended on how those who proclaimed themselves ‘Americans’ imagined themselves. Sometimes, the defining characteristic was race: Anglo-Americans, classifying themselves as ‘white,’ labeled Indians ‘not white’—most frequently, ‘red.’ At other times, the key difference was political allegiance: Anglo-Americans were citizens of the United States, while Indians were members of their respective nations.”) (footnote omitted).

in different censuses.²⁴³ Eventually, as tribal membership became a factual predicate to legal rights, privileges, and entitlements, Congress was forced to make more nuanced and specific definitions for specific situations. As a result, Congress often relied on blood quantum.²⁴⁴

For example, consider that the Supreme Court stated as late as 1886 that the Indians Not Taxed Clause was unhelpful in determining whether Congress had power to pass the Major Crimes Act.²⁴⁵ As noted above, Congress offered no definition of “Indian” in that statute.²⁴⁶ Had Congress been more specific, perhaps by limiting the application of the Major Crimes Act to tribal members or half-blood Indians, the constitutional challenge to the Act might have focused on the reasonableness of the definition. Such a focus could have forced the Court to wonder where Congress’s power to make that decision was sourced. The answer, then and now, likely is the Indians Not Taxed Clause.

As Congress (presumably) decides who is an Indian for a particular purpose, we must determine whether Congress’s decision was reviewable by an Article III court and, if so, under what standard. Also, we must determine whether congressional decisions were exclusive; we must determine whether other governmental entities, such as the executive branch or states, could make their own determinations as to which persons were Indians. The text of the Constitution itself demands that Congress determine who is an “Indian” for the purposes of regulating commerce and apportionment. Classifications of Indian status, thus, are not impermissible race-based classifications but rather constitutionally mandated political determinations.

III.

THE MEANING OF “INDIAN” IS INHERENTLY AND NECESSARILY POLITICAL

The Constitution’s structural separation of powers helps provide the proper rule for assessing the authority to make legal classifications. The proper analogical starting point is the analysis on the power of recognizing sovereigns. As noted above, Article III courts have no role whatsoever in reviewing the President’s power to recognize foreign nations and no role whatsoever in reviewing Congress’s power to join a state to the Union. Article III courts have only a very limited role in reviewing the congressional and executive branches’ shared power to recognize Indian tribes. The same analysis must apply to federal recognition of individual Indians. Article III courts’ review of legal

243. JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL* 28 (1991); see also Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 *NOTRE DAME L. REV.* 1461, 1463–64 & n.8 (1991) (detailing variations in definitions of “Indian” by census takers in the nineteenth century).

244. See generally Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 *U. MICH. L. REFORM* 275 (2000); Spruhan, *supra* note 107. These legal rights include, among others, land and money.

245. *United States v. Kagama*, 118 U.S. 375, 378 (1886).

246. 18 U.S.C. § 1153 (2018).

classifications made by the federal government should be confined by the deferential reasonableness or rational basis standards of review.

This Part offers several additional and related justifications for judicial deference to political determinations of Indian status.

A. *Indians Analogized to Foreigners*

Before Congress finally extended American citizenship to all Indians by statute in 1924,²⁴⁷ the federal government analogized Indian people to foreigners in many instances. The leading case postdating the enactment of the Fourteenth Amendment is *Elk v. Wilkins*.²⁴⁸ There, the Court referred to Indian people as “alien and dependent.”²⁴⁹ Following the Court’s reasoning in *Dred Scott*, the Court stated that the only way for an Indian to become a citizen was through the naturalization process,²⁵⁰ a process structurally committed to Congress and the executive branch.

Indian tribes have also been analogized to foreign nations. The Court in *Elk* also referred to tribes as “alien nations.”²⁵¹ Perhaps the most important case on this point is *Blatchford v. Native Village of Noatak & Circle Village*,²⁵² in which the Supreme Court held that States are immune from suit by Indian tribes.²⁵³ The Court reasoned that Indian tribes are like foreign nations in that neither class of sovereign was invited to the Constitutional Convention, nor had the capacity to ratify the Constitution and join the Union.²⁵⁴

The Supreme Court recently considered whether, in the context of tribal sovereign immunity, tribally owned property should be analogized to property owned by foreign nations, and therefore be subject to the immovable property exception to foreign sovereign immunity.²⁵⁵ The Court remanded the question for further percolation by the lower courts, but both the concurring and dissenting opinions asserted that tribal property ownership was equivalent to foreign state property ownership. Justice Thomas’s dissent asserted, “[B]ecause States and foreign countries are subject to the immovable-property exception, Indian tribes are too.”²⁵⁶ The import is that if Congress makes a legislative determination in agreement or disagreement with the judiciary on the question of tribal immunity,

247. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401 (2018)).

248. 112 U.S. 94 (1884).

249. *Id.* at 100.

250. *Id.* at 101.

251. *Id.* at 99.

252. 501 U.S. 775 (1991).

253. *Id.* at 782.

254. *Id.*

255. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1653–54 (2018).

256. *Id.* at 1661.

the Court has no power to disagree—and the Court usually does disagree when it comes to tribal immunity, but holds it is powerless to change anything.²⁵⁷

B. *The Duty of Protection*

Closely related to the notion that Indian people and Indian tribes are akin to foreign citizens and foreign nations is the notion that the duty of protection authorizes the United States to create legal classifications based on Indian status. *Lone Wolf v. Hitchcock*,²⁵⁸ one of the most vilified Supreme Court decisions in Indian law (and justifiably so in most respects²⁵⁹), is the leading case in support of the proposition that the United States owes a duty of protection to Indians and tribes, and that with that duty comes the power.²⁶⁰ Critically important to the exercise of that duty was the acknowledgment by the Supreme Court that the choice to exercise and determine the scope of that duty was a political decision: “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”²⁶¹ The Court expressed its deference to congressional judgment on the scope of the duty:

We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.²⁶²

The Court tempered its full-throated deference to Congress’s Indian affairs powers in the 1970s when it began to assert limited judicial review over Indian affairs laws.²⁶³ But significant deference remains. The Court as recently as 2011 quoted the part of *Lone Wolf* that identifies Congress’s power as political.²⁶⁴

257. *Bay Mills Indian Cmty. v. Michigan*, 572 U.S. 782, 788–91 (2014).

258. 187 U.S. 553 (1903).

259. *E.g.*, ANGELA R. RILEY, THE APEX OF CONGRESS’ PLENARY POWER OVER INDIAN AFFAIRS: THE STORY OF LONE WOLF V. HITCHCOCK, IN INDIAN LAW STORIES 189 (2011). *See generally Symposium*, *Lone Wolf v. Hitchcock: One Hundred Years Later*, 38 TULSA L. REV. 1–158 (2002) (collecting a series of articles critical of *Lone Wolf*).

260. *Lone Wolf*, 187 U.S. at 567 (“[T]here arises the duty of protection, and with it the power.”).

261. *Id.* at 565.

262. *Id.* at 568.

263. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–84 (1977); *Morton v. Mancari*, 417 U.S. 534, 555 (1974).

264. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (quoting *Lone Wolf*, 187 U.S. at 565). In the same string cite, the Court also quoted *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902), which expressed a similar sentiment: “The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of

The Supreme Court has a long history of deferring to congressional classifications made in furtherance of the duty of protection. In *Tiger v. Western Investment Co.*,²⁶⁵ for example, the Supreme Court held that Congress sets the metes and bounds of the duty of protection.²⁶⁶ There, a non-Indian purchased an interest in land subject to a federal restriction on alienation based on the Indian status of the seller.²⁶⁷ The Indian seller pled that the sale was void because of the federal restriction, but the non-Indian buyer trying to preserve the transaction argued that the federal restriction on alienation was invalid. The non-Indian purchaser claimed that the Indian seller had earned citizenship status through the allotment process and that the federal restriction on alienation violated the Due Process Clause of the Fifth Amendment.²⁶⁸ The Court concluded that citizenship did not automatically terminate the federal restriction on alienation and that the duty of protection (which the Court referred to as “tutelage”) remained until Congress chose to alter that relationship:

[I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. *It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.*²⁶⁹

Tiger is not an isolated case; the Court has applied similar rules regarding Congress’s exercise of the duty of protection again and again. As the Court said in *United States v. Nice*:

Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but *it rests with Congress to determine when and how this shall be done*, and whether the emancipation shall at first be complete or only partial.²⁷⁰

The modern-day understanding of the duty of protection has been relatively static since the 1970s, the beginning of the self-determination era.²⁷¹ Congress and the executive branch no longer refer to the United States as a guardian to Indians and tribes, nor do they refer to Indians and tribes as wards under tutelage or pupilage.²⁷² In fact, both political branches of government have accepted that

its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.” *Id.* at 308.

265. 221 U.S. 286 (1911).

266. *Id.* at 315.

267. *Id.* at 298–99.

268. *Id.* at 310.

269. *Id.* at 315 (emphasis added).

270. 241 U.S. 591, 598 (1916) (emphasis added).

271. See generally FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 3.12, at 103–09.

272. See generally *id.* § 5.2, at 182 n.69 (collecting statutes).

the best modern-day characterization of the duty of protection is a trust.²⁷³ The scope of that trust is left to Congress to decide as a political matter. Which persons are Indians for purposes of administering the duty of protection is also a political matter to which Article III courts should defer.

C. The Analogy to the Political Question Doctrine

Further, consider the political question doctrine. We have determined that legal classifications of Indians may be subject to judicial review, but the principles of the political question doctrine are useful. We know that the Supreme Court has not adopted a “blanket rule” deferring to Congress.²⁷⁴ The judiciary “will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.”²⁷⁵ But the Court does defer to the political branches.

In *Baker v. Carr*,²⁷⁶ the Supreme Court articulated a test of sorts to determine whether a question is a nonjusticiable political question. The test included numerous factors relevant to our inquiry here, including “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” which could invoke the Constitution’s delegation of Indian affairs powers to Congress; and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,” which could invoke the Constitution’s lack of definition of “Indian tribes” and “Indians not taxed.”²⁷⁷

Professor Michalyn Steele, writing about judicial review of the exercise of inherent tribal powers over nonmembers, argued that the Supreme Court has articulated different standards at different times to assess the viability of tribal powers, standards that at times overlap and at times compete with each other.²⁷⁸ Steele’s detailed analysis showed that both Supreme Court and lower court efforts to apply these standards have been a failure.²⁷⁹ Like the Supreme Court and I do, Steele gives great force to the text and structure of the Constitution, which leaves initial political choices in Indian affairs to Congress and the executive branch.²⁸⁰ Steele concludes her analysis by arguing that the courts’ failure to articulate and apply clear and predictable standards improperly leads to judicial lawmaking and policy choices otherwise best left to Congress.²⁸¹ For

273. The Supreme Court, on the other hand, still occasionally refers to Indians or tribes as wards. *E.g.*, *United States v. Lara*, 541 U.S. 193, 226 (2004) (Souter, J., dissenting) (quoting *United States v. Kagama*, 118 U.S. 375, 383 (1886)); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).

274. *Baker v. Carr*, 369 U.S. 186, 215 (1962).

275. *Id.* at 217.

276. *Id.* at 186.

277. *Id.* at 217.

278. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 690 (2016).

279. *Id.* at 699.

280. *Id.* at 702.

281. *Id.*

Steele, “Congress is much better positioned to weigh the particular considerations governing which powers of tribal sovereignty the federal government will or will not recognize and affirm because the weighing involves political considerations rather than judicial questions.”²⁸²

The political branches, primarily Congress, must make political choices on the question of which Indian affairs laws apply to which tribes. Consider the Duro fix, a federal statute in which Congress made a reasoned political choice to correct the Supreme Court’s arbitrary (by comparison) definition.²⁸³ In *Duro v. Reina*,²⁸⁴ the Supreme Court held that Indian tribes possess criminal jurisdiction over “Indians” and no others.²⁸⁵ That case involved the power of tribes to prosecute nonmember Indians, persons who were “Indian” but not members of the prosecuting tribe.²⁸⁶ The Court tied the power of tribal law enforcement to tribal citizenship, finding no inherent tribal powers to prosecute nonmembers, even nonmember Indians.²⁸⁷ The Court relied on several facts: that the defendant lived most of his life off the reservation, was not eligible for tribal membership, and could not vote in tribal elections, run for tribal office, or serve on tribal juries.²⁸⁸ The Court rejected the argument from the tribe that intermarriage between Indian tribes is common, that the defendant here had married into the tribe, lived on the reservation, and participated in the tribe’s cultural ceremonies.²⁸⁹ Instead, the Court concluded that the defendant was the same as a “non-Indian.”²⁹⁰

Congress disagreed on all of these grounds and legislatively overruled the Court almost immediately.²⁹¹ The Supreme Court’s reasoning ignored or rejected the historical reality of tribal membership, that many tribes had been split up or mashed together by the United States or other historical forces, making tribal membership alone a poor proxy for political rights. Congress agreed with tribal advocates that nonmember Indians play an important role in tribal cultures and economies, and that they significantly impact reservation governance when they commit crimes.²⁹² Congress also disagreed with the Court’s characterization of the importance of political rights of non-citizens—after all, a resident of

282. *Id.* at 705.

283. Department of Defense Appropriations Act, Pub. L. No. 101-511, Title VIII, §§ 8077(b), (c), 104 Stat. 1892 (1990) (amending 25 U.S.C. § 1301(4) (2018)).

284. 495 U.S. 676 (1990).

285. *Id.* at 688.

286. *Id.* at 679.

287. *Id.* at 688.

288. *Id.* at 679.

289. *Id.* at 695.

290. *Id.* at 688.

291. Department of Defense Appropriations Act, Pub. L. No. 101-511, Title VIII, §§ 8077(b), (c), 104 Stat. 1892 (1990); *United States v. Lara*, 541 U.S. 193, 197–98 (2004). *See generally* FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 7.6, at 360–64.

292. FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 7.6, at 360 (citing Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC’Y REV. 1123, 1128 (1994)).

Michigan may be prosecuted in an Indiana court without being able to vote or run for office there.²⁹³ Indian tribes and Congress—not the judiciary—should be making these decisions in Indian affairs.

D. Institutional Capacity of the Judiciary

If the structure and text of the Constitution—as well as the historical practices of the federal government—somehow fail to persuade the reader, consider the practical implications of the converse legal regime where the judiciary asserts its own policymaking and lawmaking powers over Indian affairs without limit. The results would be, too often, absurd and deeply unjust.

For reasons that should be obvious, Congress and the executive branch are best suited institutionally to make judgments about the recognition of Indians. Though Professor Steele’s scholarship focuses on the inherent powers of Indian tribes, it again helpfully guides this analysis in this context.²⁹⁴ Steele identifies seven factors, some of which overlap with the *Baker v. Carr* analysis, relevant to determining which actor is best suited to make a decision under our Constitution. I highlight the factors most relevant to the instant question:

First, the Constitution’s grants of power to Congress over Indian affairs suggest that the Framers viewed Congress as the proper branch for management of the United States’ Indian affairs power . . . [Second], congressional determination . . . offers the democratic legitimacy of policy set by politically accountable actors. [Third], Congress is the branch best able to tailor policies to reflect the varieties in tribal communities and capacities. [Fourth], Congress has the flexibility to monitor and refine those policies when faced with changing circumstances. . . . Finally, Congress has superior access to subject matter expertise through hearings and studies that guide policy development more effectively than individualized cases and controversies before the courts.²⁹⁵

Steele’s formulation as applied in the context of recognition decisions in Indian affairs makes sense. We know this from judicial interpretations of older federal statutes that apply to Indians or matters involving Indians where Congress did not offer a definition of Indian, namely, statutes extending federal criminal jurisdiction into Indian country. In Major Crimes Act²⁹⁶ prosecutions, for example, a federal prosecutor must prove to a jury beyond a reasonable doubt that either the defendant or the victim is an “Indian.” Because the statute is silent, the federal judiciary has provided its own definitions. The Ninth Circuit’s definition is that proof of Indian status requires “(1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally

293. *Id.*

294. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2013).

295. *Id.* at 784–85.

296. 18 U.S.C. § 1153 (2018).

recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe.”²⁹⁷ The court could have adopted a definition that includes only tribal members as Indians, as the concurring judges insisted should be the rule.²⁹⁸ The court could also have adopted the rule stated by the Supreme Court in *United States v. Rogers*,²⁹⁹ a pre-Reconstruction era case in which the Court focused exclusively on race.

While the Ninth Circuit’s test would be a reasonable test had it been legislated, it is absurd to leave the task of deciding which persons are Indians to Article III courts (and the juries they seat). Steele’s scholarship suggests that Congress is best suited to making that decision, not a court. Congress could have held hearings and taken testimony on the best definition, and what Indians would be included in a particular definition. If the definition was unjust or inaccurate, Congress could amend it. All of this decision-making is political.

Instead, the court’s test in *Zepeda* invited concurring former Judge Kozinski to engage in a pop-psychology guessing game wondering if the majority was relying upon *Rogers* without saying so. Kozinski assumed it was so, allowing him to play the straw man logical fallacy game, using the court’s presumed adoption of *Rogers* and all of that case’s racism to criticize the court.³⁰⁰ Judge Ikuta’s concurrence asserted that all blood quantum laws were unjust.³⁰¹ A congressional definition might have arrived with a Senate or House report detailing exactly why the Constitution authorizes classifications based on Indian status, perhaps relieving Judge Ikuta’s concerns. Such a legislative forum would have allowed experts in law, history, and policy to explain why it is rationally related to the fulfillment of the trust responsibility to utilize this definition; in fact, Congress engaged in this discussion to some extent in the Duro fix legislation, which restored tribal criminal jurisdiction over all “Indians.”³⁰² In any event, judicial decision-making is no forum for making these determinations. The Ninth Circuit’s heroic effort to give meaning to the term “Indian” in the

297. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1712 (2016).

298. *Id.* at 1119 (Kozinski, J., concurring); *id.* (Ikuta, J., concurring).

299. 45 U.S. (4 How.) 567 (1846).

300. Kozinski asserted that a Ninth Circuit panel in an earlier case “believed itself bound to apply a racial test because of the Supreme Court’s decision in *United States v. Rogers*,” and proceeded to attack that reasoning in *Zepeda*. *Zepeda*, 792 F.3d at 1118 (Kozinski, J., concurring). The *Zepeda* panel, on the other hand, did not cite to *Rogers* at all.

301. *Id.* at 1119 (“Because there is no need to use the blood quantum test in this context, we should avoid perpetuating the sorry history of this method of establishing a race-based distinction.”) (Ikuta, J., concurring).

302. See Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077(c), 104 Stat. 1856 (1991) (codified at 25 U.S.C. § 1301(4) (1990)) (defining “Indian” as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18 [the Major Crimes Act], if that person were to commit an offense listed in that section in Indian country to which that section applies”) (brackets added). Congress explained why it retained and effectively ratified federal judicial actions defining “Indian” in the legislative history of that Act. S. Rep. No 102-153, at 5–7 (Sept. 19, 1991).

Major Crimes Act is deeply flawed but at least it is reasonable. It is an effort far superior to the poor history of state and federal judges trying to make sense of who is an Indian in other contexts.

Consider the infamous controversy, dating back to more than a century ago, when federal and state (territorial) courts in New Mexico split in their respective determinations of whether Pueblo Indians were “Indians” under federal jurisdiction.³⁰³ A pair of Supreme Court cases assessing whether federal laws applied to Pueblo Indians and tribes, *United States v. Joseph*³⁰⁴ and *United States v. Sandoval*,³⁰⁵ reached completely different outcomes about whether the same group of people were “Indians.” In *Joseph*, the Court (following a series of New Mexico State and territorial court decisions³⁰⁶) held that Pueblo Indians were not Indians under the relevant statute; Indian status would have prevented the Indian people from losing their lands.³⁰⁷ In *Sandoval*, the Court held that Pueblo Indians actually were Indians after all; Indian status there meant that the United States could enforce its Indian country liquor regulations against tribal members.³⁰⁸ The decisions read like white, Western-educated amateur anthropologists ethnocentrically debating whether a group of people found living away from European civilization were actually human or not.³⁰⁹ It is an embarrassment of American law.

303. See generally FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 3.7, at 85–87.

304. 94 U.S. 614 (1877).

305. 231 U.S. 28 (1913).

306. *United States v. Mares*, 88 P. 1128, 1128 (N.M. Terr. 1907) (citing *United States v. Varela*, 1 N.M. 593 (1874); *United States v. Santistevan*, 1 N.M. 583 (1874); Pueblo Indian Tax Case, 76 P. 307 (N.M. Terr. 1904)).

307. *Joseph*, 94 U.S. at 617.

308. *Sandoval*, 231 U.S. at 48–49.

309. The court quoted in *Sandoval* from annual reports of local Indian office superintendents for the proposition that Pueblo Indians “are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants.” *Id.* at 40–41. Selected quotations included:

Santa Fe, 1905: “Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of the pueblos when one of these dances is in session; travelers are met on the outskirts of the pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact.”

Santa Fe, 1906: “There is a greater desire among the Pueblo to live apart and be independent and have nothing to do with the white race than among any other Indians with whom I have worked. They really care nothing for schools, and only patronize them to please their agent and incidentally to get the issues given out by the teacher. The children, however, make desirable pupils, and if they could be retained in school long enough more might be accomplished. The return student going back to the pueblo has a harder task before him than any other class of returned students, I know. It is easier to go back to the Sioux tepee and lead a white man’s life than to go back to the pueblo and retain the customs and manners taught

The Pueblo cases are not outliers. In the absence of a congressional definition of Indian within a particular statute, federal courts too often have engaged in patronizing explanations of rules of tribal membership, with the judges relying on personal views on Indian status (and marriage) that too often devolved into fallacious or pernicious reasoning. Consider *Halbert v. United States*, where the Supreme Court was called to determine whether an Indian woman who married a white man was entitled to an Indian allotment.³¹⁰ Congress conditioned eligibility of Indians to allotments not on blood quantum but on whether the Indian was a tribal member.³¹¹ The Court decided to assign to itself the determination of whether an Indian woman who was a tribal member remained a tribal member upon her marriage to a white man.³¹² The Court noted a “general . . . rule” that “an Indian woman loses her tribal membership where she marries a white man, separates from the tribe and lives with him among white people.”³¹³ This is not a judgment by Congress contained in the relevant statute or treaty. This is a judge-made rule incorporated by the Court into the matter. It has never been a general rule in the United States that an Indian person’s marriage to a non-Indian person means the Indian person loses their tribal membership, absent a tribal law, an Act of Congress, or a treaty provision expressly providing for the loss of tribal citizenship in the case of intermarriage. And if there were such a law, it likely would violate the Fifth Amendment’s Takings Clause; after all, tribal membership is a property right.³¹⁴ Even so, the Court delved into a series of broad statements—more general rules—regarding the status of the children and grandchildren of intermarriage that, again, had no basis in tribal or federal law.³¹⁵ Ironically, the Court’s conclusion was that none of these general rules mattered because the Indian woman retained her tribal membership status and therefore was entitled to an allotment.³¹⁶

in the school.

“In pueblo life the one-man domination—the fear of the wrath of the governor of the pueblo—is what holds this people down. The rules of the pueblo are so strict that the individual cannot sow his wheat, plant his corn, or harvest same in the autumn without the permission of the pueblo authorities. The pueblos under my jurisdiction that adhere religiously to old customs and rules are Taos, Picuris, Santo Domingo, and Jemez, tho there are none of them that have made much progress away from the ancient and pagan rites.”

Id. at 42–43.

310. 283 U.S. 753, 755–56 (1931).

311. *Id.* at 758 (citing Act of March 4, 1911, 36 Stat. 1345 (1911)).

312. *See id.* at 762–64.

313. *Id.* at 763.

314. *E.g.*, *Deverney v. Grand Traverse Band of Ottawa & Chippewa Indians*, 2000 WL 35749822, at *2 (Grand Traverse Tribal Ct.App. Nov. 15, 2000) (No. 96–10–201 CV) (“[A] right to due process is clearly spelled out in the Tribal Constitution and membership is a ‘property right’ subject to due process once it is granted.”); *Jackson v. Enrollment Dept.*, 12 Am. Tribal Law 85, 94 (Grand Ronde Tribal Ct.2014) (“All parties agree that the loss of Tribal membership and related loss of Petitioner’s health, social service, financial and other benefits presents strong grounds for the necessary establishment of due process property rights at issue with a disenrollment action.”).

315. *See* 283 U.S. 753, 763 (1931).

316. *See id.* at 763–64.

State courts in the pre-tribal self-determination eras fared no better. State courts in the nineteenth century adopted judge-made factors to determine whether an Indian tribe was an Indian tribe and adopted additional judge-made factors to decide whether an Indian was an Indian.³¹⁷ In 1832, the Alabama Supreme Court held that “the 1802 Trade and Intercourse Act acknowledged state authority over Indians who were surrounded by settlements of whites.”³¹⁸ Whether or not a person is an “Indian” is usually not dependent on location.

Too often, judges interject their own conceptions of Indian status in deciding whether to apply the Indian Child Welfare Act.³¹⁹ Despite the statute’s provision of clear definitions, state court judges still have disingenuously sought to undermine those definitions.³²⁰ It is not uncommon for state judges—nearly all of whom have no basis for understanding whether a person is an Indian—to take testimony and make findings of fact and law on Indian status; Professor Kevin Noble Maillard’s survey of Indian stereotypes used by judges evinces damning judicial biases.³²¹ All too often, state judges focus on completely irrelevant evidence such as powwow attendance or, worse, racial evidence such as skin and hair color, cheekbones, and the like.³²² Consider *Rye v. Weasel*,³²³ where the Kentucky Supreme Court disagreed that a child who was eligible for tribal membership was an “Indian child” for judge-made reasons:

The child has grown up in a non-Indian environment involving public schools and religious faith as well as complete integration in the community. She does not speak the Sioux language and does not practice its religion or customs.³²⁴

The Kentucky court quoted with approval an Alabama state court case, *S.A. v. E.J.P.*, where the court similarly reasoned that it knew what an “Indian family

317. See, e.g., Deborah A. Rosen, *Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790–1880*, 46 AM. J. LEGAL HIST. 26, 35 (2004) (“State courts in the west, the midwest, and the south argued that individual Indians who lived among whites or who were temporarily off their reservation were subject to state jurisdiction unless a federal law explicitly provided otherwise.”); see *id.* at 32 (“The status of an individual Indian also could subject him or her to state regulation, even if he or she was a member of a federally recognized tribe.”).

318. *Id.* at 32 (citing *Caldwell v. State*, 1 Stew. & P. 327 (Ala. 1832)).

319. 25 U.S.C. § 1901 *et seq.* (2018).

320. See generally FLETCHER, FEDERAL INDIAN LAW, *supra* note 47, § 8.3, at 431–32 (asserting that state courts and agencies routinely fail to comply with ICWA requirements that they give notice to Indian tribes when an Indian child enters the foster care system). This is a matter that recent binding federal regulations have closed. See 25 C.F.R. § 23.103(c) (2019) (“If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ‘Indian child,’ then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.”).

321. Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 129–39 (2003).

322. See *id.*

323. 934 S.W.2d 257 (Ky. 1996).

324. *Id.* at 264.

environment” was, and that the child in question had never lived in one: “This child was never a part of an Indian family environment. She has never been a member of an Indian family, has never lived in an Indian home, and has never experienced the Indian social and cultural world.”³²⁵ The Alabama court even added that the child’s father, who was a Cherokee Nation citizen, should not be considered an Indian, either: “The father is $\frac{1}{8}$ Cherokee Indian. He was not born on a reservation, has never lived on a reservation and has never attended a reservation school. The only contact the father has had with the reservation has been for medical or dental purposes. He is registered with the Cherokee Nation.”³²⁶

More recently, in Maryland, a judge identified a series of factors unrelated to the objective indicators of Indian status, such as tribal membership, to claim parents were not Indian:

By nature of the fact that usually the parents have absolutely nothing to do with the Tribe, other than the fact that there’s some type of lineal descendant. That’s the reason. It’s not like we have an active member in the Tribe that’s in South Dakota, and is part of the Tribe, and happened to come in here and had a liaison with someone else and had a child. I mean, that’s the reason the Tribe comes late to these proceedings. These women and fathers—in this particular case, as far as the County would know, would have no idea that they’re part of the Tribe. I mean they’re not active participants in the Tribe. And there’s no indication their lifestyle indicates that she’s part of the Tribe. I don’t think she goes to tribal meetings, I don’t think she’s involved in any of these tribal celebrations you’re talking about.³²⁷

ICWA defines Indian status politically, namely by whether a child is a member or eligible for membership,³²⁸ not by whether a child or their parents’ “lifestyle” is Indian or by whether they are “involved in . . . tribal celebrations.”

In another case, echoing Justice Breyer’s question in oral argument in *Adoptive Couple v. Baby Girl*, in which he seemingly implied a child was not Indian because their last ancestors who were Indian lived during George Washington’s era,³²⁹ a state judge declined to order notice to an affected tribe because a descendant was too far “back.”³³⁰ None of these factors are relevant under the statute, but judges consider them anyway.

325. 571 So. 2d 1187, 1189–90 (Ala. Civ. App. 1900).

326. *Id.* at 1188.

327. *In re Nicole B.*, 927 A.2d 1194, 1201 (Md. Ct. Spec. App. 2007) (quoting trial judge), *rev’d on other grounds*, 976 A.2d 1039 (Md. Ct. App. 2009); *see also id.* at 1202 (“I could be a member of, say the Boy Scouts, but if I didn’t tell anybody, no one would know.”).

328. 25 U.S.C. § 1903(4) (2018).

329. *See* Transcript of Oral Argument at 40, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399) (“Because, look, I mean, as it appears in this case is [sic] he had three Cherokee ancestors at the time of George Washington’s father. All right?”).

330. *In re Harrell*, 2014 WL 465718, at *7 (Mich. Ct. App., Feb. 4, 2014) (No. 316067) (quoting judge as stating, “[G]reat-grandma is pretty far back. So, I’m not gonna demand that we send notice”).

The too-often arbitrary results of judicial determinations of Indian status speak for themselves. The judiciary is not institutionally competent to decide which persons are Indians. Those decisions are inherently political decisions, which is why the Constitution leaves those questions to the political branches of government. In short, leaving the power to decide Indian status to judges—federal or state—all but guarantees poor and democratically illegitimate decision-making.

E. The False Lure of the Compromise Position

Finally, the compromise position that more moderate critics of the political classification doctrine and some defenders of tribal interests find so attractive would cement ongoing tragedies in federal Indian law involving unrecognized or terminated tribes. The Constitution fully authorizes Congress and the executive branch to make legal classifications based on blood quantum or ancestry, so there is no need for this position.

The compromise position would allow Article III courts to subject legal classifications based on tribal membership or citizenship with a federally recognized tribe to rational basis review, rendering legal classifications based on blood quantum or ancestry subject to strict scrutiny.³³¹ Perhaps the most articulate justification for this position is Judge Ikuta's concurrence in *United States v. Zepeda*.³³² Judge Ikuta surveyed the "sorry history" of the United States' discrimination against minorities through the use of blood quantum-based legal classifications—slavery, miscegenation laws, naturalization laws, and so on.³³³ While Judge Ikuta merits enormous respect, her concurrence begins with an incomplete premise that leads the judge to a false analogy:

In holding that a person is not an Indian unless a federal court has determined that the person has an acceptable Indian "blood quantum," we disrespect the tribe's sovereignty by refusing to defer to the tribe's own determination of its membership rolls. It's as if we declined to deem a person to be a citizen of France unless that person can prove up a certain quantum of "French blood," and we declared that adoptees whose biological parents are Italian cannot qualify.³³⁴

What Judge Ikuta fails to realize is that the *Zepeda* criteria—blood quantum—serves a crucial gap-filling function for those Indian people who are not tribal members because of tribal membership's shortcomings as a catch-all for Indian status. Judge Ikuta's premise is incomplete for its reliance on tribal membership criteria, which is underinclusive to deleterious effect. First, while the Supreme

331. *E.g.*, *Williams v. Babbitt*, 115 F.3d 657, 665–65 (9th Cir. 1997) (arguing that a federal law that grants preferences to Indians based on race should be subject to strict scrutiny).

332. *See* 792 F.3d 1103, 1119 (9th Cir. 2015) (en banc) (Ikuta, J., concurring), *cert. denied*, 136 S. Ct. 1712 (2016).

333. *Id.* at 1119–20.

334. *Id.* at 1119.

Court defers to tribal membership criteria,³³⁵ the federal government has approval authority over tribal membership or citizenship criteria that derives from an initial written constitution. Every initial constitution must be approved by the Secretary of the Interior,³³⁶ and often this means the Secretary dictated the criteria to the tribe.³³⁷ Second, Indian tribes are federal government contractors that provide federally funded services to Indian people; the federal government defines the eligibility of Indians for those services based on both tribal membership and blood quantum.³³⁸ As a result, most tribes are comfortable using the federal definitions (or a similar derivation of those definitions) for their own criteria because the tribes are mostly providing services to their own members. Third, many Indian people refuse to become members of Indian tribes, even where they are eligible, demonstrating that tribal membership alone does not capture all of those with Indian status.³³⁹ Similarly, many Indians who are Indian by race and culture, and accepted into tribal communities socially, are not tribal members because, by quirks of federal and tribal policy, they are not eligible anywhere. Tribes routinely provide governmental services to these nonmember Indians. Finally, specific to the *Zepeda* criminal case, if the defendant in that case could not be prosecuted by the United States because of a prohibition on the use of blood quantum to determine status, the tribe would also be forbidden from prosecuting the defendant,³⁴⁰ and the state and local governments likely would not prosecute those cases.³⁴¹ The Indian Law and Order Commission established several years ago that nonmembers are more or less free to commit crimes in Indian country—a reality that Indian people must live with—unless the United States prosecutes the crime.³⁴² For all of these factors, or any one of these factors, it would be reasonable for Congress and the executive branch to use the *Zepeda* criteria to classify Indian people for criminal jurisdiction purposes. To compare that reality, as Judge Ikuta did, with the pernicious and insidious racism of slavery, Jim Crow, and racist immigration and naturalization laws is a false comparison.

335. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

336. 25 U.S.C. § 5123(a)(2) (2018).

337. E.g., *Snowden v. Saginaw Chippewa Indian Tribe*, 32 Indian L. Rep. 6047, 6048–49 (Saginaw Chippewa Tribal App.Ct.2005) (detailing how the federal government coerced the Saginaw Chippewa Indian Tribe into adopting a constitution that excluded tribe members living off the reservation from membership).

338. 25 U.S.C. § 5129.

339. My own grandfather was eligible for membership with the Grand Traverse Band of Ottawa Indians and declined to apply (he was a crabby man).

340. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

341. See, e.g., *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016).

342. See INDIAN LAW & ORDER COMM'N, *supra* note 218, at 99 (“When crimes involve non-Indians in Indian country, and as discussed elsewhere in this report, Tribal police have only been able to exercise authority to detain a suspect, not to make a full arrest. This lack of authority jeopardizes the potential for prosecution, the security of evidence and witnesses, and the Tribal community’s confidence in effective law enforcement.”).

There are more instances of gaps left behind when only considering tribal membership. Consider the Snyder Act of 1921.³⁴³ That Act streamlined the process for appropriating federal dollars for tribal services, and stated, “the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the *Indians throughout the United States*.”³⁴⁴ Many Indians, perhaps as many as hundreds of thousands, are not enrolled tribal members, too often by “accidents” of history.³⁴⁵ There are also several thousand, perhaps many thousands, of Indian people disenrolled by their tribe for improper reasons for whom there is no legal remedy.³⁴⁶ The federal government can and should be allowed to make a political decision on the basis of blood quantum to acknowledge a duty of protection to all Indian persons.

To adopt the compromise position is to legitimize continued injustice in Indian affairs. It is reasonable and rational for Congress, the executive branch, and Indian tribes and states to use blood quantum definitions and classifications as a proxy for Indian status in order to lessen the impact of continuing injustices.

IV.

BROADER IMPLICATIONS

The most important implication of firmly (re-)establishing the political classification doctrine is to shift questions regarding Indian status out of the judiciary and into the exclusive purview of the legislative and administrative realms. Congress must first understand its duty to reasonably base Indian status classifications on fulfilling the federal government’s duty of protection to Indian people. At times, Congress relinquishes this task of classification to the judiciary, especially in the realm of criminal jurisdiction. The judiciary is not competent to do that work and should be discouraged from asserting more authority in Indian affairs.

The judiciary does still play an important role in addressing what classifications are reasonable efforts to fulfill the general trust responsibility. Perhaps the judiciary’s first role is to enforce the ground rules of the political classification doctrine by getting out of the business of determining who or what is an Indian. For example, the judiciary might engage in a cross-circuit discussion through a series of cases examining whether the Major Crimes Act’s

343. Act of Nov. 2, 1921, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13 (2018)).

344. *Id.* (emphasis added).

345. See AMERICAN INDIAN POLICY REVIEW COMM’N, *supra* note 84, at 463–64 (1977); see also DAVID ARV BRAGI, INVISIBLE INDIANS: MIXED BLOOD NATIVE AMERICANS WHO ARE NOT ENROLLED IN FEDERALLY RECOGNIZED TRIBES 6 (2005).

346. See generally DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 5 (2017) (“[F]ar too many tribal nations are engaging in banishment or politically or economically motivated disenrollment practices in clear violation of their own historic values and principles . . .”)

lack of a statutory definition is akin to an irrational or unreasonable classification. After all, a statute's lack of definition invites arbitrariness.

This Part offers initial suggestions on what a court's analysis under the rationality test should accomplish. I then delve into a few hot topics relating to federal, tribal, and state classifications of Indian status.

A. *What Classifications are Reasonable (or Not Arbitrary)?*

Congress's power is not absolute. What the Court actually did in *Morton v. Mancari* is hold that congressional Indian affairs legislation must be reasonable and rationally related to the United States' fulfillment of its duty of protection to Indians and tribes.³⁴⁷ Could Congress impose the draft on Indians alone? No, that would not be reasonable and rationally related to the duty of protection. Could Congress acknowledge the sovereignty of a Boy Scout troop? No. Could Congress guarantee a free college education to Indians? I would say absolutely yes, given that the United States promised to educate Indian children in over 100 Indian treaties.³⁴⁸ Could Congress confiscate Indian reservation lands? Yes, I would very reluctantly have to say, so long as the Supreme Court was satisfied that the law was reasonable and rationally related to the duty of protection (and complied with the Fifth Amendment's Takings, Due Process, and Just Compensation clauses³⁴⁹). But I imagine affected Indian tribes would put up one hell of a political fight.

Professor Ablavsky's scholarship on the meaning of "Indian" in the Founding Generation provides a helpful example of how to assess whether a legal classification based on Indian status is reasonable. Ablavsky's study of the views of the Framing Generation—one and all, white male political, legal, and cultural power players of the late eighteenth century—shows Congress works from a broad tapestry of understandings (and misunderstandings) of what constitutes Indian-ness. The Framing Generation understood the term "Indian" to include race and ancestry, political affiliation and loyalty to country, and suppositions about savagery and civilization. Perhaps most importantly, they understood the term "Indian" to be dynamic and subject in large part to context.³⁵⁰ Even if the government were limited to definitions of "Indian" that the white males of the Framing Generation would have approved, classifications

347. 417 U.S. 535, 555 (1974) ("As long as the [legislation affording] special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

348. Raymond L. Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1998).

349. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) ("We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.") (footnotes omitted).

350. See Ablavsky, *supra* note 43, at 1067–76.

of “Indian” by Congress, the executive branch, and the states evince that these classifications may prove reasonable on one hand or arbitrary on the other. As noted above, the judiciary has no place in this discussion.

The Supreme Court has a long history of applying a reasonable or rational basis standard of review to federal legal classifications based on Indian status. As an example of the application of the rational basis standard, consider *United States v. Ferguson*.³⁵¹ There, the Court applied a reasonability analysis to affirm the authority of Congress to create and rely upon a tribal citizenship roll.³⁵² Congress had created a legislative classification for the Creek Indians (now known as the Muscogee [Creek] Nation) based on a list of Indian people generated by the Secretary of the Interior using evidence of blood quantum supplied by the tribe’s own citizenship roll.³⁵³ That roll would be used to determine ownership of allotments upon the death of intestate Indian allotment owners, with tribal citizenship and blood quantum constituting relevant factors for consideration.³⁵⁴ Later challengers to the Secretary’s roll claimed it was erroneous and offered oral testimony to prove the error.³⁵⁵

The lower court rejected the oral testimony, and the Supreme Court affirmed that decision on several grounds. First, the Court found it was reasonable for Congress to order reliance on the Secretary’s roll because it provided “some fixed, easily accessible and reasonably reliable evidential standard by which to determine, for the purpose of the matter then in hand, who were of the full-blood and who of the mixed-blood.”³⁵⁶ Second, Congress possessed the authority to regulate these transactions involving Indian allotments.³⁵⁷ Finally, the Court noted Congress had a choice—to either rely on the Secretary’s roll, derived from the tribal rolls, or to allow oral testimony to supplement or correct those rolls on an ongoing basis, “even if not altogether free from mistake and error.”³⁵⁸ The Court deferred to Congress’s choice to exclude oral testimony and rely exclusively on the Secretary’s roll because it was a reasonable political choice.

But the best method for the federal government and states to classify persons as Indians in the self-determination era is to rely on tribal political decisions to create and implement membership and citizenship decisions. Though I have attempted to robustly defend blood quantum-based classifications as proxies for Indian status, I acknowledge that they are not “altogether free from mistake and error.”³⁵⁹ For the most part, in the last several decades at least, the

351. See 247 U.S. 175 (1918).

352. See *id.* at 178–79.

353. *Id.* at 176–77.

354. *Id.* at 176.

355. *Id.* at 177–78.

356. *Id.* at 178.

357. See *id.*

358. *Id.*

359. *Id.*

United States has deferred extensively to tribal governments in making Indian classifications. Of course, for critics, that practice begs the question of whether tribal membership or citizenship criteria is reasonable. Consider an Indian tribe that adopts a lineal descent rule of membership, allowing enrollment of persons with only a small amount of blood quantum. Critics will accuse the tribe of being too non-Indian in character. Consider an Indian tribe that adopts a strict blood quantum rule, say one-half or one-quarter, keeping out many Indian people whose parents or grandparents are tribal members. Critics will accuse the tribe of being too racially restrictive. Consider an Indian tribe that allows people who are non-Indian by blood to become members through an adoption or naturalization process (e.g., the Seminole Nation of Oklahoma, the citizenry of which at one point consisted of one-third persons of non-Indian descent, the Freedmen). Again, critics will say the tribe isn't Indian enough.

Tribal membership and citizenship decisions are fraught with economic, cultural, legal, and political consequences, as with any and every nation on earth.³⁶⁰ Whatever one's views on these questions, the role of the judiciary in federal or state cases addressing these matters should be strictly limited. All objections to tribal laws are political and best raised in the tribal political sphere. If anything is to be done by the United States, it is to be done by Congress and the executive branch. All an Article III court should do is determine whether a federal classification based on tribal membership or citizenship is reasonable or rationally related to the duty of protection.³⁶¹

B. Federal Definitions of "Indian"

Federal definitions of Indian status, as noted earlier, usually involve classifications based on tribal membership or blood quantum. Some federal statutes do not define Indian at all. This subpart examines the Indian Child Welfare Act. The analysis, however, implicates federal criminal jurisdiction statutes such as the Major Crimes Act and, most importantly, federal tribal self-determination laws such as the Indian Reorganization Act. The equal protection challenges to ICWA ask the judiciary to adopt the compromise position: that an Indian affairs statute that applies to Indians who are not already members of federally recognized tribes should be analyzed under the strict scrutiny rubric. As we will see, ICWA applies both to children who are tribal members and to children who are eligible for membership, but not yet members. The district court in *Brackeen* concluded that ICWA's application to nonmembers doomed the

360. Consider an Indian tribe that disenrolls large swaths of its tribal membership for spurious reasons like greed, political revenge, and racism. Critics will label these actions human rights violations (and rightfully so). See generally Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567 (2012) (arguing for the creation of an intertribal human rights regime with the capacity to address human rights violations so as to provide external accountability for tribal abuses of human rights).

361. See, e.g., *Morton v. Mancari*, 417 U.S. 534, 555 (1974).

entire statute. Federal criminal jurisdiction is based entirely on this structure. Nonmember Indians are eligible for some federal and state services. Dozens, perhaps hundreds, of other Indian affairs statutes apply to “Indians” who may or may not be tribal members. All of these statutes, whatever their definitions, are rationally related to fulfilling the duty of protection: the general trust responsibility.

1. *Indian Child Welfare Act*

The Indian Child Welfare Act applies first to an “Indian child” who is “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”³⁶² ICWA further defines “Indian” as “any person who is a member of an Indian tribe.”³⁶³ Both definitions rely exclusively on tribal membership with an “Indian tribe” and do not provide for consideration of blood quantum. The Act does not define “Indian tribe.”

The Act’s definitions are based primarily on tribal membership or citizenship, eligibility for which nearly all courts and commentators would agree is at the heart of Congress’s political recognition powers. Congress has made the choice to apply ICWA only to tribal members (or children eligible for membership) with Indian tribes. No court rationally can second-guess Congress’s decision here, which is an inherently political choice. Could Congress have defined “Indian” by blood quantum alone? Yes, but it did not in this instance. Could Congress have declined to define “Indian” at all? Yes, but it offered a definition here. Moreover, we can and should presume Congress meant “federally recognized Indian tribe” when it used the term “Indian tribe.” The Constitution itself uses the term “Indian tribe,” and the jurisprudence on that term grants significant deference to Congress (and the executive branch) to define what is an Indian tribe. This is the heart of Congress’s political discretion in deciding how to implement the duty of protection. Congress alone can decide how to implement the duty of protection, and Congress alone decides which persons are eligible for that protection.

In *Brackeen v. Zinke*,³⁶⁴ three states and individual plaintiffs sued the Secretary of the Interior arguing, among other issues, that ICWA’s definition of “Indian child” creates a racial classification that requires the court to apply strict scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause.³⁶⁵ The core of the argument is that Indian children who are merely eligible for membership and who are not yet tribal members have no political connection to a federally recognized tribe or to Congress’s duty of

362. 25 U.S.C. § 1903(4) (2018).

363. *Id.* § 1903(3).

364. 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev’d sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019).

365. *Id.* at 533–34.

protection to Indians and tribes. The district court agreed and held that Congress created a racial classification by including Indian children who are not tribal members.³⁶⁶

Under *Mancari*,³⁶⁷ that conclusion was flat wrong. The Court's obligation was to search for a reasonable connection between unenrolled Indian children and the federal duty of protection.³⁶⁸ If the Court found a connection, then the equal protection challenge to the statute must "not be disturbed."³⁶⁹ That search, if taken in good faith, would be short and conclusive—Indian children who are not yet enrolled but removed from their homes directly implicate the United States' duty of protection to Indians and tribes.³⁷⁰ Indian children, enrolled and unenrolled, have been a focal point of federal Indian law and policy since before the Founding, and remain so to this day. The *Brackeen* district court excitedly jumped to strict scrutiny, perhaps inspired by judges like Kozinski, who did the same without faithfully following the test stated in *Mancari*. The test is not to decide whether the classification is race-based, and then if the court concludes it is, to jump right to strict scrutiny.

The reasonability analysis requires the court to do more work than jump to conclusions. The first step would be to track the congressional findings at the beginning of ICWA. Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."³⁷¹ Here, Congress is defining the scope of the duty of protection, an inherently political determination to which the Court owes deference. Congress is also recognizing that the class of Indian people to which it owes the duty of protection in the context of child welfare extends to tribal members and those eligible for enrollment in a tribe. Again, it is well settled that Congress's power to recognize tribes is left to its political discretion, not to be disturbed by an Article III court.

Congress further found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."³⁷² Lastly, Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential

366. *Id.*

367. 417 U.S. 535 (1974).

368. *See id.* at 555.

369. *Id.*

370. *See generally* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017) (arguing that Indian children form the backbone of the original understanding of the federal-tribal trust relationship).

371. 25 U.S.C. § 1901(3) (2018).

372. *Id.* § 1901(4).

tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”³⁷³ Both of these findings go to the power of Congress to define the scope of the duty of protection the United States owes to Indians and tribes, an inherently political function that cannot be disturbed by an Article III court.

Congress also listed Indian families as preferred—but not mandatory—families for foster care and adoptive placement of Indian children.³⁷⁴ The legislative history leading up to the enactment of ICWA detailed how state courts and agencies, and the federal government, intensely discriminated against Indian families as potential foster care or adoptive placements.³⁷⁵

Forward again to the definitions section, reviewed above, and again we see Congress making inherently political decisions to define the class of persons eligible for protection under the duty of protection.³⁷⁶ Indian tribes, which we must read to include federally recognized Indian tribes, by definition, have a political relationship with the United States. Similarly, by definition, tribal members have a political connection to Indian tribes. Indian children who have not yet been enrolled—tribal membership is not automatic by birth under the laws of most Indian tribes—have a political connection to their tribe by virtue of their connection to their tribal member parents. The *Brackeen* district court’s determination that Indian children not yet enrolled by an Indian tribe have no political connection to any tribe is the epitome of an arbitrary decision. It is a decision made with incomplete information by a judge, not a decision made after considered deliberation by a legislative body charged by the Constitution with making those decisions. Congress has made a political decision to recognize a duty of protection to Indian children not yet enrolled as tribal members, again, an inherently political decision. Congress reasonably made a decision to legislate specifically in favor of Indian children, Indian parents, and Indian potential foster and adoptive families given the discrimination they all faced. None of the choices made by Congress in ICWA are irrational choices to apply federal law to Indians on the basis of their race or ancestry. All of the choices made by Congress in ICWA are inherently political and deserving of deference by the courts under *Mancari*.

When it comes to providing government services to Indians, Congress can determine that blood quantum is a fair approximation of the relationship of the Indian person to an Indian tribe that is a federally recognized Indian tribe. Courts must assume that Congress isn’t acting arbitrarily, such as extending services to

373. *Id.* § 1901(5).

374. *Id.* § 1915(a)–(b).

375. See, e.g., *Indian Child Welfare Program: Hearings Before the Indian Affairs Subcommittee of the S. Comm. of Interior & Insular Affairs*, 93d Cong., 2d Sess. 5 (Apr. 8–9, 1974) (Statement of William Byler, Association on American Indian Affairs) (alleging states discriminate against Indian foster and adoptive families, and that nationally, 85 percent of placements of Indian children are with white families).

376. See 25 U.S.C. §§ 1903(3)–(4).

Indigenous people from South America to which there is no federal trust relationship. Instead, courts must assume that Congress means American Indians who are either tribal members, eligible for membership, or descended from tribes to which the government owes a duty. That's it. There is no room for second-guessing about whether Congress created a racial classification. There is no room because *Mancari* offers no room. Neither does the Constitution.

C. State Definitions of "Indian"

I would like to make one final point that might be best explored in future scholarship. I conclude, just as the Supreme Court has in recent decades, that state governments also possess authority to make legal classifications based on Indian ancestry and tribal membership or citizenship.³⁷⁷ Because states are generally prohibited from interfering with federal Indian policy preferences, state classifications must both (1) be rationally related to the fulfillment of the trust relationship and (2) "must not interfere with tribal government or federal programs."³⁷⁸

In recent years, states have created legal classifications in furtherance of both of these requirements. Consider the Michigan Indian Tuition Waiver, which extends a social benefit to persons who are "not less than 1/4 quantum blood Indian as certified by the person's tribal association and verified by the Michigan commission on Indian Affairs."³⁷⁹ The tuition waiver is based on an unusual history where the federal government granted real property to the State of Michigan in the 1930s in exchange for a promise from the state to educate Indian children.³⁸⁰ The social benefit extended to Indians is a reasonable effort to fulfill the trust responsibility to educate Indians and does not otherwise interfere with federal or tribal programs. The question then should be whether the blood quantum certified by the Indian student's "tribal association" is also reasonable.

377. See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 568, 673 n.20 (1978) (citing *United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974); *Antoine v. Washington*, 420 U.S. 194 (1975)).

Lower court cases reached the same conclusion. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (state gaming laws), *cert. denied*, 543 U.S. 815 (2004); *McBride v. Shawnee County, Kansas Court Services*, 71 F. Supp. 2d 1098 (D. Kan. 1999) (state recognition of Native American Church); *St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983) (state housing programs); *Livingston v. Ewing*, 455 F. Supp. 825 (D. N.M. 1978) (state arts and crafts preference), *aff'd*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979); *In re Interest of Phoenix L.*, 708 N.W.2d 786 (Neb. 2006) (state Indian child adoption law); *Krueth v. Indep. Sch. Dist. No. 38, Red Lake, Minnesota*, 496 N.W.2d 829 (Minn. App. 1993) (state preference in employment to Indian teachers).

378. E.g., *St. Paul Intertribal Hous. Bd.*, 564 F. Supp. at 1412 n.5.

379. MICH. COMP. LAWS § 390.1252 (2019).

380. See, e.g., REID CHAMBERS ET AL., THE MICHIGAN INDIAN TUITION WAIVER IS BASED ON A POLITICAL RELATIONSHIP, NOT A RACIAL CLASSIFICATION 6 (2007), <https://turtletalk.files.wordpress.com/2009/03/tribal-position-paper-final.pdf> [<https://perma.cc/UR8U-REGS>].

While the blood quantum cut-off is likely underinclusive of Indians, the one-quarter limit is fairly typical of such classifications.

The proponents of the compromise position might wonder why blood quantum alone is acceptable. They would argue it seems to be purely based on race and should therefore be subject to strict scrutiny. However, I would argue that first, it is likely the language requiring “tribal association” in the text of the statute, which was enacted in the 1970s when many Michigan Indian tribes were still improperly “terminated” by the Department of the Interior, should be construed to mean “Indian tribe.” Second, I would argue that blood quantum alone is sufficient to pass constitutional muster.

Again, consider the Indians Not Taxed Clause. I have argued that Congress is authorized to make legal classifications based on tribal membership and ancestry by the mere existence of this clause, which required that Congress make those determinations in order to conduct a census, for example, and to define eligibility for federal entitlements due to Indians. States should also be entitled and authorized to make legal classifications; after all, the Fourteenth Amendment’s Indians Not Taxed Clause applies to state action as well. States long have been making classifications to give effect to the Indians Not Taxed provision.³⁸¹ Unfortunately, many of those laws were designed to bar Indians from voting. Certainly states ought to be able to use these classifications to fulfill federal entitlements due to Indians.³⁸²

Utah provides an interesting example of how states are positioned to assert the power to make legal definitions of the “Indians Not Taxed.” Utah’s enabling act required Utah to decide which persons were then “Indians not taxed,”³⁸³ not unlike the enabling acts of other western states.³⁸⁴ In *Meyers ex rel. Meyers v. Board of Education of San Juan School District*, a public school board argued it had no obligation to provide public schooling to Indians, asserting that Utah’s enabling act authorized the district to exclude “Indians not taxed” from its guarantee of public education to all children in the state.³⁸⁵ The court rejected that claim, noting that even Indians not taxed counted as people: “Although the State may have been authorized to distinguish ‘Indians not taxed’ from other groups, the constitution actually adopted did not expressly exclude Native

381. See generally Elizabeth Durfee, *Apportionment of Representation in the Legislature: A Study of State Constitutions*, 43 MICH. L. REV. 1091 (1945) (tables showing constitutional provisions for apportionment).

382. See generally Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167 (1991) (detailing the manner in which the “Indians not taxed” phraseology has been used to deny franchise to Indians).

383. Act of July 16, 1894, ch. 138, § 3, 28 Stat. at 108. (1894) (cited in *Meyers By & Through Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544, 1557 (D. Utah 1995)).

384. E.g., Mario Gonzalez & J. Youngblood Henderson, *Health Care for Tribal Citizens: A Criticism of White v. Califano*, 7 AM. INDIAN L. REV. 245, 249–50 (1979) (South Dakota).

385. 905 F. Supp. at 1557.

American children from its guarantee of a public education system ‘open to all children of the state.’”³⁸⁶

I argue the Indians Not Taxed Clause of the Constitution, along with Indians Not Taxed provisions of some state enabling acts, does nonetheless authorize states to make legal classifications to define Indian status for purposes of state law. These are political choices to be made in accordance with state political prerogatives that are in accord with the Fourteenth Amendment. So long as the state classification fulfills the *Morton v. Mancari* test and otherwise does not interfere with federal and tribal programs, the state classification is valid.

CONCLUSION

For too long, political discourse about Indian affairs has devolved away from the federal and state governments’ obligations to protect Indian people and toward complaints that Indian law improperly hands Indian people special rights and privileges. Young John Roberts’s writings, grouching that Indian money settlements are racial giveaways, ignored that Indian tribes and individual Indians prevailed in litigated cases vindicating property rights all Americans enjoy. We should be wary of letting the political rhetoric of “giveaways” creep into the judiciary. Indian and tribal legal rights were established in federal laws that Indian tribes and people acquired in a bargained-for exchange going back to the Founding.

The United States was founded on slave labor and the lands and resources of Indian tribes and individual Indians.³⁸⁷ The Constitution impliedly acknowledges this reality. There are reasons why slaves and “Indians not taxed” were partially counted or not counted at all for apportionment purposes. Which persons fit within those terms was then and is now, for Indians, a political choice to be made by federal and state political actors. And, as the Supreme Court has held, once the political actors make those determinations, the judiciary has little or no role to play in deciding who is an Indian.

386. *Id.*

387. See generally Tiya Miles, *America Holds Onto an Undemocratic Assumption from Its Founding: That Some People Deserve More Power than Others*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/republicans-racism-african-americans.html> [<https://perma.cc/T4LL-B5NP>] (describing the connection between slavery and Indian lands); Tiya Miles, *How Slavery Made Wall Street*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> [<https://perma.cc/7VXR-2ZTQ>] (“While ‘Main Street’ might be anywhere and everywhere, as the historian Joshua Freeman points out, ‘Wall Street’ has only ever been one specific place on the map. New York has been a principal center of American commerce dating back to the colonial period—a centrality founded on the labor extracted from thousands of indigenous American and African slaves.”).