Politics, Indian Law, and the Constitution

Matthew L.M. Fletcher*

Abstract

The question whether Congress may create legal classifications based on Indian status under the Fifth Amendment's Due Process Clause is not 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. Textually*, I argue, 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 why the judiciary should refrain from applying strict scrutiny review of Congressional legal classifications rooted in the political question doctrine and the institutional incapacity of the judiciary. Who is an Indian is a deeply fraught question to which judges have no special institutional capacity to assess.*

---

* Professor of Law & Director of Indigenous Law and Policy Center, Michigan State University College of Law; Visiting Professor, University of Michigan Law School (Fall 2019); Visiting Professor, Stanford Law School (Spring Quarter 2019). Reporter, Restatement of the Law of American Indians (American Law Institute). Enrolled Citizen, Grand Traverse Band of Ottawa and Chippewa Indians. Thanks to Tiffani Darden, Kate Fort, Catherine Grosso, Neoshia Roemer, Wenona Singel, David Thronson, Veronica Thronson, Monica Williamson, and to the Friday Forum.

Politics, Indian Law, and the Constitution

Matthew L.M. Fletcher

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, in one instance calling the law an "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 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,

---

[1] Memorandum for Fred F. Fielding from John G. Roberts (Sept. 26, 1984), available at https://turtletalk.files.wordpress.com/2007/10/roberts092684-shoalwater-bay.pdf; Memorandum for Fred F. Fielding from John G. Roberts (Nov, 30, 1983), available at https://turtletalk.files.wordpress.com/2007/10/roberts113083-las-vegas-paiute.pdf.

[2] Roberts 1983 Memorandum, supra.

[3] Nina Totenberg, Looking at Roberts' Record Before the Court, National Public Radio, July 22, 2005, https://www.npr.org/templates/story/story.php?storyId=4765617.

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

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

pointed out to the Court that Indian affairs laws "singl[ing] out Natives for special treatment" are perfectly allowable under the Constitution, most notably 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 not yet a class of American citizens to which the United States recognizes this special kind of relationship, but the Court did reconfirm the "obvious" point made above.[7]

In a few short years, it is likely that Chief Justice Roberts will be called upon to decide whether Indian affairs laws will survive at all. There is a concerted effort by opponents to Indian affairs legislation to undo the special relationship. One federal district court judge recently

---

[6] Id. at 26 (citing Cohen's Handbook of Federal Indian Law 840-41 (1982 ed.)) (emphasis added).

[7] Rice v. Cayetano, 528 U.S. 495, 519 (2000) ("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 Morton v. Mancari, 417 U.S. 535, 552 (1974)).

concluded that the Indian Child Welfare Act,[8] which creates legal classifications of Indian children based on their tribal membership status or the membership status of their biological parents,[9] is race-based legislation that cannot survive strict scrutiny.[10] Assuming a case like this one reaches the Supreme Court, both tribal advocates and opponents will be strategizing on the best way to win Chief Justice Roberts' vote. Which John Roberts will we see? The young, hyper-partisan lawyer suspicious of "Indian giveaways"? Or the apolitical, institution-protecting "Umpire in Chief?"[11]

* * *

Ask any 100 Americans "Who is an Indian?" and you are likely to receive 100 different answers. The same is true if you ask 100 American Indians. The indeterminacy plagues federal Indian law and confounds policymakers and judges.[12] 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.

The problem identified by critics is that the legal classification of Indians requires governments to make

---

[8] Pub. L. 95-608, Nov. 8, 1978, 92 Stat. 3069, codified as amended at 25 U.S.C. § 1901 et seq.

[9] 25 U.S.C. §§ 1903(3), (4).

[10] Brackeen v. Zinke, 338 F. Supp. 3d 514, 533 (W.D. Tex. 2018), on appeal (5th Cir.) (No. 18-11479).

[11] Jeffrey Rosen, John Roberts, the Umpire in Chief, N.Y. Times, June 27, 2015, at __.

[12] 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).

classifications on the basis of race. For decades, legal elites – courts, legislators, and executive branch officials – 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,[13] classifications that the Supreme Court has nonetheless consistently upheld.[14] Commentators and courts most especially wring their hands over legislative definitions of "Indian" that are rooted in Indian ancestry or blood quantum.[15]

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.[16] Until the civil rights era of the mid-20th century, courts understood federal

---

[13] E.g., Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (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 (2016) (arguing 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 (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 (1991) (arguing that all Indian affairs laws violate equal protection).

[14] E.g., Morton v. Mancari, 417 U.S. 535 (1974); Fisher v. District Court, 424 U.S. 382 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); United States v. Antelope, 430 U.S. 641 (1977).

[15] E.g., L. Scott Gould, Mixing Bodies and Beliefs: The Predicament of Tribes, 101 Colum. L. Rev. 702 (2001).

[16] E.g., Northwest Ordinance, art. 3 (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 authorized 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."); Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 (treaty of alliance with "Delaware nation"); Declaration of Independence (referencing "merciless Indian Savages").

power to do so was rooted in the foreign and wars powers of the Constitution, not to be disturbed or questioned by Article III judges absent unusual circumstances.[17] Congress has power to regulate and govern Indians and Indian tribes through the Indian Commerce Clause, the Treaty Power, other constitutional provisions like the Property and Territory Clause,[18] and the general trust relationship with Indians and tribes (originally known in American law as the duty of protection[19]). These powers are bolstered by the Supremacy Clause and the Necessary and Proper Clause.[20] 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.[21] The Supreme Court faithfully (if grudgingly) applies a sort of rational basis test instead of strict scrutiny to Fifth Amendment equal protection challenges to Indian affairs laws.[22] It is the settled law of the land that when Congress legislates in accordance with its trust relationship with Indian tribes, Congress is entitled to significant deference under this test, usually known as the political classification doctrine.[23]

---

[17] Baker v. Carr, 369 U.S. 186, 215 (1962).

[18] United States v. Lara, 541 U.S. 193, 200-01 (2004).

[19] Worcester v. Georgia, 31 U.S. 515, 556 (1832).

[20] Id. at 561-62; Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 199 (1984).

[21] E.g., 25 U.S.C. § 163 ("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. . . ."); 25 U.S.C. § 1353 ("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.").

[22] Morton v. Mancari, 417 U.S. 535, 555 (1974).

[23] Id.

It would be easy enough to argue that the *Brackeen* decision therefore simply runs afoul of Supreme Court decisions to the contrary, and that the federal judge who decided it was simply wrong.[24] But conservative Supreme Court Justices seem to have signaled that they are willing to reconsider the political classification doctrine.[25] Moreover, the current Presidential administration casually declared Indian affairs legislation providing services to individual Indians as improperly based in race in a signing statement involving appropriations for housing block grants.[26] 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" (the agency did signal later that it might back down under tribal pressure).[27]

The statute at issue in *Brackeen*, the Indian Child Welfare Act (ICWA),[28] now appears to the battleground for the decisive determination about the political classification doctrine,[29] and therefore, the future of Indian law.[30] Three

---

[24] 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, available at https://www.bizjournals.com/dallas/news/2018/12/19/judge-reed-o-connor-political-conservatives.html.

[25] 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 a broad, opening salvo against the political classification doctrine.

[26] Andrew I. Huff and Robert T. Coulter, Defending Morton v. Mancari and the Constitutionality of Legislation Supporting Indians and Tribes, at 14 (Nov. 19, 2018), available at https://turtletalk.files.wordpress.com/2018/12/mancari-11-19.pdf. According to Huff and Coulter, "No previous administration has ever characterized statutes or programs benefiting tribal governments as racial preferences." Id.

[27] Id. at 14-15.

[28] 25 U.S.C. § 1901 et seq.

[29] 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

States have challenged the constitutionality of the Act under the equal protection component of the Fifth Amendment, and the case is currently pending in the Fifth Circuit. If *Brackeen* holds, then every federal statute not explicitly limited to federal recognized Indian tribes or their members would be subject to strict scrutiny, a mode of review that one prominent commentator once described as strict in theory, but fatal in fact.[31] The worry that all of Title 25 would be vulnerable now is a real world concern.[32]

There is a spectrum of argument against the political classification doctrine. The most concerted attack – what I

Petition for Writ of Certiorari, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399), 2012 WL 5209997 (Oct. 22, 2012). 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, LLC v. Patrick, 693 F.3d 1, 16-28 (1st Cir. 2012).

[30] Justice Blackmun's majority opinion explained the stakes in Morton v. Mancar, 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).

[31] 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).

[32] One federal district court judge spelled out the stakes in stark terms:

> 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 to 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 Morton v. Mancari, 417 U.S. 535, 552-53 (1974).

call the compromise position – is on the surface an effort to be reasonable, and has therefore caught the attention of many more 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 reality, the overwhelming reality, that Indian tribes are sovereigns – domestic sovereigns yes – but sovereigns to which to Constitution itself acknowledges in the Commerce Clause.[33] But if Congress chooses to legislate or if the Executive branch chooses to regulate or administer services to members of a tribe that are not formally acknowledged as a sovereign by the United States, compromise position advocates claim that such an act creates a purely racial classification that should be subject to strict scrutiny under the equal protection component of the Fifth Amendment.[34]

---

[33] Const. art. I, § 8, cl. 3.

[34] 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. The two paragraphs of the *Williams* opinion in which Kozinski reasons a Native Alaskan reindeer monopoly is a race-based classification that should be subject to strict scrutiny is a hot mess:

> [W]e can discern [*Morton v.*] *Mancari*'s scope by looking to the cases it cited as examples of permissible special treatment for Indians . . . : Each case dealt with life in the immediate vicinity of Indian land. *E.g., Morton v. Ruiz* . . . (providing welfare benefits to Indians, but only those who live "on or near" reservations); *McClanahan v. Arizona State Tax Comm'n* . . . (tax exemption for income derived wholly from reservation sources); *Simmons v. Eagle Seelatsee* . . . (limiting the right to inherit reservation land only to Indians); *Williams v. Lee* . . . (tribal courts and their jurisdiction over reservation affairs).
>
> While *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests. . . . For example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts. At oral argument, counsel for the government conceded that granting natives a monopoly on all Space Shuttle contracts would not pass *Mancari*'s rational-relation test. Counsel could only distinguish the Space Shuttle preference from a reindeer preference by noting that, in 1937, natives were heavily involved in the reindeer

This is the tack taken by the district court in *Brackeen*, which held 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 is the

---

> business whereas they aren't involved in the Space Program. The casino example defies this distinction, but is equally unrelated to "Congress' unique obligation toward the Indians." . . .

Williams, 115 F.3d at 664-65 (some citations omitted). Kozinski seemed so excited about condemning the federal agency decision, he failed to make a coherent argument as to why the government's interpretation merited strict scrutiny review. Consider the above paragraph – it opens with an effort to limit *Mancari*'s holding to Indian "life in the immediate vicinity of Indian land." Id. at 665. Kozinski must quickly retreat, because *Mancari* involved federal employment preferences, 417 U.S. at 537, and many federal Indian affairs employees work in Washington, D.C., far from Indian land. So, Kozinski quickly restates his rule limiting *Mancari*'s scope to "those statutes that affect *uniquely* Indian interests." Id. (citing United States v. Antelope, 430 U.S. 641, 646 (1976)). 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.

Lastly, Kozinski moves to justify this ad hoc and messy misstatement of the political classification doctrine by invoking hypotheticals that are classic logical fallacies. Kozinksi 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 federal government on a no-bid contracting basis, taking advantage of contracting preferences benefitting Indian-owned businesses (false analogy).

Judge Kozinski's opinion in *Williams* is an oft-cited and influential opinion, especially by those who advocate for the overruling of or for significant limitation of the 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. 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.

biological child of a member of an Indian tribe" is a race-based classification subject to strict scrutiny.[35]

***

Legal scholars long have 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."[36] Some of the scholarship (including, to this point, my own[37]) 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.[38] Ablavsky parsed through 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

---

[35] Brackeen, 338 F. Supp. 3d at 533.

[36] 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, __ Mont. L. Rev. __ (forthcoming 2019), manuscript at 1, available at https://ssrn.com/abstract=3272355. See also Sarah Krakoff, They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum, 69 Stan. L. Rev. 491 (2017).

[37] Matthew L.M. Fletcher, Tribal Membership and Indian Nationhood, 37 Am. Indian L. Rev. 1 (2012-2013); Matthew L.M. Fletcher, Race and American Indian Tribal Nationhood, 11 Wyo. L. Rev. 295 (2011).

[38] Gregory Ablavsky, "With the Indian Tribes:" Race, Citizenship, and Original Constitutional Meanings, 70 Stan. L. Rev. 1025, 1074-75 (2018).

term "tribe" as an understanding (mostly) that Indian tribes were nations.[39] Ablavsky's research is a game-changer.

I now disagree substantively and strategically with these scholars and, as should be obvious, the critics of the political 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 at the years around the time of the ratification of the Constitution.[40] Even today, there is no single, definitive understanding of what the term means. Given that the American polity is now far less exclusionary than it was at the Founding, what that term means to a 21st century American citizen is likely even more disparate. 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 Congress first and foremost as a political matter decides which persons are Indians, and 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

[39] Ablavsky, supra, at 1025-26.
[40] Ablavsky, supra, at 1067-76.

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. 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, the duty of protection owed by the United States to Indians and Indian tribes, a bargained for sovereign-to-sovereign relationship. 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 leaves for Congress and to a lesser extent the Executive branch the exclusive power to decide what entities qualify as an "Indian tribe" and which persons are "Indians." In the first subsection, I show that the political branches of the federal government possess exclusive power to recognize foreign nations and Indian tribes, and to incorporate new states into the Union. These decisions are political decisions over which Article III courts possess no power to review. Similarly, 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. In short, the political branches' recognition of Indians, which necessarily requires racial and cultural classifications, is 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 and war powers. 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 a relationship 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," whoever they are.[41] Congress enacted various statutes authorizing certain Indians to become citizens.[42] 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, at bottom, involves the relationship between the United States and Indian tribes. In the modern era, the relationship is characterized by the federal government as the general trust relationship.[43] 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

---

[41] Const. amend. XIV, § 2.

[42] See generally Matthew L.M. Fletcher, Federal Indian Law § 3.8, at 92-97 (2016).

[43] Fletcher, Federal Indian Law, supra, § 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).

trust relationship will be characterized as it was originally labeled, the duty of protection.[44]

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.[45] 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.[46] The First Congress preempted the field in 1790 by enacting the first Trade and Intercourse Act that forbade state and individual American citizen intercourse with Indians and tribes.[47] And in all, the United States entered into approximately 400 treaties with Indian tribes[48] that formed

---

[44] Cherokee Nation v. Georgia, 30 U.S. 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).

[45] Fletcher, Federal Indian Law, supra, § 1.2, at 4-5.

[46] 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).

[47] Cf. Johnson v. McIntosh, 21 U.S. 543, 587 (1823) (acknowledging federal exclusive right to extinguish Indian title). See generally Fletcher, Federal Indian Law, supra, § 3.1, at 51-53.

[48] Fletcher, Federal Indian Law, supra, § 5.13, at 213.

an additional legal basis for the federal government's duty of protection to Indian tribes and individual Indians.[49]

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.[50] The Court also confirmed that the United States owed a duty of protection to Indians and tribes, but because that relationship with akin to a sovereign-to-sovereign political relationship, deferred to the United States on the scope and contours of that duty.[51]

American policymakers began cynically and at times viciously on 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. [52] 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.[53] From this political model came assimilation programs targeted at individual Indians and dispossession of tribal and Indian lands and resources.[54] 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 well into the 20th century.[55]

---

[49] United States v. Kagama, 118 U.S. 375, 383-84 (1886).

[50] Johnson v. McIntosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). See generally Fletcher, Federal Indian Law, supra, § 2.1 – 2.2, at 21-37.

[51] 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).

[52] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (Marshall, C.J., lead opinion).

[53] See generally Fletcher, Federal Indian Law, supra, § 5.2, at 178-81.

[54] Id.

[55] Id. § 5.2, at 179.

At least since the 1970s, the federal government turned away from characterizing the duty of protection as a guardianship and now characterizes its relationship as a trust, hence the general trust relationship.[56] Federal-tribal relations are now considered government-to-government relationships. Indian tribes serve as federal government contractors providing their own federally funded government services. Indian tribes operate business enterprises and use the proceeds to additionally fund tribal government services. For the last half century, federal-tribal relations are guided by the policy of tribal self-determination. Now federal laws tend to support tribal interests and individual Indians. Sadly, now that the United States is not in open political, legal, and economic war with Indians and tribes, anti-Indian and anti-tribal groups have proliferated.[57]

B. Federal Indian Affairs Classifications

In the exercise of 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.[58] The United States recognizes a trust relationship only with federally recognized Indian tribes.[59] There are several methods by which an Indian tribe can be recognized or acknowledged.[60]

---

[56] See generally Fletcher, Federal Indian Law, supra, § 5.1 at 181-94.

[57] See generally Matthew L.M. Fletcher, On Indian-Hating (forthcoming Fulcrum Publishing).

[58] Stephanie Keith & Andrew Hay, "We Know How to Survive," but U.S. shutdown cuts deep for Native Americans, Reuters, Jan. 29, 2019 (quoting Nedra Darling, Bureau of Indian Affairs spokeswoman).

[59] 25 U.S.C. § 5131(a).

[60] Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 103(3), Nov. 2, 1994, 108 Stat. 4791 ("Indian tribes presently may be recognized by

The Treaty Process

The earliest method of federal acknowledgment of Indian tribes is through the treaty process.[61] 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. The United States does not enter into treaties with states, or corporations, or the Boy Scouts. The Treaty Power extends to nations and nations only – foreign nations and Indian tribes.[62] However, as a matter of policy, Congress stated it would no longer consider agreements with Indian tribes under the Treaty Power in 1871.[63]

Only Congress can terminate or abrogate a treaty.[64] However, at times, the Department of the Interior has improperly terminated a given treaty relationship without authorization from Congress.[65]

Acknowledgment by Act of Congress

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.").

[61] 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. 7 Stat. 13.

[62] Const. art. I, § 10, para. 1 ("No State shall enter into any Treaty. . . ."); Const. art. II, § 2, para. 2 (President's treaty powers)

[63] 16 Stat. 566, codified at 25 U.S.C. § 71.

[64] E.g., 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."); 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).

[65] E.g., Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan, 369 F.3d 960, 961-62 & n.2 (6th Cir. 2004).

Congress may acknowledge Indian tribes through simple legislation. [66] Congress terminated and restored dozens of Indian tribes legislatively throughout the mid-20th century.[67]

At times, the process of legislative recognition is tortured and lengthy. Consider the history of the Mississippi Band of Choctaw Indians, described in detail in *United States v. John*. [68] The Mississippi Choctaw Indian people were signatories to an 1830 treaty through which the United States forced the federally recognized Indian tribe now known as the Choctaw Nation of Oklahoma to move out of Mississippi.[69] In the Court's telling of the story, "During the 1890's, the Federal Government became acutely aware of the fact that not all the Choctaws had left Mississippi." [70] 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.[71] 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 be recognized as an Indian tribe. [72] Congress in 1939 eventually formally instructed the Secretary of the Interior to hold Mississippi Choctaw lands in trust.[73]

---

[66] E.g., Restoration of Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. 103–323, Sept. 21, 1994, 108 Stat. 2152; Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. 103–324, Sept. 21, 1994, 108 Stat. 2156; Pub. L. 95–375, Sept. 18, 1978, 92 Stat. 712 (Pascua Yaqui Tribe of Arizona).

[67] United States v. Lara, 541 U.S. 193, 203 (2004).

[68] 437 U.S. 634 (1978).

[69] Id. at 640-41 (citing Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333).

[70] Id. at 642.

[71] Id. at 644-45 (citations omitted).

[72] Id. at 645-46 (citations omitted).

[73] Id. at 646 (citing 53 Stat. 851).

Executive Branch Acknowledgement (Until 1978)

When the United States chose to end, as a matter of policy, the practice of formally entering into treaties with Indian tribes 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 federal agency largesse, and 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 the decision of the Deputy Commissioner for Indian affairs in 1972.[74] 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. [75] The American Indian Policy Review Commission's 1977 report detailed the administrative and political complexities of federal recognition prior to 1978.[76] The injustices and inequities of that process left hundreds of Indian tribes nonrecognized. The report noted that the Department of the Interior exercised the recognition power without any express authorization from Congress (which it probably does not need), but also that Interior exercised this power without articulating formal standards. Interior relied on the "Cohen

[74] General Accounting Office, Improvements Needed in Tribal Recognition Process at 25 (Nov. 2001).

[75] 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 Passamaqvoddy 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.").

[76] 1 American Indian Policy Review Commission, Final Report 457-84 (May 17, 1977).

criteria" in recognizing 20 tribes from the 1940s to the 1970s.[77]

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.[78] A petitioning tribal organization may demonstrate tribal status under this rigorous and expensive process. Several tribes have been successful under the FAP.[79] Because the Secretary's decision is a final agency decision, it subject to administrative review under the Administrative Procedure Act.[80]

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.[81] Congress forced the Secretary of the Interior to publish a list of federally recognized tribes, and keep that list updated (and to stop making more classifications).[82] The 1994 Act did formally acknowledged the Executive branch's power to acknowledge tribes under 25 C.F.R. Part 81.[83] The government updated and amended the regulations in 2015.[84]

---

[77] William Wood, Indians, Tribes, and (Federal) Jurisdiction, 65 U. Kan. L. Rev. 415, 476-77 (2016).

[78] 25 C.F.R. Part 81.

[79] General Accounting Office, Improvements Needed in Tribal Recognition Process at 25-26 (Nov. 2001).

[80] E.g., Nipmuc Nation v. Zinke, 305 F. Supp. 3d 257 (D. Mass. 2018) (applying arbitrary and capricious standard under 5 U.S.C. § 706).

[81] H.R. Rep. 103-781, at 3-4 (Oct. 3, 1994).

[82] 25 U.S.C. § 5131.

[83] Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 103(3), Nov. 2, 1994, 108 Stat. 4791.

[84] 80 Fed. Reg. 37,887 (July 1, 2015).

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 complicated. 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.

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."[85] The first federal enactment on Indian affairs, the Trade and Intercourse Act of 1790, also uses the term "Indians" without definition. [86] 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.'"[87]

In the criminal jurisdiction context, the United States prosecutes "Indians" for Indian country crimes – and must

---

[85] Const. art. I, § 2, para. 3.

[86] An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137.

[87] Alex Tallchief Skibine, Indians, Race, and Criminal Jurisdiction in Indian Country, 10 Alb. Gov't L. Rev. 49, 49 (2017).

prove to a jury beyond a reasonable doubt that a defendant is an Indian – even if the defendants are not members of federally recognized tribes.[88] The lower courts have adopted common law tests derived from Indian law judicial statements such as *United States v. Rogers*[89] to determine whether a person is an "Indian" under the statute.[90]

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."[91] There are many 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.[92] 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."[93] Other tribe-specific statutes and many treaties created classifications of persons based on blood quantum.[94]

Most Congressional blood quantum-based legal classifications are 19th century allotment statutes, but there are relatively recent examples. One of the more controversial statutes was the 1954 Act dividing the Ute Tribe into two

---

[88] United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009).

[89] 45 U.S. 567 (1845).

[90] Skibine, Indians, Race, and Criminal Jurisdiction, supra, at 55-59. See generally 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. Racial & Ethnic Just. 241 (2010); Jacqueline F. Langland, Indian Status under the Major Crimes Act, 15 J. Gender Race & Just. 109 (2012).

[91] 25 U.S.C. § 5129.

[92] 8 U.S.C. § 1359.

[93] 25 U.S.C. § 345.

[94] E.g., 25 U.S.C. § 355 ("full-blooded members"; "full-blood Indian"); Treaty with the Pottawatomies, art. II, Nov. 15, 1861, 12 Stat. 1191, 1192 ("persons being members of the Pottawatomie tribe and of Indian blood").

groups, mixed-blood and full-blood members, and terminating the federal government's duty of protection to the mixed-blood group.[95] The House report accompanying the law, which enacted during the termination era of the mid-20th century, asserted that "the majority of the mixed-blood group feel that they are ready for a termination of Federal supervision over their property and fullblood Indians believe that they are not ready for such action."[96] Despite criticism,[97] I can find no determination by the federal judiciary disparaging the constitutionality of this arrangement. My suspicion is that the 1954 Act was very likely a constitutional legal classification enacted by Congress in accordance with its powers to regulate Indian affairs, and the criticism is more political and economic than legal.

Tribal membership

Modern era federal statutes focus on the status of a person as a tribal citizen or tribal member in order to determine Indian status. Tribal citizenship or tribal membership status is often determinative of whether a person is an "Indian" under federal law. 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 Federal jurisdiction."[98]

---

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

[96] H. R. Rep. 83-2493, at __ (year), quoted in United States v. Felter, 752 F.2d 1505, 1506 n.2 (10th Cir. 1985).

[97] E.g., R. Warren Metcalf, Lambs of Sacrifice: Termination, the Mixed-blood Utes, and the Problem of Indian Identity, 64 Utah Hist. Q. 322 (year).

[98] 25 U.S.C. § 5129.

For the purposes of this paper, the definition of "Indian child" in the Indian Child Welfare Act (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."[99] 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.[100] Congress reasonably extended its definition of Indian children to include children eligible for membership because tribes do not (and possibly cannot[101]) automatically enroll Indian children at birth. Moreover, many Indian children are eligible for membership with more than one tribe, and almost all tribes prohibit dual enrollment.[102] The federal government usually forces tribal members to choose one tribe for federal purposes.[103]

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 persons (and their descendants)

---

[99] 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).

[100] Brackeen v. Zinke, 338 F. Supp. 3d 514, 533 (W.D. Tex. 2018) ("This means one is an Indian child if the child is related to a tribal ancestor by blood.").

[101] Cf. Nielson v. Ketchum, 640 F.3d 1117, 1114 (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.").

[102] E.g., Crocker v. Tribal Council for Confederated Tribes of Grand Ronde Community of Oregon, 13 Am. Tribal Law 58 (Tribal Court of the Confederated Tribes of the Grand Ronde Community 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).

[103] Akers v. Hodel, 871 F.2d 924, 933 n. 16 (10th Cir. 1989).

held as slaves by the citizens of several Indian tribes, most notably the "Five Civilized Tribes" in Oklahoma, the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole nations.[104] 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. Many observers would agree the government imposed the terms of those treaties on the tribes.[105] The treaties required the tribes to accept the Freedmen as tribal citizens, their descendants also becoming eligible for tribal citizenship.[106]

In the case of the Seminole Nation of Oklahoma, fully one-third of tribal citizens were non-Indian Freedmen.[107] In *Goat v. United States*,[108] 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. There, the Court addressed whether the Seminole Freedmen could alienate the allotments they acquired through the division of the Seminole reservation in 1898.[109] In 1908, Congress lifted the federal restriction of alienation burdening the Seminole Freedmen allotments (as

---

[104] 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 ("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).

[105] 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").

[106] 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).

[107] Goat v. United States, 224 U.S. 458, 458 (1912) (quoting Report of the Dawes Commission 13 (1898)).

[108] Id.

[109] Id. at 459; id. at 462 (citing Act of July 1, 1898, 30 Stat. 567).

well as the allotments held by "enrolled . . . intermarried whites" and "mixed-blood Indians having less than half Indian blood. . ."). [110] In 1904, however, Congress had removed the restrictions upon alienation on allotments held by "allottees . . . who are not of Indian blood. . . ."[111] The Court concluded that the Freedmen were persons "not of Indian blood," and so the 1904 Act lifted the restriction upon alienation first. [112] The Court held that conveyances before the 1908 Act but after the 1904 Act by the Freedmen were valid. [113] 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 an Indian tribe.

C. The Political Classification Doctrine

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, coupled with the civil rights movement of the 1960s, naturally led to scrutiny of Indian affairs statutes. [114] The leading case on the political classification doctrine case, indeed the case that originated the doctrine, *Morton v. Mancari*,[115] was decided during this time. *Mancari* involved an employment preference granted to Indians initially authorized in 1934.[116]

---

[110] Id. at 465 (citing Act of May 27, 1908, 35 Stat. 312).
[111] Id. at 467 (citing Act of April 21, 1904, 33 Stat. 189, 204).
[112] Id. at 468.
[113] Id. at 469-71.
[114] Bolling v. Sharpe, 347 U.S. 497 (1954).
[115] 417 U.S. 535 (1974).
[116] 25 U.S.C. § 5116.

The Indian New Deal of the 1930s, highlighted by the Indian Reorganization Act of 1934,[117] likely was the first time Congress had enacted a statute designed to encourage and support Indian tribes to assert the power of self-determination.[118] 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.[119]

In *Mancari*, a Fifth Amendment equal protection challenge to Indian preference in employment laws and regulations brought by a non-Indian federal employee,[120] allowed the Supreme Court the 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.[121] "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."[122] The statute defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian

---

[117] Act of June 18, 1934, c. 576, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 et seq.

[118] See generally Fletcher, Federal Indian Law, supra, § 1.3, at 12.

[119] Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83-84 (1977).

[120] 417 U.S. at 537.

[121] 25 U.S.C. § 5116.

[122] Id.

reservation, and shall further include all other persons of one-half or more Indian blood."[123] 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 Federally-recognized tribe."[124] The *Mancari* Court described the Indian preference "political" rather than "directed toward a 'racial' group consisting of 'Indians'. . . ."[125] 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" – the duty of protection – then those judgments "will not be disturbed."[126]

---

[123] 25 U.S.C. § 5129.

[124] Mancari, 417 U.S. at 553 n. 24.

[125] 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.").

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

Id. at 554-55.

Applying the standard, the Court concluded the Indian preference was "reasonable" and upheld the law.[127] 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.[128] It made sense then, and makes sense now, that Indian people be involved 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*, Supreme Court rejected Fifth Amendment equal protection claims related to the exclusive jurisdiction of tribal courts in *Fisher v. District Court*, [129] and to federal criminal jurisdiction in Indian country in *United States v. Antoine*. [130] The Court even extended the doctrine to state law classifications in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.[131]

The political classification doctrine is particularly important in the self-determination era. Congress has enacted numerous self-determination statutes that acknowledge Indian tribes as sovereign entities.[132] 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

---

[127] Id. at 554.

[128] Id. at 544-45.

[129] 424 U.S. 382 (1974).

[130] 430 U.S. 641 (1977).

[131] 443 U.S. 658 (1979).

[132] 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 Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 56 Tex. L. Rev. 1195 (1978).

Indian Education, and Indian Health Service.[133] Congress has granted preferences in contracting to tribes and tribal corporations under the Small Business Act and other statutes.[134] Congress allows Indian tribes to be treated the same as states for purposes of administering and enforcing federal environmental laws.[135] Congress has authorized casino-style gaming on Indian lands.[136] Congress has settled many claims for money damages by Indians and tribes,[137] settled land claims,[138] settled water rights cases,[139] regulated tribal powers,[140] and acknowledged tribes as sovereigns.[141] 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.[142]

There is no room for lower courts to tinker with *Mancari*'s definitive statement. The *Mancari* test is often

---

[133] 25 U.S.C. § 5301 et seq.

[134] See generally 13 C.F.R. § 124.109.

[135] [citations]

[136] 25 U.S.C. § 2701 et seq.

[137] E.g., Michigan Indian Land Claims Settlement Act of 1997, Pub. L. 105–143, 111 Stat. 2652.

[138] E.g., Rhode Island Indian Claims Settlement Act, Pub. L. 95–395, Sept. 30, 1978, 92 Stat. 813.

[139] See generally Robert A. Anderson, Indian Water Rights, Practical Reasoning, and Negotiated Settlements, 98 Calif. L. Rev. 1133 (2010).

[140] Pub. L. 113-4, Title IX, § 904, Mar. 7, 2013, 127 Stat. 120, codified at 25 U.S.C. § 1304 & 18 U.S.C. § 2265(e).

[141] E.g., Restoration of Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. 103–323, Sept. 21, 1994, 108 Stat. 2152; Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. 103–324, Sept. 21, 1994, 108 Stat. 2156; Pub. L. 95–375, Sept. 18, 1978, 92 Stat. 712 (Pascua Yaqui Tribe of Arizona).

[142] Simmons v. Eagle Seelatsee, 244 F.Supp. 808, 814 n. 13 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966).

The courts assume that the equal protection component of the Due Process Clause of the Fifth Amendment is to be applied to Indian affairs statutes like any other federal law. I have doubts the Fifth Amendment applies at all to Indian affairs statutes. If it is true that the equal protection component of the Fifth Amendment is an implied right derived from the Fourteenth Amendment, and the Fourteenth Amendment excludes Indians, then the equal protection component cannot properly be applied to Indian affairs legislation except as viewed through the lens of the political question doctrine.

described as a rational basis test, but that nomenclature is slightly, but significantly, inaccurate. The rational basis the Supreme Court is looking for in Indian affairs statutes is the "fulfillment" of the duty of protection. If the Court finds that there is "reasonable and rationally designed to further Indian self-government," [143] the analysis ends there. If 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.*[144]

II. The Structural and Textual Argument

The Constitution denies Article III courts the power to review decisions by Congress and the Executive branch to recognize the sovereignty of states (after the original 13), foreign nations, and Indian tribes. I argue the Constitutional also denies to Article III courts the full power to review decisions by Congress and the Executive branch to recognize and classify individual Indians as well. Both the text and the structure of the Constitution grant the power to recognize and classify individual Indians to Congress and the Executive branch, and likely the states for limited purposes. The relevant Constitutional text is the Indians Not Taxed Clause and the Commerce Clause. The structural argument rest with the fact that the Constitution leaves to the federal political branches (and the states) the concurrent powers to define "Indians not taxed" and "Indian tribes."

---

[143] Id.

[144] 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).

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.[145] The Constitution authorizes – and in fact requires – the federal government to define who is Indian.

A. The Constitution's Political Triad

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. . . ."[146] The main thrust of the clause is to vest in Congress plenary powers to regulate commerce with these three types of sovereign entities. The Executive branch possesses the power to recognize which entities qualify as foreign sovereigns. Congress possesses the exclusive power to admit states to the union. Congress and the Executive branch share the power to acknowledge tribal sovereigns.

It is hornbook law that Article III courts are forbidden from reviewing those political choices to recognize which entities are sovereign. The only exception in relation to judicial review of federal recognition of Indian tribes is extremely narrow and 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*.[147] There, the Court reviewed the source and scope of the "recognition power" of the United States to

---

[145] Ablavsky, supra, at 1074-75.
[146] Const. art. I, § 8, cl. 3.
[147] 135 S.Ct. 2076 (2015).

acknowledge foreign nations.[148] 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.[149] 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.[150] The Court added that the President also possesses the power to negotiate and (once the Senate ratifies them) proclaim treaties and to send ambassadors to foreign nations.[151] The Court acknowledged, however, that the President's power is concurrent with Congress, which also possesses certain powers in relation to foreign nations, including the power to regulate commerce with foreign nations.[152] Whatever the scope of the recognition power possessed by the Executive branch and Congress, a subject of much debate within the Court itself, the Court stated that Article III judges have no say in the ultimate decision: "[T]he Judiciary is not responsible for recognizing foreign nations."[153]

2. States

The Constitution even 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

[148] Id. at 2084-88.
[149] Id. at 2084.
[150] Id. at 2085.
[151] Id. at 2086.
[152] Id. at 2087.
[153] Id. at 2091.

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." While the scope of the decision to admit a new state into the Union may be adjudicated, the political choice of Congress to do so is not justiciable.[154]

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 akin to the 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,[155] but in practice federal recognition by Congress has never been reviewed by the judiciary. The Executive branch also possesses the power to recognize Indian tribes, and created an administrative process in 1978 to do exactly that.[156] That administrative process necessarily allows judicial review of administrative recognition decisions on the arbitrary and capricious standard.[157]

The leading case on the question of the scope of Congress' political discretion to acknowledge individual Indians is *United States v. Holliday*.[158] Holliday involved the criminal indictment under federal law for the illegal sale of

---

[154] Cf. Luther v. Borden, 48 U.S. 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 guarantees 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.").

[155] United States v. Sandoval, 231 U.S. 28, 46 (1913).

[156] 25 C.F.R. Part 83.

[157] 5 U.S.C. § 706.

[158] 70 U.S. 407 (1865).

liquor to an Indian outside of the boundaries of Indian country.[159] The Congressional purpose was to "protect[t]" Indians "under the pupilage of the government. . . ."[160] The Court held that the commerce clause authorized to Congress to regulate commerce with Indians and Indian tribes both within and without Indian country.[161] The Indian who purchased the liquor lived on fee land, voted in state and local elections, but also continued to participate in tribal government and receive treaty annuities.[162] The Court concluded he remained a tribal member under federal jurisdiction.[163] 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.[164] 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*

[159] Id. at 415.
[160] Id. at 415-16.
[161] Id. at 417-18.
[162] Id. at 418.
[163] Id. at 418-19.
[164] Id. at 419.

> *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.[165]

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.[166] 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," but that when Congress does not act arbitrarily, Article III courts have no place in second guessing those political choices.[167] That case, *United States v. Sandoval*, involved a similar fact pattern to the *Holliday* case in that it involved the question of Congressional power to bar liquor sales to Indians.[168] The Court analogized the admission of new states into the union with the acknowledgment of Indian tribes, stating that they are both political questions not subject to review by Article III courts.[169]

Modern day executive branch decisions to acknowledge Indian tribes are subject to the arbitrary and capricious standard of the Administrative Procedure Act.[170] Judge Posner's opinion in *Miami Nation v. Dept. of the Interior* held that the political question doctrine does not apply to agency determinations of tribal status, but like the vast majority of

---

[165] Id. (emphasis added).

[166] Id. at 419-20.

[167] United States v. Sandoval, 231 U.S. 28, 46 (1913).

[168] Id. at 36.

[169] Id. at 38 (quoting Coyle v. Oklahoma, 221 U.S. 559, 574 (1911)).

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

agency decisions authorized by and appropriately cabined by Congress and the President, deferred greatly to the agency's decision.[171] 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 (or not acknowledge) an Indian tribe. [172] The two agency recognition decisions reversed by an Article III court involved a tribe the government recognized without utilizing the normal recognition process promulgated in 25 C.F.R. Part 83, rendering those decisions arbitrary and capricious.[173]

Federal courts, following the political classification doctrine, apply a rational basis standard of review to equal protection challenges brought against the government. In *Kahawaiolaa v. Norton*,[174] Native Hawaiians challenged a federal rule prohibiting them from seeking federal acknowledgment as an Indian tribe.[175] 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."[176] However, once a federal agency makes a determination related to federal recognition of Indian tribes, an Article III court possesses

---

[171] Id. at 349-51. See also Muwekma Ohlone Tribe v. Salazar, 708 F.3d 209 (D.C. Cir. 2013); Schaghticoke Tribal Nation v. Kempthorne, 587 F.3d 132 (2d Cir. 2009); Ramapough Mountain Indians v. Norton, 25 Fed.Appx. 2 (D.C. Cir., Dec. 11, 2001); Miami Nation, 255 F.3d at 351; Nipmuc Nation v. Zinke, 305 F. Supp. 3d 257 (D. Mass 2018).

[172] The Supreme Court in Carcieri v. Salazar, 555 U.S. 379 (2009), did hold contrary to the Secretary of the Interior's interpretation of the Indian Reorganization Act that the Interior Department could acquire land in trust for the Narragansett Tribe under 25 U.S.C. § 5108, id. at 395-96, but left alone the federal acknowledgement decision itself.

[173] 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).

[174] 386 F.3d 1271 (9th Cir. 2004).

[175] Id. at 1272.

[176] Id. at 1276 (citing United States v. Sandoval, 231 U.S. 28, 46 (1913)).

some authority to review that decision.[177] The Native Hawaiians claimed the decision to exclude their group violated the equal protection component of the Due Process Clause of the Fifth Amendment.[178] The court then applied the political classification doctrine to hold that the proper standard of review was the rational basis test.[179] 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*[180] and *Adarand Constructors, Inc. v. Peña*[181] must be subject to strict scrutiny.[182] *Rice*, which now forms a significant part of the basis for attacking the political classification doctrine against all 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.[183] The Ninth Circuit held that *Rice* was inapplicable because "claim challenges the very regulations that acknowledge the quasi-sovereign, government-to-government relationship between the United States and Indian tribes."[184] The circuit noted that the Supreme Court in *Rice* explicitly confirmed the political classification doctrine as applied to Indian tribes.[185] The court concluded, "Recognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny."[186]

---

[177] Id. (citing Miami Nation, 255 F.3d at 348).
[178] Id.
[179] Id. at 1278 (citing Morton v. Mancari, 417 U.S. 535, 553-54 (1974)).
[180] 528 U.S. 495 (2000).
[181] 515 U.S. 200 (1995).
[182] Kahawaiolaa, 386 F.3d at 1279.
[183] Rice, 528 U.S. at 515.
[184] Kahawaiolaa, 386 F.3d at 1279.
[185] Id. (quoting Rice, 528 U.S. at 519-20).
[186] Id.

In sum, Article III courts are effectively barred from reviewing and reversing Congressional and Executive branch decisions to acknowledge Indian tribes unless the decision 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, it is Congress that must exercise that judgment, with assists from both the Executive branch and 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 merely 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.

1. The Commerce Clause

As we have seen, the commerce clause necessarily requires the United States to make a determination as to the recognition of governmental entities as sovereign Indian tribes. Recognition of Indian tribes being a political act, Article III judges must defer to the political branches of government. When Congress or the Executive branch recognize an Indian tribe, those branches of government are

also recognizing as Indian the members or citizens of that Indian tribe.

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. In those cases, the Supreme Court held that members or citizens of federally recognized tribes are Indians to which the duty of protection applies. Importantly, in both cases, the federal government's recognition of tribal status meant recognition of the membership or citizenship determinations by those tribes. 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. 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.

There are limits to the deference an Article III court must grant to the political branches and the tribal membership or citizenship criteria. Consider *United States v. Rogers*,[187] 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.[188] Chief Justice 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 be Indian because he was "still a white man, of the white race. . . ."[189] Still, Taney's torturous opinion attempted to detail why Congress would not have

[187] 45 U.S. 567 (1846).
[188] Id. at 571.
[189] Id. at 573.

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."[190] 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.[191] In the same opinion, however, Taney acknowledged that Congress (and presumably tribes, too) could allow white men to undertake "obligations . . . upon himself by becoming a Cherokee by adoption. . . ."[192]

The import of the *Rogers* case, assuming its antebellum-era, racially-tinged reasoning survived the Reconstruction Amendments, is that Congress (and again presumably tribes) are free to create legislative classifications based on race. The *Rogers* Court did not believe Congress was intending in that instance to allow a white man to escape federal prosecution by claiming tribal membership, but at least implicitly acknowledged that Congress *could* do so if it chose; after all, white men could benefit from being tribal members and citizens, the converse must also certainly be true.[193]

2. The Indians Not Taxed Clauses

The federal government's deference to — and perception of — tribal membership and citizenship criteria

---

[190] Id.

[191] Id.

[192] Id.

[193] 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, 381-82 (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 and Order Commission, [report].

also necessitated the introduction of explicit federal statutory and administrative definitions of "Indian" based on race and ancestry, often independent of tribal membership or citizenship. I argue that the Constitution's text implicitly authorizes Congress and the Executive branch (and likely, the states) to create legal classifications of race and ancestry in order to define who or what is an "Indian." Judicial review of those inherently political classifications invites absurdity and injustice.[194]

In the original text of the Constitution now repealed by the Reconstruction Amendments, Article I, Section 2, paragraph 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 Persons. . . .

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 slaves, 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; scholars reasonably presume that this is so.[195] Professor Lee's article glosses over the passive voice in the text by inserting Congress as an

---

[194] See infra, Part III.

[195] 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).

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. . . .'"[196] 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 presumption, which is reasonable if not definitive, that it is Congress that makes the ultimate determination of population numbers. And if it is Congress making that determination, then it must be Congress that is 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. The Court in the notorious *Dred Scott* case[197] opined on the meaning of the Indians Not Taxed Clause at length, however. The *Dred Scott* Court, one might recall, involved a claim to individual rights by a Black person, a former slave, alleging his freedom. The opinion by Chief Justice Taney held that the Constitution (at that time, 1857) included within it no text authorizing Black persons, slave or free, to become American citizens eligible for individual rights protections.[198] Taney compared Black persons to Indians, focusing on the Indians Not Taxed Clause.[199] Taney argued that Indians Not Taxed were the typical Indians of the day, loyal to Indian tribes and not the United States or any State,

---

[196] 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.

[197] 60 U.S. 393 (1857).

[198] Id. at 403-04.

[199] Id.

and savage.[200] Taney argued, however, that Congress possessed the power, if it chose, to recognize Indians as citizens[201] (presumably, "taxable" Indian, perhaps). Taney doubted that such a decision was a wise policy choice, noting the inherent savagery of Indian people, but he concluded that the Constitution did, in theory, allow Congress to make that choice.[202]

Out of this horror show of legal analysis, there is a gloss on the meaning of the Indians Not Taxed Clause. 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.[203] 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

---

[200] Id.

[201] Id. at 417.

[202] Id. at 420.

[203] 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) ("2. Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization. 3. Persons 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.").

that regime, states could and occasionally did extend the suffrage or other rights to Indians, offering up their own definitions of "Indian." [204] The State of Michigan, for example, in 1850 recognized Indians as citizens, so long as they became "civilized."[205]

The original Constitutional Article I text that included the Indians Not Taxed Clause is no more, having been repealed by the Reconstruction Amendments. However, Section 2 of the Fourteenth Amendment retained the Indian Not Taxed Clause. 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*."[206] 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 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. [207] During the debates on the Fourteenth Amendment that followed shortly thereafter, Congress chose not to relitigate the issue and retained the Indians Not Taxed Clause to preclude Indian citizenship.[208]

---

[204] See generally Deborah A. Rosen, American Indians and State Law: Sovereignty, Race, and Citizenship, 1790-1880 (2007).

[205] Mich. Const. (1850), art. 7. See also Rosen, supra, at 133-36.

[206] Const. amend. XIV, § 2 (emphasis added).

[207] Fletcher, Federal Indian Law, supra, § 3.8 at 93.

[208] Id.

Finally, after the ratification of the Fourteenth Amendment, the Senate issued a report confirming that its understanding was that the ratification did not affect Indians at all.[209] The main conclusion 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.[210] So, if nothing else, the 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 key intent was to deny citizenship to Indians.

The Supreme Court confirmed that understanding *Elk v. Wilkins*.[211] There, an Indian person who lived among white people, spoke English, and was educated, attempted to vote.[212] The Court held that Indians could not vote unless Congress enacted a statute authorizing Indians to vote, or

---

[209] 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.

[210] 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 not 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.

[211] 112 U.S. 94 (1884).

[212] Elk, 112 U.S. at 99.

perhaps extending citizenship to Indians.[213] Just as the *Dred Scott* Court assumed Congress had the power to create a class of taxable Indians, so to speak, the *Elk* Court also agreed that Congress had that power. The Court listed numerous treaties and statutes that did confer American citizenship on Indian people.[214] 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]," [215] the law survived constitutional challenges (albeit challenges based on non-equal protection grounds).[216]

In my view, the existence of the undefined term "Indians Not Taxed" in the Constitution's provisions on apportionment *requires* definition of which persons are "Indians" by a government entity with the delegated 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. [217] Ablavksy'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. 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 the attitude" of the census taker, leading to circumstances where an Indian person was counted as

---

[213] Id. at 109.

[214] Id. at 100-07.

[215] 8 U.S.C. § 1401(b).

[216] E.g., Ex parte Green, 123 F.2d 862 (2d Cir. 1941) (rejecting 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 challenge by county in voting rights context).

[217] 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)

multiple different races in different censuses.[218] Eventually, as tribal membership became factual predicates to legal rights to land, money, and other rights, privileges, and entitlements, Congress was forced to make more nuanced and specific definitions for specific situations, often relying on blood quantum.[219]

Consider further the Supreme Court as late as 1886, which stated the Indians Not Taxed Clause was unhelpful in determining whether Congress had power to pass the Major Crimes Act.[220] Even there, Congress offered no definition of "Indian." [221] Had Congress been more specific, perhaps 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. That question could have forced the Court to wonder where Congress' power to make that decision was sourced. The answer then and now likely is the Indians Not Taxed Clause.

As it is (presumably) Congress that decides who is an Indian for a particular purpose, then 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; in other words, 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.

---

[218] Jack Campisi, The Mashpee Indians: Tribe on Trial 28, 41 (1991).

[219] 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); Paul Spruhan, A Legal History of Blood Quantum in Federal Indian Law to 1935, 51 S.D. L. Rev. 1 (2006).

[220] United States v. Kagama, 118 U.S. 375, 378 (1886).

[221] 18 U.S.C. § 1153.

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 powers of recognition of 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' power to join a state to the union. Article III courts have only a very limited role in reviewing the shared Congressional and Executive branch power to recognize Indian tribes. The same analysis must apply to federal recognition of individual Indians. Article III courts' review of legal classifications made by the federal government should be confined by the deferential reasonableness or rational basis standard of review.

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

A. Indians Analogized to Foreigners

In many instances in American history before Congress finally extended American citizenship to all Indians by statute in 1924,[222] the federal government analogized Indian people to foreigners. The leading case, importantly a case postdating the enactment of the Fourteenth Amendment, is *Elk v. Wilkins*.[223] There, the Court referred to Indian people as "alien and dependent."[224] Following the Court's reasoning

[222] Indian Citizenship Act of 1924, ch. 232, 43 Stat. 253, codified as amended at 8 U.S.C. § 1401.

[223] 112 U.S. 94 (1884).

[224] Id. at 100.

in *Dred Scott*, the Court stated that the only way for an Indian to become a citizen was through the naturalization process, a process structurally committed to Congress and the Executive branch.[225]

Indian tribes are also analogized to foreign nations. The Court in *Elk* also referred to tribes as "alien nations."[226] Perhaps the most important case on this point is *Blatchford v. Native Village of Noatak and Circle Village*,[227] where the Supreme Court held that States are immune from suit by Indian tribes.[228] There, the Court reasoned that Indian tribes are more 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.[229]

Recently, the Supreme Court 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.[230] 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' dissent asserted, "[B]ecause States and foreign countries are subject to the immovable-property exception, Indian tribes are too."[231] The import is that if Congress makes a legislative determination in agreement or disagreement with the judiciary on the question of tribal immunity, the Court has

---

[225] Id. at 101.
[226] Elk, 112 U.S. at 99.
[227] 501 U.S. 775 (1991).
[228] Id. at 782.
[229] Id.
[230] Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1653-54 (2018).
[231] Id. at 1661.

no power to disagree (and the Court usually does when it comes to tribal immunity).[232]

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 United States is authorized by the duty of protection to create legal classifications based on Indian status. *Lone Wolf v. Hitchock*,[233] one of the most vilified Supreme Court decisions in Indian law (and justifiably so in most respects),[234] is the leading case in support of the proposition that the United States owes a duty of protection to Indians and tribes, and with that duty comes the power. In the words of the Court: "[T]here arises the duty of protection, and with it the power."[235] Critically important to the exercise of that duty was the acknowledgment by the Supreme Court that the choice to exercise that duty and to 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."[236] 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

[232] Bay Mills Indian Community v. Michigan, 572 U.S. 782, 788-91 (2014).
[233] 187 U.S. 553 (1903).
[234] [citations to articles critical of Lone Wolf]
[235] Lone Wolf, 187 U.S. at 567.
[236] Id. at 565.

> 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. [237]

The Court later (and correctly) tempered down its full-throated deference to Congress' Indian affairs powers by the 1970s when it began to assert limited judicial review over Indian affairs laws. [238] But significant deference remains. The Court as recently as 2011 quoted the portion of *Lone Wolf* that identifies Congress' power as political.[239]

There is a long history of the Supreme Court deferring to Congressional classifications made in furtherance of the duty of protection. In *Tiger v. Western Investment Co.*,[240] for example, the Supreme Court held that Congress sets the metes and bounds of the duty of protection.[241] There, a non-Indian purchased an interest in land subject to a federal restriction on alienation based on the Indian status of the seller. [242] The Indian seller pled that the sale was void because of the federal restriction, but the non-Indian buyer

---

[237] Id. at 568.

[238] Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83-84 (1977); Morton v. Mancari, 417 U.S. 534, 555 (1974).

[239] 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 its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." Id. at 308.

[240] 221 U.S. 286 (1911).

[241] Id. at 315.

[242] Id. at 298-99.

trying to preserve the transaction argued that the federal restriction on alienation was invalid. The Indian seller had earned citizenship status through the allotment process, the non-Indian purchaser claimed, and the federal restriction on alienation violated the Due Process Clause of the Fifth Amendment.[243] 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 under Congress chose to alter that relationship, not the judiciary:

> [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.[244]

Tiger is not an isolated case; the Court has applied similar rules regarding Congress' exercise of the duty of protection again and again; as the Court said in *United States v. Nice*:[245]

> 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

[243] Id. at 310.
[244] Id. at 315 (emphasis added).
[245] 241 U.S. 591 (1916).

> emancipation shall at first be complete or only partial.[246]

The modern day understanding of the duty of protection has been relatively static since the 1970s, the beginning of the self-determination era.[247] 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.[248] In fact, both political branches of government have accepted that the best modern day characterization of the duty of protection is a trust.[249] 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.[250] The judiciary "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[251] But the Court does defer to the political branches.

---

[246] Id. at 598 (emphasis added).

[247] See generally, Fletcher, Federal Indian Law, supra, § 3.12, at 103-09.

[248] [examples of Congressional enactments acknowledging a trust relationship]

[249] 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. 1, 16 (1831)).

[250] Baker v. Carr, 369 U.S. 186, 215 (1962).

[251] Id. at 217.

In *Baker v. Carr*,[252] the Supreme Court articulated a test of sorts to determine whether a question is a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[253]

Professor Michalyn Steele's excellent scholarship on the application of the political question doctrine in Indian affairs supports limitations on judicial interference with federal classifications of Indians.[254] Steele found in the context of judicial review of the exercise of inherent tribal powers over nonmembers, the Supreme Court has articulated three standards at different times to assess the viability of tribal powers, standards that at times overlap and at times compete with each other.[255] Steele's detailed

---

[252] 369 U.S. 186.

[253] Id. at 217.

[254] Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. Rev. 666 (2016).

[255] Id. at 690.

analysis of both Supreme Court and lower court efforts to apply these standards has been a failure: "Ultimately, the standards that have emerged to guide the inquiry into whether inherent tribal authority endures or whether it has been implicitly divested have confounded courts and litigants."[256] Like I do (and the Supreme Court), Steele gives great force to the text and structure of the Constitution, which leaves for Congress and the Executive branch to make initial political choices in Indian affairs.[257] Steele concludes by powerfully showing 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. [258] For 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."[259]

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.[260] In *Duro v. Reina*,[261] the Supreme Court held that Indian tribes possess criminal jurisdiction over "Indians" and no others.[262] That case involved the power of tribes prosecute nonmember Indians, persons who were

---

[256] Id. at 699.
[257] Id. at 702.
[258] Id. at 702.
[259] Id. at 705.
[260] Pub. L. 101-511, Title VIII, §§ 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892, amending 25 U.S.C. § 1301(4).
[261] 495 U.S. 676 (1990).
[262] Id. at 688.

"Indian" but not members of the prosecuting tribe.[263] The Court tied the power of tribal law enforcement to tribal citizenship, finding no tribal inherent powers to prosecute nonmembers, even nonmember Indians.[264] The Court relied on several facts, that the defendant lived most of his life off the reservation, was not eligible for tribal membership, that he could not vote in tribal elections, run for tribal office, or serve on tribal juries.[265] 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.[266] Instead, the Court concluded that the defendant was the same as a "non-Indian."[267]

Congress disagreed on all of these grounds and almost immediately legislatively overruled the Court.[268] 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.[269] Congress also disagreed with the Court's characterization of the importance of political rights of non-citizens — after all, a resident of Michigan may be prosecuted in an Indiana court without being able to vote or run for office there.[270] The Supreme Court's reasoning also ignored or rejected the historical reality of tribal membership, that many tribes had been split up or mashed

---

[263] Id. at 679.

[264] Id. at 688.

[265] Id. at 679.

[266] Id. at 695.

[267] Id. at 688.

[268] Pub. L. 101-511, Title VIII, §§ 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892, amending 25 U.S.C. § 1301(4); United States v. Lara, 541 U.S. 193, __ (2004). See generally Fletcher, Federal Indian Law, supra, § 7.6, at 360-64.

[269] Fletcher, Federal Indian Law, supra, § 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)).

[270] Id.

together by the United States or other historical forces, making tribal membership alone a poor proxy for political rights. Congress, not the judiciary, should be making these decisions in Indian affairs.

D. Institutional Capacity of the Judiciary

If the structure and text — 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.

In short, Congress and the Executive branch, for reasons that should be obvious, are best suited institutionally to make judgments about the recognition of Indians. Though it focuses on the inherent powers of Indian tribes, Professor Steele's scholarship again helpfully guides this analysis in this context as well.[271] 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

[271] Michalyn Steele, Comparative Institutional Competency and Sovereignty in Indian Affairs, 85 U. Colo. L. Rev. 759 (2013).

> 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.[272]

Steele's formulation as applied in the context of recognition decisions in Indian affairs makes a great deal of sense. We know this from older federal statutes that apply to Indians or matters involving Indians where Congress did not offer a definition of Indian, namely, certain federal statutes extending federal criminal jurisdiction into Indian country. In Major Crimes Act[273] 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 recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe."[274] The court could have adopted a definition that includes only tribal members as Indians, as the dissenting judges insisted should be the rule.[275] The court could have adopted the rule stated by the Supreme Court in *United*

---

[272] Id. at 784-85.

[273] 18 U.S.C. § 1153.

[274] United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc), cert. denied, 136 S. Ct. 1712 (year).

[275] Zepeda, 792 F.3d at 1119 (Kozinksi, J., dissenting); id. (Ikuta, J., dissenting).

States v. Rogers,[276] 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 by Congress, it is arguably (to say the least) 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, even an enlightened one. 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 decisionmaking is political.

Instead, the court's test invited dissenting 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. Judge Ikuta's dissent asserted that all blood quantum laws were unjust. 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. In short, judicial decisionmaking is no place to making these determinations. The Ninth Circuit's heroic effort to give meaning to the term "Indian" in the Major Crimes Act is flawed yet reasonable, but that court's efforts are far superior to the poor history of state and federal judges trying to make sense of who is an Indian.

Consider the infamous controversy more than a century ago when federal and state (territorial) courts in

[276] 45 U.S. 567 (1846).

New Mexico split in their respective determinations of whether Pueblo Indians were "Indians" under federal jurisdiction.[277] A pair of Supreme Court, cases assessing whether federal laws applied to Pueblo Indians and tribes, United States v. Joseph[278] and United States v. Sandoval,[279] reached completely different outcomes. In *Joseph*, the Court (following a series of New Mexico State and territorial court decisions[280]) held that Pueblo Indians were not Indians under the relevant statute; Indian status would have prevented the Indian people from losing their lands.[281] 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.[282] 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. It is an embarrassment of American law.

The Pueblo cases are not aberrations. In the absence of a Congressional definition of Indian within a particular statute, federal courts too-often have engaged in what we might now call "mansplaining" the 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, for example, *Halbert v. United States*,[283] where the Supreme Court was called to determine whether an Indian woman who married

---

[277] See generally Fletcher, Federal Indian Law, supra, § 3.7, at 85-87.

[278] 94 U.S. 614 (1876).

[279] 231 U.S. 28 (1913).

[280] 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)).

[281] Joseph, 94 U.S. at 617.

[282] Sandoval, 231 U.S. at 48-49.

[283] 238 U.S. 753 (1931).

a white man was entitled to an Indian allotment.[284] Congress conditioned eligibility of Indians to allotments not on blood quantum but on whether the Indian was a tribal member.[285] The Court, unnecessarily I think, 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.[286] 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."[287] 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. As far as I can tell, 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 was such a law, it likely would violate the Fifth Amendment's Takings Clause — tribal membership is a property right. 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.[288] 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.[289]

---

[284] Id. at 755-56.
[285] Id. at 758 (citing Act of March 4, 1911, 36 Stat. 1345).
[286] Id. at 762-64.
[287] Id. at 763.
[288] Id.
[289] Id. at 764.

State courts in the pre-tribal self-determination eras fared no better. State courts in the 19th 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.[290]

We also know judges are not institutionally competent to make decisions on Indian status by the experience of state courts applying a judge-made test to determine whether an Indian child was an Indian under the Indian Child Welfare Act.[291] The fact that the statute provides clear definitions and state court judges still disingenuously sought to undermine those definitions[292] is a matter that recent binding federal regulations have closed.[293] But prior to those regulations, it was not uncommon for state judges — nearly all of whom had no basis for understanding whether a person was an Indian — taking testimony and making findings of fact and law on Indian status; Professor Kevin Noble Maillard's survey of Indian stereotypes used by judges is damning information about judicial biases.[294] All too often, state judges focused on completely irrelevant evidence such as powwow attendance or, worse, racial evidence such as skin and hair color, cheekbones, and the like.[295] Consider *Rye v. Weasel*,[296] where the Kentucky Supreme Court disagreed that a child who was eligible for tribal membership was an "Indian child" for reasons the judges themselves brought into the equation:

---

[290] See generally Deborah A. Rosen, Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790-1880, 46 Am. J. Legal Hist. 26 (2004).

[291] 25 U.S.C. Sec. 1901 et seq.

[292] See generally Fletcher, Federal Indian Law, supra, § 83, at 431-32.

[293] [2016 regs on EIF]

[294] Kevin Noble Maillard, Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption, 28 Am. Indian L. Rev. 107, 129-39 (2003-2004).

[295] Id.

[296] 934 S.W.2d 257 (Ky. 1996).

> 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.[297]

The Kentucky court quoted with approval an Alabama state court case, *S.A. v. E.J.*P.,[298] which similarly decided that it knew what an "Indian family 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."[299] 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 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."[300]

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 to judges — federal or state — the power to decide Indian status all but guarantees poor and democratically illegitimate decision-making.

---

[297] Id. at 264.
[298] 571 So.2d 1187 (Ala. Ct. Civ. App. 1990).
[299] Id. at 1189.
[300] Id. at 1188.

E. The False Lure of the Compromise Position

Finally, the compromise position so attractive to the more moderate critics of the political classification doctrine and some defenders of tribal interests would cement ongoing tragedies in federal Indian law involving nonrecognized 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, and make legal classifications based on blood quantum or ancestry subject to strict scrutiny.[301] Perhaps the most articulate justification for this position is Judge Ikuta's dissent in *United States v. Zepeda*.[302] Judge Ikuta surveyed the "sorry history" of the discrimination Americans have imposed on minorities through the use of blood quantum-based legal classifications — slavery, miscegenation laws, naturalization laws, and so on.[303] With all due respect to the judge (and enormous respect is due to this particular judge), Judge Ikuta's dissent begins with a false premise (well, more like 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

[301] 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).

[302] 792 F.3d 1103, 1119 (9th Cir. 2015) (en banc) (Ikuta, J., dissenting), cert. denied, 136 S. Ct. 1712 (year).

[303] Id. at 1119-20.

> 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.[304]

The incompleteness of this premise must start with the tribe's membership criteria. 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,[305] and often (but not always) that means the Secretary dictated the criteria to the tribe.[306] Second, Indian tribes are federal government contractors to provide federally-funded services to Indian people; the federal government defines the eligibility of Indians for those services based on both tribal membership and by blood quantum.[307] 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 (but not exclusively) providing services to their own members. Third, many Indian people refuse to become members of Indian tribes, even where they are eligible. My own grandfather was eligible for membership with the Grand Traverse Band of Ottawa Indians and declined to apply (he was a crabby man). 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

---

[304] Id. at 1119.
[305] 25 U.S.C. § 5123(a)(2).
[306] E.g., [SCIT case; GTB article].
[307] 25 U.S.C. § 5129.

anywhere. Tribes routinely provide governmental services to these nonmember Indians. Finally, specific to the *Zepeda* case, which is a criminal case, keep in mind that if the defendant in that case could not be prosecuted by the United States, the tribe would also be forbidden from prosecuting the defendant,[308] and the state and local governments likely would not prosecute those cases.[309] 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.[310] 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 with the pernicious and insidious racism of slavery, Jim Crow, and racist immigration and naturalization laws is a false comparison.

There is more. Consider the Snyder Act of 1921.[311] 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*. . . ."[312] Many Indians, perhaps as many as half of the entire Indian population, are not enrolled tribal members, too often by "accidents" of history."[313] There are also several thousand, perhaps many thousands, of Indian people

[308] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[309] United States v. Bryant, 136 S. Ct. 1954, 1960 (2016).
[310] [ILOC report]
[311] Act of Nov. 2, 1921, 42 Stat. 208, codified at 25 U.S.C. § 13.
[312] Id. (emphasis added).
[313] 1 American Indian Policy Review Commission, Final Report 463-64 (1977).

disenrolled by their tribe for improper reasons and for whom there is no legal remedy.[314] The federal government can and should be allowed to make a political decision to acknowledge a duty of protection to all of those Indian persons.

To adopt the compromise position is to legitimize continued injustice in Indian affairs. It is reasonable and rational for Congress and 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 impacts 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 legislative and administrative realms exclusively. Congress first and foremost should become aware that it must make Indian status classifications reasonably based on fulfilling the federal government's duty of protection to Indian people. At times, Congress seems to leave it to the judiciary, especially in the realm of criminal jurisdiction, to make judicial classifications. The judiciary is not competent to do that work, and should be discouraged from asserting more responsibility and 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

[314] See generally David E. Wilkins & Shelly Hulse Wilkins, Dismembered: Native Disenrollment and the Battle for Human Rights (2017).

judiciary might engage in a cross-circuit discussion through a series of cases examining whether the Major Crimes Act's lack of a statutory definition is akin to an irrational or unreasonable classification. After all, no definition invites arbitrariness.

This Part offers initial suggestions on what a court's analysis under the rationality test should accomplish. I then delve into several 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 to hold that Congressional Indian affairs legislation must be reasonable and rationally related to the United States' duty of protection to Indians and tribes.[315] Could Congress impose the draft on Indians alone? No, not reasonable and not 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.[316] 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 relationally related to the duty of protection (and complied with the Fifth Amendment's Takings, Due Process, and Just Compensation Clauses[317]). But I imagine affected Indian tribes would put up one hell of a fight.

---

[315] 417 U.S. 535, 555 (1974).

[316] [Raymond Cross citation]

[317] 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

Professor Ablavsky's scholarship on the meaning of "Indian" in the Founding Generation is 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 18th 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, they understood the term to include political affiliation and loyalty to country, they understood the term to include suppositions about savagery and civilization, and perhaps most importantly they understood the term to be dynamic and subject in large part to context. Even if government was limited to definitions of "Indian" as the white males of the Framing Generation would have approved, there is an enormous pool of evidence from which classifications of "Indian" by Congress, the Executive branch, and the states may be proven reasonable on one hand, or arbitrary on the other.

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.*[318] There, the Court applied a reasonability analysis to affirm the authority of Congress to create and rely upon a tribal citizenship roll.[319] There, Congress created a legislative classification for the Creek Indians (now known as the Muscogee (Creek) Nation) based

---

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).

[318] 247 U.S. 175 (1918).

[319] Id. at 178-79.

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.[320] That roll would be used to determine ownership of allotments upon the death of intestate Indian allotment owners; tribal citizenship and blood quantum being relevant factors to consider.[321] Later challengers to the Secretary's roll claimed the roll was erroneous, and offered oral testimony to prove the error.[322] 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, once created, for "there [to] be 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."[323] Second, Congress possessed the authority to regulate these transactions involving Indian allotments.[324] 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."[325] The Court deferred to Congress' choice to exclude oral testimony and rely exclusively on the Secretary's roll because the choice was political, and because the choice was reasonable.

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.

---

[320] Id. at 176-77.
[321] Id. at 176.
[322] Id. at 177-78.
[323] Id. at 178.
[324] Id.
[325] Id.

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."[326] For the most part, in the last several decades at least, the United States has deferred extensively to tribal governments in making Indian classifications. Of course, for critics, that practice begs the question about whether tribal membership or citizenship criteria is reasonable. Consider an Indian tribe that adopts a lineal descendancy rule of membership that allows 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, that keeps 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 (recalls the Seminole Nation of Oklahoma, the citizenry 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, the same as with any and every nation on earth.[327] Whatever one's views on these questions, at the core of it, the role of the judiciary in federal or state cases addressing these matters should be strictly limited. All of the objections to the tribal laws are political and best raised in the tribal political sphere. If anything is to

[326] Ferguson, 247 U.S. at 178.

[327] 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).

be done, 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.

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, federal criminal jurisdiction statutes such as the Major Crimes Act, and the Indian Reorganization Act. All of these statutes, whatever their definitions, are rationally related to fulfilling the duty of protection (general trust responsibility).

Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) 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."[328] ICWA further defines "Indian" as "any person who is a member of an Indian tribe."[329] Both definitions rely exclusively on tribal membership with an "Indian tribe." The Act does not define "Indian tribe."

This Act's definitions are based primarily on tribal membership or citizenship, what nearly all courts and commentators would agree is at the heart of Congress' political recognition powers. Congress has made the choice to apply ICWA only to tribal members (or children eligible for

[328] 25 U.S.C. § 1903(4).
[329] 25 U.S.C. § 1903(3).

membership) with Indian tribes. No court rationally can second-guess Congress' 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 did offer 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 the political discretion of Congress in deciding how to implement the duty of protection. Congress and only Congress can decide how to implement the duty of protection, and Congress and only Congress decides which persons are eligible for that protection.

In *Brackeen v. Zinke*,[330] 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.[331] 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' duty of 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.[332]

---

[330] 338 F. Supp. 3d 514 (W.D. Tex. 2018).
[331] Id. at 533-34.
[332] Id.

Under *Mancari*,[333] that conclusion was flat wrong. The court's obligation was to search for a reasonable connection between nonenrolled Indian children and the federal duty of protection.[334] If the court found a connection, then the equal protection challenge to the statute must "not be disturbed."[335] That search, if taken in good faith, would be short and conclusive – Indian children who are not yet unenrolled but removed from their homes directly implicate the United States' duty of protection to Indians and tribes.[336] Indian children, enrolled and nonenrolled, 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 decide whether the classification is race-based, and then if the court concludes it is 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. . . ."[337] Here, Congress is defining the scope of the duty of protection, an inherently political determination to which it owes deference. Congress is also recognizing that the class of Indian people to which it owes the duty of protection in

[333] 417 U.S. 535 (1974).

[334] Id. at 555.

[335] Id.

[336] See generally Matthew L.M. Fletcher & Wenona T. Singel, 95 Neb. L. Rev. 885 (2016).

[337] 25 U.S.C. § 1901(3).

the context of child welfare extends to tribal members and those eligible for enrollment in a tribe. Again, it is well settled that Congress' 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. . . ." [338] 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 tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[339] 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. [340] 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.[341]

---

[338] 25 U.S.C. § 1901(4).

[339] 25 U.S.C. § 1901(5).

[340] 25 U.S.C. § 1915.

[341] E.g., Indian Child Welfare Program, Hearings before the Indian Affairs Subcommittee of the Senate Committee of Interior and Insular Affairs, 93d Cong., 2d Sess. 5 (April 8-9, 1974) (Statement of William, Association on American Indian

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.[342] 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 child 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 deserving of deference by the courts under *Mancari*.

When it comes to providing government services to Indians, Congress can make a determination that blood

---

Affairs) (alleging states discriminate against Indian foster and adoptive families, and that 85 percent of placements of Indian children are with non-Indian families).

[342] 25 U.S.C. §§ 1903(3)-(4).

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 extending services to persons descended from the Nation of India, or to Indians 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 second-guessing about the whether Congress created a racial classification. There is no room because *Mancari* offers no room.

C. State Definitions of "Indian"

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.[343] Because states are generally prohibited with interfering with federal Indian policy preferences, state classifications must both (1) be rationally related to the fulfillment of the trust

---

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

Lower court cases reaching the same conclusion include Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 733 (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, 1102 (D. Kan. 1999) (state recognition of Native American Church); St. Paul Intertribal Housing Board v. Reynolds, 564 F. Supp. 1408, 1412 (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, 797 (Neb. 2006) (state Indian child adoption law); Krueth v. Independent School District No. 38, Red Lake, Minnesota, 496 N.W.2d 829, 836-37 (Minn. App. 1993) (state preference in employment to Indian teachers).

relationship and (2) must not "must not interfere with tribal government or federal programs. . . ."[344]

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."[345] 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.[346] 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. 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. It seems to be purely based on race, and should therefore be subject to strict scrutiny. First, it is likely the language requiring a "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.

---

[344] *St. Paul Intertribal Housing Board*, 564 F. Supp. at 1412 n. 5.

[345] Mich. Comp. Laws § 390.1252.

[346] The Michigan Indian Tuition Waiver is Based on a Political Relationship, not a Racial Classification at 6 (Jan. 17, 2007), https://turtletalk.files.wordpress.com/2009/03/tribal-position-paper-final.pdf.

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 Indian people. I argue states are also 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, [347] unfortunately many of those laws were designed to bar Indians from voting.[348]

An interesting example of how states are positioned to assert the power to make legal definitions of the "Indians not taxed" is Utah. Utah's enabling act required Utah to decide which persons were then "Indians not taxed,"[349] not unlike the enabling acts of other western states.[350] In *Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist.*, a public school board argued it had no obligation to provide public schooling to Indians, asserting that the State of Utah's enabling act authorized the district to exclude "Indians not taxed" from its guarantee of public education to all children in the state.[351] The court rejected that claim, noting that that even Indians not taxed counted as people:" "Although the State may have been authorized to

[347] See generally Elizabeth Durfee, Apportionment of Representation in the Legislature: A Study of State Constitutions, 43 Mich. L. Rev. 1091 (1945).

[348] See generally Jeanette Wolfley, Jim Crow, Indian Style: The Disenfranchisement of Native Americans, 16 Am. Indian L. Rev. 167 (1991).

[349] Act of July 16, 1894, ch. 138, § 3, 28 Stat. at 108, cited in Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist., 905 F. Supp. 1544, 1557 (D. Utah 1995).

[350] E.g., Mario Gonzalez and 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).

[351] Myers, 905 F. Supp. at 1557.

distinguish 'Indians not taxed' from other groups, the constitution actually adopted did not expressly exclude Native American children from its guarantee of a public education system 'open to all children of the state.'"[352]

I believe 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. The writings of young John Roberts, grousing that Indian money settlements are racial giveaways, are typical. That political discourse, which is driven by ignorance of the legal rights established in federal laws going back to the Founding for which Indian tribes and Indian people acquired in a bargained-for exchange, is creeping into the courts. It should not.

The United States was founded on the backs of slave labor and the lands and resources of Indian tribes and individual Indians. The Constitution impliedly acknowledges that this is so. There are reasons why slaves and "Indians

[352] Id.

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.