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THE EQUAL-PROTECTION CHALLENGE TO FEDERAL INDIAN LAW

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This article addresses a significant challenge to federal Indian law currently emerging in the federal courts. In 2013, the Supreme Court suggested that the Indian Child Welfare Act may be unconstitutional, and litigation on that question is now pending in the Fifth Circuit. The theory underlying the attack is that the statute distinguishes between Indians and non-Indians and thus uses the suspect classification of race, triggering strict scrutiny under the equal-protection component of the Due Process Clause. If the challenge to the Indian Child Welfare Act succeeds, the entirety of federal Indian law, which makes hundreds or even thousands of distinctions based on Indian descent, may be unconstitutional. This article defends the constitutionality of federal Indian law with a novel argument grounded in existing Supreme Court case law. Specifically, this article shows that the congressional plenary power over Indians and Indian tribes, which the Supreme Court has recognized for nearly a century and a half and which inevitably requires Congress to make classifications involving Indians and Indian tribes, compels the application of a rational-basis standard of review to federal Indian law.

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INTRODUCTION

Federal Indian law faces a very serious challenge. Since 1790, Congress has enacted hundreds of statutes concerning American Indians and American Indian tribes. Critics increasingly argue that statutory distinctions between Indians and non-Indians are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. The heart of the challenge maintains that these distinctions are based on race and are therefore subject to the strict-scrutiny standard of review generally applicable to suspect classifications. In a 2013 decision, the Supreme Court signaled a willingness to consider that argument,¹ which may come to the Court soon by way of an attack on the Indian Child Welfare Act of 1978² currently pending before the Fifth Circuit Court of Appeals.³ The stakes could not be higher. If successful, the equal-protection challenge has the potential to destroy federal Indian law.

The purpose of this article is to defend the constitutionality of the distinctions that Congress draws between Indians and non-Indians. My argument, although novel, is grounded in established Supreme Court case

¹ *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).

² Pub. L. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963).

³ In *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536, 546 (N.D. Tex. 2018), a federal district court held portions of the Indian Child Welfare Act of 1978 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, as made applicable to the federal government by the Due Process Clause of the Fifth Amendment. Although a panel of the Fifth Circuit reversed, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), the case is now under *en banc* review, 942 F.3d 287 (5th Cir. 2019).

law. In brief, I show that for nearly a century and a half, the Supreme Court has maintained that Congress has plenary power over Indians and Indian tribes. That plenary power, I argue, compels the application of a rational-basis standard of review, both by logic and by direct analogy to the Court's longstanding equal-protection analysis of federal immigration law, another area where Congress has plenary power. Under the rational-basis standard of review, the distinctions in federal law between Indians and non-Indians satisfy the Equal Protection Clause and the Due Process Clause.

Beginning with the Trade and Intercourse Act of 1790, passed as the new republic's thirty-third public law,⁴ Congress has legislated repeatedly on Indians and Indian tribes. Much of the legislation is collected in Title 25 of the United States Code, entitled simply "Indians."⁵ The executive branch, in turn, has issued hundreds of regulations under this legislation.⁶ The statutes and the regulations are extensive; they cover almost every aspect of public life and many aspects of private life for individual Indians and for Indian tribes. The federal government's expansive authority here is unique. Under a line of U.S. Supreme Court decisions dating to 1886,⁷ Congress has "plenary power" over Indians and Indian tribes—in effect, the power to regulate the external relations of Indian tribes, the internal governance of Indian tribes, the economic activity of Indian tribes, and the health, safety, morals, and general welfare of Indians.⁸ The congressional plenary power even includes the authority to recognize or to abolish tribal status and tribal sovereignty.

Federal statutory and regulatory law draws numerous distinctions between Indians and non-Indians, between members and non-members of recognized Indian tribes, and between such tribes and all other groups subject to U.S. jurisdiction.⁹ Many of the distinctions include a preference for Indians or Indian tribes such that Indians or Indian tribes are treated better than their non-Indian or non-tribal counterparts. For example, the Indian Gaming Regulatory Act generally permits certain gaming enterprises under tribal ownership, even if state law otherwise prohibits such enterprises under non-

⁴ Act of July 22, 1790, ch. 33, §§ 1–5, 1 Stat. 137, 137–138.

⁵ See generally 25 U.S.C. (containing 48 chapters of federal laws governing numerous aspects of Indian life, from education and healthcare to grave protection).

⁶ See generally 25 C.F.R. (cataloguing hundreds of regulations, including nearly 300 relating to the Bureau of Indian Affairs alone).

⁷ See *United States v. Kagama*, 118 U.S. 375, 382–84 (1886) (establishing that Congress has plenary power over Indian tribes).

⁸ MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 37–45 (2016); COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* §§ 5.02–5.03 (Nell Jessup Newton ed., 2017) [hereinafter COHEN'S *HANDBOOK*].

⁹ There are currently 574 tribal nations recognized by the federal government. See NAT'L CONG. OF AM. INDIANS, *TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION* 11 (2020) (noting that 574 sovereign tribal nations have a bilateral relationship with the U.S. government).

tribal ownership.¹⁰ And many of the distinctions include a dispreference for Indians or Indian tribes, such that Indians or Indian tribes are treated worse than their non-Indian or non-tribal counterparts. For example, section 177 of Title 25 prohibits any “Indian nation or tribe of Indians” from selling, granting, leasing, or otherwise conveying any land or title or claim to land, except “by treaty or convention entered into pursuant to the Constitution.”¹¹ In other words, section 177 denies Indian tribes the free alienability of their lands. Unlike other landowners in the United States, tribes may transfer their lands only to or under the authority of the federal government.

The equal-protection problem, from the perspective of those who see an equal-protection problem, is that the distinctions underlying these preferences and dispreferences are based in whole or in part on race. For example, the Indian Gaming Regulatory Act extends its preference only to an Indian tribe, and it defines “Indian tribe” as a “band, nation, or other organized group or community of Indians” recognized as such by the federal government.¹² A few federal statutes apply without regard to membership in a recognized tribe. Under the Indian Education Act of 1972,¹³ the federal government provides educational assistance to any “Indian”—with the term “Indian” defined to include a member of a tribe that has been terminated by the federal government, a member of a tribe recognized by a state government but not by the federal government, a first- or second-degree descendant of any such member, and any other person “considered by the Secretary of the Interior to be an Indian for any purpose.”¹⁴

Many Indian law statutes refer to race only indirectly. Because federal Indian law generally concerns the relationship between the federal government and the 574 recognized Indian tribes or between the federal government and the members of those tribes, statutory preferences and dispreferences often depend on tribal status or tribal membership.¹⁵ The Indian Self-Determination and Education Assistance Act of 1975,¹⁶ for example, defines the term “Indian” as “a person who is a member of an Indian tribe.”¹⁷ And the Indian Child Welfare Act defines the term “Indian child” as an unmarried individual under the age of eighteen who is “a member of an Indian tribe” or who is both “eligible for membership in an Indian tribe” and

¹⁰ 25 U.S.C. § 2710.

¹¹ *Id.* § 177.

¹² *Id.* § 2703(5).

¹³ Pub. L. No. 92-318, 86 Stat. 334 (current version at scattered sections of 20 U.S.C.).

¹⁴ 20 U.S.C. § 7491(3).

¹⁵ Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 451–53 (2002).

¹⁶ Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5321–5332 and 42 U.S.C. § 2004b).

¹⁷ 25 U.S.C. § 5304(d).

“the biological child of a member of an Indian tribe.”¹⁸ Such references to tribal membership are effectively references to the racial classification of American Indians or Alaska Natives. Under a longstanding Supreme Court decision, any Indian tribe recognized as such by Congress must be a “distinctly *Indian* communit[y].”¹⁹ Although the precise parameters remain vague, a federally recognized Indian tribe must comprise, to some substantial extent, people who are racially Indian.²⁰ Thus, whether a federal statute specifically refers to individuals of the Indian race or generally refers to individuals who are members of Indian tribes, the statute very likely has the effect of classifying individuals on the basis of race.²¹

That raises questions under the Equal Protection Clause of the Fourteenth Amendment, which applies to the federal government through the Due Process Clause of the Fifth Amendment.²² Settled constitutional law

¹⁸ *Id.* § 1903(4). The Indian Child Welfare Act defines “Indian tribe” as a federally recognized tribe. *Id.* § 1903(8).

¹⁹ *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (emphasis added); see also Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 533–35 (2017) (noting that *Sandoval* and related cases “affirm that Congress’s power to recognize tribes and pass legislation concerning them hinges on tribes’ status as distinct political communities with ties to precontact aboriginal peoples.”).

²⁰ COHEN’S HANDBOOK, *supra* note 8, § 3.02(4). “[T]he only practical limitations on congressional and executive decisions as to tribal existence are the broad requirements that: (a) the group have some ancestors who lived in what is now the United States before discovery by Europeans, and (b) the group be a ‘people distinct from others.’” *Id.* (quoting *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867)). Additionally, tribes themselves usually require some measure of Indian ancestry for tribal membership. *Tribal Enrollment Process*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/tribes/enrollment> [<https://perma.cc/LY2B-7GFH>] (last visited Nov. 3, 2020). Those requirements typically derive from historic federal mandates. Often, a member must be a lineal descendant of someone on the tribe’s “base roll” (the tribe’s original membership list, typically compiled under the authority of the federal government in the late nineteenth or early twentieth century), and many tribes require a specific “blood quantum” or minimum percentage of “Indian blood.” Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323–25, 345–48 (2014); see also Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIR. 23, 28–29 (2013) (identifying various tribes’ “blood quantum” thresholds for membership); Goldberg, *supra* note 15, at 445–50 (noting explicit federal affirmation of tribal voting eligibility provisions closely linked to citizenship); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 718 (2001) (“[R]ace is now an essential criterion for recognizing tribes, approving tribal governments, and, among tribes themselves, in defining tribal membership.”).

²¹ See COHEN’S HANDBOOK, *supra* note 8, § 14.03(b)(ii) (“[E]ven when federal classifications turn solely on formal tribal citizenship, the fact that Indian ancestry is normally required for citizenship as a matter of tribal law suggests that the federal classification may be incorporating a race-like component.”); see also Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1 (2012) (“It is impossible to avoid the fact that racial ancestry is critical to tribal membership criteria.”).

²² *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

holds that race is a suspect classification and that a legislative or regulatory distinction made on the basis of race is subject to judicial review under a strict-scrutiny standard.²³ This requires that the legislation or regulation be “narrowly tailored” to achieve a “compelling governmental interest[.]”²⁴ Non-suspect legislative and regulatory classifications generally are reviewed under a much more forgiving rational-basis standard, so that the legislation or regulation is valid if it is “rationally related to a legitimate governmental interest.”²⁵ Although it is possible for a classification to survive strict-scrutiny review, this is both difficult and rare. The principal race-based classifications that have passed strict scrutiny have been affirmative-action programs in higher education.²⁶

For most of the last half century, the Supreme Court has treated federal Indian law differently under the Equal Protection Clause. In *Morton v. Mancari*, decided in 1974, the Court unanimously upheld an employment preference for Indians at the federal Bureau of Indian Affairs (the BIA) against an equal-protection challenge, even though the preference looked in part to Indian descent.²⁷ In the Court’s view, the preference was “reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.”²⁸ The Court said that, as a general matter, any “special treatment” of Indians that “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . . will not be disturbed” and that, as a specific matter, because the BIA employment preference was “reasonable and rationally designed to further Indian self-government,” it did not violate the equal-protection requirement.²⁹ In effect, *Mancari* subjects classifications of Indians and Indian tribes under federal Indian law to a modified form of rational-basis review.

Even as general challenges to affirmative action have gained traction in the federal courts, the Supreme Court has adhered to *Mancari* and has upheld classifications involving Indians or Indian tribes, whether those

²³ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

²⁴ *Id.*

²⁵ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Occasionally, rational-basis review has “bite.” Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–63 (2011). Legislative classifications on the basis of gender or illegitimacy, sometimes referred to as “quasi-suspect,” trigger intermediate scrutiny. Such classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives” in order to satisfy the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁶ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016); *Grutter*, 539 U.S. at 343. *See generally* George Rutherglen, *Fisher II: Whose Burden, What Proof?* 20 GREEN BAG 2D 19 (2016) (commenting on the Court’s finding in *Fisher II* that the University of Texas met its burden under strict scrutiny).

²⁷ 417 U.S. 535, 555 (1974).

²⁸ *Id.* at 554.

²⁹ *Id.* at 555.

classifications are favorable or unfavorable. Thus, in *Fisher v. U.S. District Court of the Sixteenth Judicial District of Montana*, the Court relied on *Mancari* to reject an equal-protection challenge to a tribal ordinance subjecting an Indian, but not a similarly situated non-Indian, to tribal-court jurisdiction for adoption proceedings;³⁰ in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, the Court relied on *Mancari* to reject an equal-protection challenge to the federal exemption of Indians from state taxation;³¹ in *Delaware Tribal Business Committee v. Weeks*, the Court relied on *Mancari* to reject an equal-protection challenge to a distribution of federal funds to the Cherokee Delawares and the Absentee Delawares but not to the Kansas Delawares;³² in *United States v. Antelope*, the Court relied on *Mancari* to reject an equal-protection challenge to a federal criminal statute that exposed an Indian, but not a similarly situated non-Indian, to a felony-murder charge;³³ in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, the Court relied on *Mancari* to reject an equal-protection challenge to the State of Washington's partial assumption of criminal and civil jurisdiction for matters involving Indians or Indian tribes;³⁴ in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court relied on *Mancari* to reject an equal-protection challenge to treaty provisions reserving fishing rights to Indians.³⁵

But cross winds have begun to blow. In its 1995 decision in *Adarand Constructors, Inc. v. Peña*, the Supreme Court applied the strict-scrutiny standard to a federal program that gave contracting preferences to firms owned or controlled by “socially and economically disadvantaged” groups, including “black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans.”³⁶ Then, suggesting a possible interest in revisiting *Mancari*, the Court in its 2013 decision in *Adoptive Couple v. Baby Girl* said that the Indian-adoption preferences in the Indian Child Welfare Act might “raise equal protection concerns.”³⁷ Taking that cue, a federal district court, in *Brackeen v. Zinke*, read *Mancari* narrowly and struck down core provisions

³⁰ 424 U.S. 382, 390–91 (1976).

³¹ 425 U.S. 463, 479–81 (1976).

³² 430 U.S. 73, 85–87 (1977). The Cherokee Delawares and the Absentee Delawares were both federally recognized tribes; the Kansas Delawares were not. *Id.* at 85.

³³ 430 U.S. 641, 646–47 (1977).

³⁴ 439 U.S. 463, 500–01 (1979).

³⁵ 443 U.S. 658, 673 n.20 (1979).

³⁶ 515 U.S. 200, 207, 236 (1995).

³⁷ 570 U.S. 637, 656 (2013). For an argument that the Court should have examined the equal protection question further in that case, see Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509, 510 (2014).

of the Indian Child Welfare Act using the strict-scrutiny standard.³⁸ Although a panel of the Fifth Circuit followed a straightforward application of *Mancari* to reverse the district court in *Brackeen v. Bernhardt*,³⁹ the case is now pending before the Fifth Circuit for en banc review.⁴⁰ Whether through *Brackeen* or some other vehicle, the prospect of the Supreme Court taking a hard look at the equal-protection status of federal Indian law seems stronger now than at any time since *Mancari* and the cases decided in its immediate wake.

From the perspective of Indians and Indian tribes, everything will turn on that hard look. If subjected to strict scrutiny, most (possibly all) of federal Indian law could be struck down. Again, every statute in Title 25 and every regulation issued under Title 25 draws a distinction between Indians and non-Indians, between members and non-members of recognized Indian tribes, or between such tribes and all other groups.⁴¹ And those distinctions normally incorporate a direct or indirect reference to Indian descent. Federal Indian law presents little difficulty under the modified rational-basis review of *Mancari*. But if the Supreme Court replaces modified rational-basis review with strict-scrutiny review, how many federal Indian statutes or regulations would be found to be “narrowly tailored” to achieve a “compelling governmental interest”?⁴² The threat is very grave.

This is the equal-protection challenge confronting federal Indian law. How is the challenge best met? Scholars and advocates of tribal interests have proposed a broad range of solutions and arguments, some more persuasive or compelling than others.⁴³ In this paper, I present a defense of the constitutionality of federal Indian law, a defense that is novel but nonetheless grounded in established Supreme Court case law. Specifically, I argue that, for any equal-protection question under federal Indian law, the congressional plenary power over Indians and Indian tribes, which has been recognized by the Supreme Court since the late nineteenth century, precludes application of the strict-scrutiny standard of review and compels application of the rational-

³⁸ 338 F. Supp. 3d 514, 532–34 (N.D. Tex. 2018), *rev'd sub nom.* *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *rehearing en banc granted*, 942 F.3d 287 (5th Cir. 2019). The district court’s decision in *Brackeen* quoted the Supreme Court’s equal-protection dicta from *Adoptive Couple v. Baby Girl*. *See id.* at 533 n.10 (noting that, in *Adoptive Couple v. Baby Girl*, “the Supreme Court mentioned that an interpretation of provisions of ICWA that prioritizes a child’s Indian ancestry over all other interests ‘would raise equal protection concerns’”).

³⁹ 937 F.3d 406, 427–29 (5th Cir. 2019), *rehearing en banc granted*, 942 F.3d 287, 289 (5th Cir. 2019).

⁴⁰ *Brackeen v. Bernhardt*, 942 F.3d 287, 289 (5th Cir. 2019).

⁴¹ *See supra* notes 5–6 and accompanying text.

⁴² *See, e.g.*, Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 594 (1979) (“If the modern doctrine of strict scrutiny were to be applied to all classifications based on ‘Indian-ness,’ the entire structure of Indian law would crumble.”).

⁴³ *See infra* Part III.

basis standard. This approach yields outcomes that are similar but not identical to the results under *Mancari*, and it broadly validates federal Indian law.

In brief, my argument runs as follows. I take the congressional plenary power over Indians and Indian tribes as a given, although I recognize that several scholars and at least one sitting member of the Supreme Court express skepticism about it. As articulated time and again by the Supreme Court, this power is comprehensive; it permits Congress to regulate both the external and the internal affairs of Indians and Indian tribes, including the health, safety, morals, and general welfare of Indians. Additionally, the congressional plenary power is exclusive of state power; it is the federal government, not state governments, that exercises this complete regulatory authority over Indians and Indian tribes. Over the last century and a half, the Court has established the congressional plenary power as a bedrock principle of federal Indian law.

But Congress cannot exercise this power without drawing distinctions between Indians and non-Indians, between members and non-members of recognized Indian tribes, and between such tribes and all other groups. As a matter of simple logic, the congressional plenary power cannot be reconciled with strict-scrutiny review of federal statutes that directly or indirectly incorporate Indian descent; only rational-basis review permits Congress to exercise its plenary power over Indians and Indian tribes. This is precisely how the Supreme Court treats a similar plenary power—the congressional plenary power over immigration. Under longstanding Supreme Court decisions, the exercise of the congressional plenary power over immigration is reviewed, for equal-protection purposes, under the rational-basis standard. Therefore, the Equal Protection Clause requires only that federal Indian law statutes and regulations constitute a reasonable exercise of the congressional plenary power over Indians and Indian tribes. And for that reason, federal Indian law generally satisfies the equal-protection requirement.

The remainder of this paper proceeds as follows. The first part sets out the argument that the congressional plenary power over Indians and Indian tribes compels application of the rational-basis standard and precludes application of the strict-scrutiny standard. This is a matter both of logic and consistency with the Supreme Court's approach to immigration law. The second part draws out the specific implications of this argument. It shows that most (probably all) of federal Indian law, whether favorable or unfavorable to Indians and Indian tribes, satisfies the equal-protection requirement under the rational-basis standard. It also shows that state-law preferences and dispreferences for Indians and Indian tribes remain subject to strict scrutiny and so generally fail the equal-protection requirement, except when state law implements a delegation of federal power. The third part assesses previous scholarly efforts to address the equal-protection challenge.

I. CONGRESSIONAL PLENARY POWER AND RATIONAL-BASIS REVIEW

The congressional plenary power over Indians and Indian tribes, although long settled in Supreme Court case law, remains controversial. Several academics object to the plenary power on various doctrinal and normative grounds. Justice Thomas has stated his interest in re-examining it, and perhaps others on the Court harbor doubts as well. For purposes of this article, I take the plenary power as a given. That is, I assume that Congress has plenary power over Indians and Indian tribes, and I assume that the terms of that power are as described by the Supreme Court in a long line of cases reaching back to the nineteenth century. I intend, in future work, to analyze the foundations of the plenary power doctrine, but it is sufficient here to explain the content of the doctrine and to assume that the Court's decisions under the doctrine are generally correct (at least as to their holdings, if not as to their rationales). What must be shown are the implications of the congressional plenary power for the application of the equal-protection requirement to federal Indian law. That is the principal work of this Part.

A. Congressional Plenary Power over Indians and Indian Tribes

The congressional plenary power over Indians and Indian tribes is unusual in our constitutional system. The federal government is a government of limited powers, and Congress may legislate only when it has constitutional authority to do so,⁴⁴ such as when it imposes taxes, pursuant to its “Power To lay and collect Taxes, Duties, Imposts and Excises,” or when it creates lower federal courts, pursuant to its power “[t]o constitute Tribunals inferior to the supreme Court.”⁴⁵ During the middle of the twentieth century, the congressional power “[t]o regulate Commerce . . . among the several States”⁴⁶ developed into an expansive source of federal lawmaking. Once it came around to validating New Deal legislation, the Supreme Court determined that “[t]he [interstate] commerce power is not confined in its exercise to the regulation of commerce among the states” but that it also “extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make

⁴⁴ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined, and limited . . .”).

⁴⁵ U.S. CONST. art. I, § 8.

⁴⁶ *Id.*

regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”⁴⁷

Although broad, the congressional power to regulate interstate commerce is not comprehensive. It does not enable Congress, for example, to regulate the possession of firearms in school zones,⁴⁸ to create a private cause of action against perpetrators of certain violent acts,⁴⁹ or to require individuals to purchase health insurance from private insurers.⁵⁰ It does not grant Congress the authority to exercise a general police power;⁵¹ instead, it allows Congress to regulate only the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce.⁵²

The congressional plenary power over Indians and Indian tribes is qualitatively different. Although not absolute or unlimited, the plenary power enables Congress to establish the terms on which the U.S. maintains government-to-government relationships with the Indian tribes, including whether to recognize tribes in the first instance.⁵³ The plenary power permits Congress to expand, limit, or even eliminate tribal sovereignty, and it permits Congress to terminate the relationship between the federal government and an Indian tribe, thereby cutting the tribe off from all the benefits and burdens of federal recognition as an Indian tribe.⁵⁴ And as a distinct source of legislative authority, the plenary power is not subject to the limitations that the Supreme Court has recognized or imposed under the Interstate Commerce Clause.

Importantly, the congressional plenary power over Indians and Indian tribes includes a broad authorization to legislate as to the health, safety, morals, and general welfare of Indians and Indian tribes in a manner “similar to the states’ police powers over non-Indians.”⁵⁵ This tracks the parallel congressional power over U.S. “territories and possessions, the District of Columbia, and federal enclaves such as post offices, national parks, and

⁴⁷ *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (“It is a familiar principle that acts which directly burden or obstruct interstate . . . commerce . . . are within the reach of the congressional power.”).

⁴⁸ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

⁴⁹ *Morrison*, 529 U.S. at 613.

⁵⁰ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2011).

⁵¹ *Lopez*, 514 U.S. at 567.

⁵² *Id.* at 558–59.

⁵³ COHEN’S HANDBOOK, *supra* note 8, § 5.02.

⁵⁴ *Id.*

⁵⁵ *Id.* The assertion of a general federal police power over Indians and Indian tribes is controversial. *See, e.g.*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 245 (2002) (arguing that “there is no constitutionally acceptable justification for claims of overriding federal power” with respect to Indian tribes).

military installations.”⁵⁶ Thus, Congress has the power to create and administer comprehensive programs for Indian education,⁵⁷ health care,⁵⁸ housing,⁵⁹ and other social services;⁶⁰ to acquire, own, sell, and regulate the use of tribal lands;⁶¹ to define and to punish crimes within Indian country,⁶² including crimes that normally would be defined and punished by state law;⁶³ to control the exploitation of natural resources within Indian country;⁶⁴ to regulate foster care, adoptions, child custody, and child welfare for Indians and Indian tribes;⁶⁵ to permit and to regulate gaming activities by Indians and Indian tribes, even where such activities would be prohibited under state law;⁶⁶ to regulate the transportation, sale, and other distribution of alcohol to and within Indian country;⁶⁷ to control the devise and descent of Indian property;⁶⁸ to protect and to promote Indian and tribal cultural resources;⁶⁹ and to safeguard Indian graves and Indian remains from use or exploitation by non-Indians.⁷⁰

⁵⁶ COHEN’S HANDBOOK, *supra* note 8, § 5.02 (footnotes omitted).

⁵⁷ *See id.* § 5.03 (noting that Congress created and funds the Indian Health Service and Bureau of Indian Affairs, which has broad authority over “social services, welfare, economic development, education, and housing programs.”).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² “Indian country” is a term of art in federal Indian law, though federal Indian law does not provide a comprehensive definition of it. For purposes of federal criminal jurisdiction, “Indian country” is defined as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Thus, Indian country includes all lands within the boundaries of a reservation, even lands that are owned in fee simple by non-Indians, and all lands outside the boundaries of a reservation that are owned in fee simple by an Indian tribe or by members of an Indian tribe. By common practice, the definition in the federal criminal code is used in civil matters as well. COHEN’S HANDBOOK, *supra* note 8, § 3.04.

⁶³ COHEN’S HANDBOOK, *supra* note 8, § 6.01.

⁶⁴ *Id.* § 5.05.

⁶⁵ *Id.* § 6.04.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 4.07.

⁶⁹ *Id.* § 20.02.

⁷⁰ *Id.* § 1.07.

Several points bear emphasis here. First, as articulated by the Supreme Court, the plenary power is not just a power over Indian tribes; it is also a power over Indians as individuals.⁷¹ The Court has referred repeatedly to the congressional “plenary power[] over . . . Indians”⁷² and the “plenary power of Congress to deal with the special problems of Indians.”⁷³ Whether the Court means for the power to reach beyond individual Indians who are members of recognized Indian tribes is open to question,⁷⁴ but it is clear that the power is not limited to Indian tribes as collectives. Instead, it reaches into the tribes and applies to individual tribal members.⁷⁵

Second, the plenary power is not restricted to interstate commerce.⁷⁶ For that reason, Congress can regulate matters involving Indians or Indian tribes that it cannot otherwise regulate. This point is foundational to the capacity of Congress to use the plenary power as a general police power with respect to Indians and Indian tribes. Congress can—and does—use its plenary power to do for Indians and Indian tribes what state and local governments often do for their citizens and residents, such as regulate land use, provide rules for testate and intestate succession, implement public health and safety measures, and control education at the primary and secondary levels. It may well be, for example, that the plenary power would permit Congress to regulate the possession of firearms in school zones within Indian country,⁷⁷ to create a private cause of action against perpetrators of certain violent acts

⁷¹ *Cf. id.* § 5.02 (describing Congress exercising authority over individual property in addition to tribal property and property held in trust).

⁷² *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980); *see also* *Bd. of Comm’rs v. United States*, 308 U.S. 343, 354 (1939) (acknowledging Congress’s “exclusive plenary power to legislate concerning . . . Indians . . .”); *United States v. Algoma Lumber Corp.*, 305 U.S. 415, 421 (1939) (noting that “the government has plenary power to take appropriate measures to safeguard the disposal of property of which the Indians are the substantial owners.”).

⁷³ *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also* *United States v. Lara*, 541 U.S. 193, 201 (2004) (noting that “entering into treaties with the Indian tribes” did not impact or diminish Congress’s plenary power over Indians and tribes); *Antoine v. Washington*, 420 U.S. 194, 203–04 (1975) (“Article I, § 8, cl. 3, provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation.”) (quoting *Mancari*, 417 U.S. at 551–52).

⁷⁴ COHEN’S HANDBOOK, *supra* note 8, § 5.01 n.38 (“The exercise of power under the Indian commerce clause is limited to situations in which a tribe has a distinct political existence. Laws directed at Indians as members of racial or ethnic minorities must be justified on other grounds.”).

⁷⁵ Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 968–73 (2002); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 999–1000 (1981).

⁷⁶ COHEN’S HANDBOOK, *supra* note 8, § 5.01 (“The Indian Commerce Clause . . . is not limited to regulation of trade or economic activities, or laws that are interstate in character or impact.”).

⁷⁷ *Cf. United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress lacked the power under the Interstate Commerce Clause to enact the Gun-Free School Zones Act).

against Indians,⁷⁸ or to require individual Indians to purchase health insurance from private insurers.⁷⁹

Third, the plenary power has broad preemptive effect over state law. For this reason, the power is not only plenary but also exclusive.⁸⁰ In *Seminole Tribe v. Florida*, the Supreme Court said:

[O]ur inquiry is limited to determining whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.⁸¹

The inapplicability of state law within Indian country dates back to the 1832 opinion of Chief Justice Marshall in *Worcester v. Georgia*.⁸² In reversing the state criminal conviction of a Congregationalist minister who lived and worked among the Cherokees in violation of Georgia law, Marshall said that the U.S. Constitution gives the federal government the exclusive power to regulate commerce with the Indian tribes⁸³ and that, within Cherokee lands, the “laws of Georgia can have no force.”⁸⁴

Although the Supreme Court has allowed some inroads for state regulation of non-Indians within Indian country,⁸⁵ it has “repeatedly affirmed

⁷⁸ *Cf.* *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress lacked the power under the Interstate Commerce Clause to create a private cause of action for violence against women).

⁷⁹ *Cf.* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2011) (holding that Congress lacked the power under the Interstate Commerce Clause to enact the individual mandate of the Affordable Care Act).

⁸⁰ COHEN’S HANDBOOK, *supra* note 8, § 5.02.

⁸¹ 517 U.S. 44, 62 (1996).

⁸² 31 U.S. (6 Pet.) 515, 595 (1832).

⁸³ *Id.* at 557–62.

⁸⁴ *Id.* at 561.

⁸⁵ *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989) (finding that “federal law, even when given the most generous construction, does not pre-empt” New Mexico from imposing oil and gas severance taxes on energy extractions from Indian reservations); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 157 (1980) (holding, in part, that the Indian Commerce Clause does not “automatically bar[] all state taxation of matters significantly touching the political and economic interests of the Tribes,” especially when the taxes do not discriminate against or burden Indian commerce).

. . . the *Worcester* decision.”⁸⁶ Thus, “as a general rule, matters affecting Indians in Indian country are excepted from the usual application of state law to the ordinary affairs of state inhabitants.”⁸⁷ Congressional regulation has preempted, as applied to Indians and Indian tribes, “state hunting and fishing laws, regulatory [and] tax laws, and laws governing such traditional state areas of concern as child welfare.”⁸⁸ Within limits, Congress can delegate its regulatory power to the states.⁸⁹ But unless it does so, it is Congress, not the states, that holds and exercises the general police power over Indians and Indian tribes.

Fourth, the plenary power is subject to the general limitations on congressional power imposed by the Bill of Rights. In the early twentieth century, the Supreme Court took the view that challenges to the exercise of the congressional plenary power were non-justiciable. In upholding legislative abrogation of an Indian treaty, the Court said that, “as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation” and that “[i]f injury was occasioned . . . 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.”⁹⁰ But that extreme deference to Congress in Indian matters has long since given way to the view that the rights provisions of the Constitution trump the plenary power.⁹¹ Thus, for example, federal takings of tribal lands generally trigger the Fifth Amendment requirement to pay just

⁸⁶ COHEN’S HANDBOOK, *supra* note 8, § 6.01. As support, Cohen’s Handbook cites the following: *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 168–69 (1973); *Williams v. Lee*, 358 U.S. 217, 218–19 (1959). *See also* *United States v. Kagama*, 118 U.S. 375, 377 (1886) (affirming federal, as opposed to state or tribal, jurisdiction over certain designated offenses “committed by one Indian against the person or property of another . . . on an Indian reservation”); *The New York Indians*, 72 U.S. 761, 771–72 (1867) (holding that the state of New York does not have the power to tax Indian tribes); *The Kansas Indians*, 72 U.S. 737, 757, 759–60 (1867) (holding that the state of Kansas does not have the power to tax Indian tribes). On the preemptive effect of the congressional plenary power, see also Clinton, *supra* note 75, at 1006–08.

⁸⁷ COHEN’S HANDBOOK, *supra* note 8, § 6.01.

⁸⁸ *Id.* at § 5.02.

⁸⁹ The preeminent example of such delegation is Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (codified in scattered sections of 18 and 28 U.S.C.). Enacted in 1953, Public Law 280 delegates federal criminal and civil jurisdiction over Indian country to certain specific states. *See generally* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997) (critiquing Congress’s stated rationale for Public Law 280); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975) (exploring the legislative history of Public Law 280 and its effects on jurisdiction over reservation Indians).

⁹⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

⁹¹ Clinton, *supra* note 75, at 995–97.

compensation.⁹² And federal statutes and regulations involving Indians or Indian tribes are subject to the Equal Protection Clause of the Fourteenth Amendment, as applicable to the federal government through the Due Process Clause of the Fifth Amendment.⁹³ But of course, to say that federal Indian law is subject to the equal-protection requirement is not to say that federal classifications involving Indians and Indian tribes are necessarily subject to strict scrutiny under that requirement.

Fifth, as indicated above, the legitimacy of the plenary power remains controversial. The difficulty here, which has grown more pressing as textualism has gained greater prominence in the federal courts, is in locating a basis for the plenary power in the Constitution. The two leading candidates, at least in the view of the contemporary Supreme Court, are the Indian Commerce Clause and the Treaty Clause.⁹⁴ The Indian Commerce Clause, located in Article I, grants Congress the power “[t]o regulate Commerce . . . with the Indian Tribes.”⁹⁵ The Court views “the central function” of the Indian Commerce Clause as “provid[ing] Congress with plenary power to legislate in the field of Indian affairs.”⁹⁶ The problem with relying on the Indian Commerce Clause is apparent. The Court has held that the plenary power authorizes congressional regulation even of the internal affairs of Indian tribes and the private transactions of individual Indians. That requires an expansive understanding of the word “Commerce”—an understanding far more expansive than the Court has allowed for the same word in the Interstate Commerce Clause. Even the case that first announced the congressional

⁹² *Shoshone Tribe v. United States*, 299 U.S. 476, 496 (1937). *But see* *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290 (1955) (declining “to subject the Government to an obligation to pay the value” of property taken from the Tee-Hit-Ton Indians in Alaska).

⁹³ *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also* *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 75 (1977) (holding that a group of Indians was not denied “equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment” when it was not included in the distribution of an award from the Indian Claims Commission).

⁹⁴ *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”); *Mancari*, 417 U.S. at 551–52 (1974) (“[T]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government’s power to deal with the Indian tribes.”); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 n.7 (1973) (“The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”).

⁹⁵ U.S. CONST. art. I, § 8.

⁹⁶ *Cotton Petroleum Corp.*, 490 U.S. at 192.

plenary power, *United States v. Kagama*, specifically rejected the Indian Commerce Clause as a basis for the power.⁹⁷ As long as this point remains contested, the Indian Commerce Clause will continue to provide an insecure footing for the plenary power.

The Treaty Clause, located in Article II, is an even more dubious basis for the plenary power. It states that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties.”⁹⁸ The Supreme Court concedes that the “treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, ‘to make Treaties.’”⁹⁹ But the Court reasons that “treaties made pursuant to that power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”¹⁰⁰ This approach, however, provides at best an incomplete and imperfect justification for the plenary power. Congress ended the practice of making treaties in 1871; there have been no treaties between the United States and any Indian Tribe in the last 150 years.¹⁰¹ The Treaty Clause, then, cannot justify exercise of the plenary

⁹⁷ *United States v. Kagama*, 118 U.S. 375 (1886). The Court in *Kagama* considered the constitutionality of the Major Crimes Act, which made certain crimes committed by Indians within Indian Country federal offenses. The Court said the Indian Commerce Clause

is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id. at 378–79. Although some commentators maintain that the Supreme Court first announced the congressional plenary power over Indians and Indian tribes in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), that case is really about federalism—specifically, whether the state governments have authority over the Indian tribes. *Worcester* determined that governmental authority over the Indian tribes resides in the federal government and tribal governments. *Worcester*, 31 U.S. at 558–59. *Kagama*, decided a half century later, determined that the federal government has plenary power over Indians and Indian tribes. 118 U.S. at 384–85.

⁹⁸ U.S. CONST., art. II, § 2.

⁹⁹ *Lara*, 541 U.S. at 201 (quoting U.S. CONST., art. II, § 2).

¹⁰⁰ *Id.* (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

¹⁰¹ Section 1 of the Appropriations Act of March 3, 1871 provides that “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.” Pub. L. 41-120, 16 Stat. 544 (1871). “The reason for the prohibition was the House’s resentment of the Senate’s outsized role in setting Native American policy through its exclusive power to ratify treaties.” Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS. 27, 40 (2018).

power over Indians and Indian tribes as to any tribe with which the United States never entered a treaty (consisting, for the most part, of tribes in the western part of the country and in Alaska) or as to any matter not covered in any of the hundreds of treaties that the United States did make with the tribes. On this approach, establishing the legitimacy of any specific exercise of the plenary power would require a tribe-by-tribe, treaty-by-treaty, matter-by-matter analysis.

Thus, the congressional plenary power over Indians and Indian tribes, although firmly established in Supreme Court case law, stands on a contested and uncertain constitutional basis. The leading treatise on federal Indian law confidently asserts, in reference to the Indian Commerce Clause and the Treaty Clause, that “Congress’s power to give effect to these provisions, coupled with the supremacy of federal law[,] provides ample support for the federal regulation of Indian affairs.”¹⁰² But others are not so sure. Over the last half century, scholars and commentators have questioned, criticized, or even rejected the legitimacy of the plenary power.¹⁰³

¹⁰² COHEN’S HANDBOOK, *supra* note 8, at § 5.01.

¹⁰³ See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1829–38 (2019) (summarizing history of the Supreme Court’s “dormant inherent powers doctrine”); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 328 (2018) (criticizing textualist arguments in support of the plenary power for using “cherry-picked” sources); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1082–88 (2015) (describing the original congressional authority as restricted to only international treaties and land sales); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 73–94 (2012) (arguing that there is no textual basis to establish absolute congressional power over Indian tribes); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U.L. REV. 201, 212 (2007) (“The drafting history of the Constitution, the document’s text and structure, and its ratification history all show emphatically that the Indian Commerce Power was not intended to be exclusive.”); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132–33 (2006) (explaining that skepticism of the plenary power gained prevalence due to the Rehnquist Court’s “deep suspicion” of congressional authority); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 443 n.58 (2005) (claiming that the plenary power “was never justified by reference to constitutional text”); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1086–1105 (2004) (arguing that the Indian Commerce Clause does not textually support a grant of plenary power over Indians to Congress); 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, 25–27, 77–81 (2002) (asserting that the plenary power was established on the basis of extraconstitutional reasoning, “relating to colonial discovery and the Indians’ aboriginal status” and that the “constitutionalization” of the plenary power has changed over time); Clinton, *supra* note 55, at 235–46 (arguing that Indian Tribes are not subject to federal supremacy); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1760–61, 1765 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (describing the plenary power as based on “fiction,” given its absence in the text of the Constitution);

The academic criticisms have gained some traction within the Supreme Court. In a concurring opinion, Justice Thomas said of the plenary power that he “cannot locate such congressional authority in the Treaty Clause . . . or the Indian Commerce Clause.”¹⁰⁴ Reasonably enough, Thomas pointed out that the longstanding idea of retained, inherent tribal sovereignty stands in tension with the congressional plenary power over Indians and Indian tribes, a power that includes the authority to terminate tribal sovereignty altogether: “It is quite arguably the essence of sovereignty,” Thomas wrote, “not to exist merely at the whim of an external government.”¹⁰⁵ But a close examination of the constitutional basis for the plenary power must await another article. For present purposes, I take the decisions issued by the Supreme Court since the nineteenth century at face value and treat the congressional plenary power over Indians and Indian tribes as an established point of constitutional law.

B. *The Vulnerability of Morton v. Mancari*

For nearly half a century, *Morton v. Mancari* has largely insulated federal statutory and regulatory classifications involving Indians or Indian tribes from strict scrutiny; if left undisturbed, the case provides a framework for the favorable resolution of equal-protection challenges to federal Indian law. But *Mancari* stands on doubtful reasoning, and both courts and commentators question its legitimacy, with some arguing that many or even

Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 33–74 (1996) (examining the ways in which Congressional plenary power, as reflected in federal Indian law, creates constitutional problems); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court Indian Law*, 84 CALIF. L. REV. 1573, 1579 (1996) (reporting the position held by some that Cohen and the Marshall Trilogy “unduly dignif[y] a congressional power over Indian affairs based on a self-legitimizing colonialist theory” and condemning “the pernicious potential of plenary power of Congress to divest and alter the powers of Indian tribes”); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 395 n.59 (1993) [hereinafter Frickey, *Marshalling Past and Present*] (expressing “serious qualms about the plenary power doctrine as a congressional sword against the tribes . . .”); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1204–05 (1990) [hereinafter Frickey, *Congressional Intent*] (citing scholarly criticism that the plenary power doctrine “lacks a constitutional basis”); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 46–55 (1987) (suggesting that there may not be a legitimate basis for finding such a broad power); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 228–36 (1984) (surveying a series of decisions in which the Court repudiated the idea that the plenary power prohibited courts from hearing Indian tribes’ constitutional claims).

¹⁰⁴ *Lara*, 541 U.S. at 215 (Thomas, J., concurring) (citations omitted).

¹⁰⁵ *Id.* at 218.

all classifications involving Indians or Indian tribes should be treated as suspect. These criticisms make it necessary to reconsider *da capo* how the equal-protection requirement applies to federal Indian law. If the focus is shifted from the people who are the subject of federal Indian law—that is, Indians and Indian tribes—to the governmental body with responsibility for federal Indian law—that is, the U.S. Congress—it becomes clear that the nature of the congressional power is central to the equal-protection analysis.

Mancari involved an equal-protection challenge to an employment preference for Indians at the BIA. Congress had authorized the preference in the Indian Reorganization Act of 1934,¹⁰⁶ but BIA practice for decades had limited the preference to initial hiring decisions.¹⁰⁷ In 1972, the BIA expanded it to cover “situation[s] where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.”¹⁰⁸ A group of non-Indian BIA employees challenged the expanded preference as a violation of the Equal Protection Clause (by way of the Due Process Clause of the Fifth Amendment).

The Supreme Court unanimously upheld the preference. Noting that federal policies for Indian preferences in “the Indian service” reach back, in one form or another, to 1834, the Court said that the “purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.”¹⁰⁹ “Resolution” of the equal-protection question, the Court said, “turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes.”¹¹⁰ The Court pointed out that all Indian legislation makes distinctions between Indians and non-Indians and that, if those laws were struck down as a violation of the equal-protection requirement, Title 25 of the U.S. Code “would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”¹¹¹

Then, in a problematic move, the Court said that the BIA employment preference did not constitute “racial discrimination” because it was “not even a ‘racial’ preference.”¹¹² The Court maintained that the preference, which looked to both Indian descent and membership in a recognized Indian tribe,

¹⁰⁶ Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101–29).

¹⁰⁷ *Morton v. Mancari*, 417 U.S. 535, 538 (1974).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 541–42.

¹¹⁰ *Id.* at 551.

¹¹¹ *Id.* at 552.

¹¹² *Id.* at 553.

was “political rather than racial in nature.”¹¹³ The Court’s aim was to tie the BIA employment preference to the federal government’s objective of promoting tribal self-determination and to the federal government’s “unique obligation” to Indians and Indian tribes, an obligation that the Court attributed to the historic dispossession of tribal lands.¹¹⁴ “The preference, as applied,” the Court stressed, “is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”¹¹⁵ In the Court’s view, the employment preference was “reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.”¹¹⁶

The legal rule that emerged (or that appeared to emerge) from *Mancari* is that any “special treatment” of Indians that “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . . will not be disturbed.”¹¹⁷ For that reason, any preference, such as the BIA employment preference, that is “reasonable and rationally designed to further Indian self-government” does not violate the equal-protection requirement.¹¹⁸ This, in effect, subjects classifications involving Indians or Indian tribes to a modified form of rational-basis review.¹¹⁹ *Mancari* has remained the controlling precedent for the equal-protection analysis of federal Indian law ever since.

But the decision is vulnerable on several points. First is the Court’s insistence that the employment preference was a “political” rather than a “racial” classification. The Court said that, “[c]ontrary to the characterization made by [the non-Indian plaintiffs], this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference.”¹²⁰ The Court reasoned that the employment preference was “not directed towards a ‘racial’ group consisting of ‘Indians’” but that it applied “only to members of ‘federally recognized’ tribes.”¹²¹ This, the Court noted, effectively excludes “many individuals who are racially to be classified as ‘Indians’” and concluded that “[i]n this sense, the preference is political rather than racial in nature.”¹²²

¹¹³ *Id.* at 553, n.24.

¹¹⁴ *Id.* at 552, 555.

¹¹⁵ *Id.* at 554.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 555.

¹¹⁸ *Id.*

¹¹⁹ *Cf.* COHEN’S HANDBOOK, *supra* note 8, § 5.04 n.41 (“While the much-quoted standard from *Mancari* indicates a slightly lower level of deference than mere rationality review, the case law appears to apply ordinary rational basis review.”).

¹²⁰ *Mancari*, 417 U.S. at 553.

¹²¹ *Id.* at 553 n.24.

¹²² *Id.*

This reasoning is simply wrong. As mandated by federal law,¹²³ most federally recognized Indian tribes generally require some measure of Indian descent as a condition for membership, such that even an employment preference limited only to members of Indian tribes would indirectly incorporate a racial component. Additionally, the preference upheld in *Mancari* expressly required both membership in a federally recognized Indian tribe and “one-fourth or more degree Indian blood.”¹²⁴ Thus, as commentators have noted, *Mancari* elided the racial element of the employment preference, treating it as a political—and therefore as a non-suspect classification—rather than as a racial—and therefore as a suspect—classification.¹²⁵

Properly understood, the BIA employment preference was neither exclusively political nor exclusively racial. It was both, and that raises the question of how a mixed classification should be treated for equal-protection purposes. The loose reasoning in *Mancari* does not resolve the issue; it does not really even address it—it simply evades it. That tactic works so long as a majority of the Supreme Court is willing to play along—and it is possible that a majority will be willing to do so indefinitely in order to avoid the difficult confrontation between the equal-protection requirement and federal Indian law. But the *fiat* declaration that a mixed political-and-racial classification is

¹²³ United States v. Sandoval, 231 U.S. 28, 46 (1913).

¹²⁴ *Mancari*, 417 U.S. at 553 n.24.

¹²⁵ See, e.g., FLETCHER, *supra* note 8, at 110 (referring to this portion of *Mancari* as “superficially theorized”); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1185 (2010) (stating of the *Mancari* “political rather than racial in nature” rationale that, “[a]lthough this might be interpreted to mean that classifications of tribal members are not racial at all, this conclusion is dissatisfying, particularly because the challenged regulation itself required individuals to be *both* tribal members *and* have at least one-quarter Indian blood to qualify for the preference”); Gould, *supra* note 20, at 725 (calling the “political rather than racial in nature” rationale of *Mancari* “disingenuous”); Frickey, *Adjudication and Its Discontents*, *supra* note 103, at 1762 (“[U]nder the [BIA] regulation [in *Mancari*], then, race, as measured by blood quantum, was a but-for requirement of eligibility for the preference. The Court in *Mancari* did not pause to ponder this problem.”); David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 191, 198 (1991) [hereinafter Williams, *Sometimes Suspect*] (“I fear that the Court’s approach in *Mancari*—denying that Indian law is race-based—will encourage a fast-and-loose attitude toward the requirements of the Equal Protection Clause, because the approach is so palpably a fiction.”); Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 UCLA L. REV. 169, 173 (1991) (“[G]iven the typical criteria for tribal membership, it is foolish to call classifications involving tribal Indians anything other than ‘race-plus.’ . . . By denying that Indian-based classifications are racial, *Mancari* both defied logic and undermined federal policy supporting tribal self-determination.”); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 792–810 (1991) [hereinafter Williams, *Indians as Peoples*] (criticizing the “political rather than racial in nature” rationale); Newton, *supra* note 103, at 272 n.441 (calling the “political rather than racial in nature” rationale of *Mancari* “disingenuous”).

exclusively political fools no one, least of all those who think that classifications involving Indians or Indian tribes should be subject to strict scrutiny.

One way to reconsider the point would be to ask the questions that the Court in *Mancari* decided to dodge: Does inclusion of the racial component in the employment preference taint or otherwise overcome the political component in the preference, so that the preference must be reviewed under the strict-scrutiny standard? Or does the inclusion of the political component purge or otherwise neutralize the racial component, so that the preference must be reviewed under the rational-basis standard? It should be readily apparent that laying a suspect classification over a non-suspect classification (or for that matter, laying a non-suspect classification over a suspect classification) should not defeat strict scrutiny. After all, a law requiring African Americans with valid car registrations to drive five miles per hour below the posted speed limit would include both a suspect classification (being African American) and a non-suspect classification (having a valid car registration). But who honestly could say that such a law would not discriminate on the basis of race in violation of the Equal Protection Clause?¹²⁶

To reframe the point in terms closer to *Mancari*, if the BIA had maintained an employment policy against hiring or promoting any member of a federally recognized Indian tribe who was of “one-fourth or more degree Indian blood,” the Court presumably would have struck that policy down as a violation of the equal-protection requirement. And regardless of one’s general views on the constitutionality of affirmative action, the initial analytical move should be the same in both cases: Either the combination of a non-suspect classification with a suspect classification removes the governmental action from strict-scrutiny review, or it does not. Intuitions about the unconstitutionality of a driving restriction on African Americans with valid car registrations and the unconstitutionality of an employment ban on Indians who are members of Indian tribes confirm that the Supreme Court erred on that initial analytical move.¹²⁷ This is not to say that the outcome in *Mancari* is wrong, but it is to say that a critical piece of its rationale is fundamentally flawed.

¹²⁶ See, e.g., Williams, *Indians as Peoples*, *supra* note 125, at 807 (“It cannot be . . . that the simple addition of a nonsuspect trait to a suspect one yields a nonsuspect class.”).

¹²⁷ The Court used similar bad reasoning in *Geduldig v. Aiello* to hold that the exclusion of pregnancy from a state disability-insurance program maintained by California was not a classification based on sex for purposes of the equal-protection requirement. 417 U.S. 484 (1974). *Geduldig* and *Mancari* were both decided on June 17, 1974, although Justice Stewart wrote the opinion in *Geduldig* and Justice Blackmun wrote the opinion in *Mancari*. In a footnote dismissing the equal-protection argument, the Court in *Geduldig* said that the case was “a far cry from cases . . . involving discrimination based upon gender as such” and that although “only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.” *Id.* at 496 n.20. Echoing *Mancari*, the Court reasoned that “[t]he lack of identity between the excluded disability and

The Supreme Court signaled some uneasiness with the *Mancari* “political rather than racial in nature” rationale in *Rice v. Cayetano*, a 2000 decision invalidating a provision of the Hawaii state constitution that limited voting for the trustees of a state agency to “Hawaiians.”¹²⁸ The Court determined that, in defining the term “Hawaiians” to include only descendants of the people who inhabited the Hawaiian Islands in 1778 (the year of initial European contact),¹²⁹ the state constitution used ancestry as a proxy for race.¹³⁰ Although the Court reaffirmed the general applicability of *Mancari* to classifications involving Indians or Indian tribes (and even quoted the “political rather than racial in nature” rationale),¹³¹ it determined that classifications involving “Hawaiians” and “Native Hawaiians” are strictly racial and therefore impermissible under the Fifteenth Amendment.¹³² The *Rice* Court said that “[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”¹³³ That undercuts the reasoning in *Mancari* that the BIA employment preference was “not directed toward a ‘racial’ group consisting of ‘Indians’” because it applied “only to members of ‘federally recognized’ tribes” and effectively excluded “many individuals who are racially to be classified as ‘Indians.’”¹³⁴ More broadly, *Rice* implies that pairing a non-racial classification with a racial classification does not remove the constitutional problems associated with the racial classification. Whether the Court might revisit *Mancari* on that basis remains an open question.¹³⁵

gender as such under this insurance program becomes clear upon the most cursory analysis” because “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons”—with “the first group [being] exclusively female, [and] the second includ[ing] members of both sexes.” *Id.* In *Mancari*, the point was that the employment preference could not be racial discrimination because it favored some Indians (those who were tribal members) but not other Indians (those who were not tribal members). In *Geduldig*, the point was that the pregnancy dispreference could not be sex discrimination because it disfavored some women (those who were pregnant) but not other women (those who were not pregnant). In both decisions, the Court would have been well advised to undertake something more than “the most cursory analysis.”

¹²⁸ 528 U.S. 495, 520 (2000).

¹²⁹ *Id.* at 509.

¹³⁰ *Id.* at 514.

¹³¹ *Id.* at 514–17.

¹³² *Id.* at 517. The Court also indicated that *Mancari* would not protect a voting arrangement (other than one for internal tribal governments) using a classification involving Indians or Indian tribes: “It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.” *Id.* at 520.

¹³³ *Id.* at 516–17.

¹³⁴ *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

¹³⁵ For a close study of the equal-protection issues raised by preferences for Native Hawaiians, see generally Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

The second point of vulnerability for *Mancari* is the Court's separate reliance on the federal government's "unique obligation" to the Indian tribes. In truth, this part of the opinion is muddled (after all, it was written by Justice Blackmun). The Court initially framed the equal-protection question as a matter of determining "whether . . . the [employment] preference constitutes invidious racial discrimination,"¹³⁶ but it immediately said that "[r]esolution of [that] issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."¹³⁷ Noting that "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations," the Court correctly observed that finding "invidious racial discrimination" in the employment preference would "effectively erase[]" Title 25 of the U.S. Code and "jeopardize[]" the "solemn commitment of the Government toward the Indians."¹³⁸

This is where matters become obscure. Having made this point about the place of Indians in federal law, the Court suggested that it provides only "historical and legal context" and quickly moved to argue that the employment preference is "political rather than racial in nature."¹³⁹ But then the Court switched back to the relationship between the federal government and Indians, concluding that "[a]s long as the special treatment" of Indians "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."¹⁴⁰ It is therefore hard to determine how much the government's "unique obligation" provides a justification for the outcome that is independent of the "political rather than racial in nature" rationale.

Quite apart from the slipshod reasoning, the "unique obligation" rationale is problematic because, as a matter of positive constitutional law, the existence of that obligation is wholly dependent on the will of Congress. For more than a century, it has been black-letter law that Congress can redefine or even terminate the government's "unique obligation" to the tribes.¹⁴¹ In fact, Congress did terminate its "unique obligation" to more than one hundred Indian tribes during the period known as the "termination era" of federal Indian law (which ran roughly from the 1940s to the 1960s).¹⁴² My meaning here should not be misunderstood. In my view, it is incontestable that,

¹³⁶ *Mancari*, 417 U.S. at 551.

¹³⁷ *Id.*

¹³⁸ *Id.* at 552.

¹³⁹ *Id.* at 553.

¹⁴⁰ *Id.* at 555.

¹⁴¹ *United States v. Kagama*, 118 U.S. 375, 379–80 (1886).

¹⁴² COHEN'S HANDBOOK, *supra* note 8, § 1.06.

as a political and moral matter, the U.S. government has a unique and indeed compelling obligation to the Indian tribes and that the tribes have an indefeasible claim to sovereignty. But the place of Indian tribes in U.S. law is both pre-constitutional and extra-constitutional. However compelling as a political and moral matter, constitutional law leaves it to Congress to decide whether and on what terms to honor the government's obligation and whether and on what terms to continue Indian tribal sovereignty.

To suggest, as *Mancari* does, that the equal-protection status of federal Indian law turns on the government's "unique obligation" to the Indian tribes is really to say that the equal-protection status of federal Indian law turns on the continuing will of Congress not to repudiate that obligation. This leaves the exemption from strict scrutiny of federal classifications involving Indians or Indian tribes highly precarious. It necessarily implies that if Congress repudiates its obligation to the Indian tribes, any subsequent legislation that either favors or disfavors Indians and Indian tribes would have to be reviewed under the strict-scrutiny standard. It also implies that if Congress terminates federal recognition of a particular Indian tribe and then later re-confers federal recognition on that tribe—something Congress in fact did during and after the termination era¹⁴³—the new federal recognition would have to be reviewed under the strict-scrutiny standard. Surely Justice Blackmun would have written a different opinion if he had thought his reasoning all the way through to its problematic implications.

Mancari thus includes two rationales that potentially justify the outcome in the case, but both present difficulties. The "political rather than racial in nature" rationale simply mischaracterizes classifications involving Indians or Indian tribes, including the classification at issue in *Mancari*. The "unique obligation" rationale leaves the equal-protection status of federal Indian law contingent on Congress not modifying or repudiating that unique obligation. To compound matters, the relationship between the two strands is exquisitely unclear. Is either rationale sufficient on its own to justify the result? Are both necessary? Perhaps the most faithful reading of the opinion is that the employment preference is "political rather than racial in nature" *because of* the government's "unique obligation." That does not really make much sense, but it does appear to be what Justice Blackmun was trying to say.

In subsequent cases, the Supreme Court itself appears to have had difficulty deciding what *Mancari* means. The Court has relied on *Mancari* six times to reject equal-protection challenges to classifications involving Indians or Indian tribes, but it has equivocated between the "political rather than racial in nature" rationale and the "unique obligation" rationale. In *Fisher v. District Court of the Sixteenth Judicial District of Montana*, a 1976 *per curiam* decision, the Court leaned on both rationales to hold that requiring

¹⁴³ *Id.*

a member of an Indian tribe to litigate a child-custody proceeding in tribal court rather than state court does not violate the equal-protection requirement.¹⁴⁴ The Court reasoned that the tribal court's jurisdiction did "not derive from the race of the plaintiff but rather from the quasi-sovereign status" of the tribe and that enforcing exclusive tribal-court jurisdiction "further[ed] the congressional policy of Indian self-government."¹⁴⁵ Another unanimous decision issued in 1976, *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, relied only on the "unique obligation" rationale to reject an equal-protection challenge to the federal exemption of Indians from state taxation.¹⁴⁶ So too did *Delaware Tribal Business Committee v. Weeks*, which rejected an equal-protection challenge to a distribution of federal funds to the Cherokee Delawares and the Absentee Delawares but not to the Kansas Delawares.¹⁴⁷

But in 1977, *United States v. Antelope* looked only to the "political rather than racial in nature" rationale.¹⁴⁸ *Antelope* held that the conviction of an Indian defendant for felony murder under the federal Major Crimes Act did not violate the equal-protection requirement, even though the defendant could not have been charged with felony murder if he had been a non-Indian defendant.¹⁴⁹ The classification worked to the obvious disadvantage of the Indian defendant and did not further tribal self-government, so the "unique obligation" rationale was unavailable to the Court. The unanimous opinion read *Mancari* and *Fisher* to say that "federal regulation of Indian affairs . . . is rooted in the unique status of Indians as 'a separate people' with their own political institutions" and "is not to be viewed as legislation of a 'racial' group."¹⁵⁰ Similarly, the Court's 1979 decision in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation* looked only to the "political rather than racial in nature" rationale in rejecting an equal-protection challenge to the State of Washington's unilateral assumption of criminal and civil jurisdiction over some, but not all, matters involving Indians

¹⁴⁴ 424 U.S. 382, 390–91 (1976).

¹⁴⁵ *Id.*

¹⁴⁶ 425 U.S. 463, 479–81 (1976). Although the Court in *Moe* pointed out that *Mancari* had said that "these kinds of statutory preferences" are not "racial" in character," it pointed to the "unique obligation" rationale as "[t]he test" applicable to federal classifications involving Indians or Indian tribes. *Id.* at 480. For that reason, the case is best read as relying only on the "unique obligation" rationale.

¹⁴⁷ 430 U.S. 73, 84–85 (1977). The Cherokee Delawares and the Absentee Delawares were both federally recognized tribes; the Kansas Delawares were not. *Id.* at 85.

¹⁴⁸ 430 U.S. 641, 646 (1977).

¹⁴⁹ *Id.* at 644, 646–47.

¹⁵⁰ *Id.*

or Indian tribes.¹⁵¹ As in *Antelope*, the classification worked to the disadvantage of the Indians (the challenge was brought by the Yakima Indian Nation), so the “unique obligation” rationale again was not plausible. The Court reasoned that the “unique legal status” of the Indians “permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.”¹⁵² Later in 1979, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court returned to the “unique obligation” rationale to reject an equal-protection challenge to treaty provisions reserving fishing rights to Indians.¹⁵³

What, then, is the meaning of *Mancari*? Does *Mancari* stand for the proposition that federal classifications involving Indians or Indian tribes are not subject to strict scrutiny because they are always “political rather than racial in nature”? *Antelope* and *Yakima Indian Nation* support that reading, but *Moe*, *Delaware Tribal Business Committee*, and *Washington State Commercial Passenger Fishing Vessel* indicate otherwise. Does *Mancari* stand for the proposition that federal classifications involving Indians or Indian tribes are not subject to strict scrutiny as long as they further the federal government’s “unique obligation” to Indians and Indian tribes? *Moe*, *Delaware Tribal Business Committee*, and *Washington State Commercial Passenger Fishing Vessel* support that reading, but *Antelope* and *Yakima Indian Nation* indicate otherwise. *Fisher* suggests that the exemption from strict scrutiny rests on both rationales together.

Perhaps the most accurate reading of these cases is that federal classifications *favorable* to Indians are not subject to strict scrutiny by reason of the “unique obligation” rationale (*Moe*, *Delaware Tribal Business Committee*,¹⁵⁴ and *Washington State Commercial Passenger Fishing Vessel*) and that federal classifications *unfavorable* to Indians are not subject to strict scrutiny by reason of the “political rather than racial in nature” rationale (*Antelope* and *Yakima Indian Nation*).¹⁵⁵ If that is the best that can be said of *Mancari*, the legitimacy of the decision is rightly open to doubt. On this

¹⁵¹ 439 U.S. 463, 500–02 (1979). Without mentioning the “unique obligation” rationale, the Court in *Yakima Indian Nation* said that “classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States” and that “the argument that such classifications are ‘suspect’” is “untenable.” *Id.* at 501.

¹⁵² *Id.* at 500–01.

¹⁵³ 443 U.S. 658, 673 n.20 (1979).

¹⁵⁴ The federal statute at issue in *Delaware Tribal Business Committee*, which involved the distribution among Delaware Indians of a specified amount appropriated by Congress, was favorable to two recognized tribes (the Cherokee Delawares and the Absentee Delawares) but *pro tanto* unfavorable to a non-tribal group of Indians (the Kansas Delawares).

¹⁵⁵ Note that the tribal ordinance in *Fisher*, which the Court upheld by reference to both the “political rather than racial in nature” rationale and the “unique obligation” rationale, was favorable to the tribe as a whole and unfavorable to a particular member of the tribe.

reading, no federal classification involving Indians or Indian tribes is subject to strict scrutiny, but the Court cannot identify a principled justification for the result. That hardly suggests that advocates of tribal interests should rest easy about the future of federal Indian law.

Finally, *Mancari* is vulnerable because of subsequent developments under the Equal Protection Clause. When the Court decided *Mancari* in 1974, it had not yet addressed the constitutionality of affirmative action. But there has been a lot of water over that dam since then. The Court's first affirmative-action case, *DeFunis v. Odegard*, was brought by a white applicant who had been denied admission to the University of Washington School of Law.¹⁵⁶ The school admitted the applicant while his challenge was pending, and the Supreme Court dismissed the case as moot on April 23, 1974—just one day before it heard oral argument in *Mancari*.¹⁵⁷ Four years later, the Court, in *Regents of the University of California v. Bakke*, took up the substantive question that it had not decided in *DeFunis*.¹⁵⁸ In a fragmented decision, the Court upheld the use of race as one factor in admissions for a public medical school but rejected a hard quota for non-white students.¹⁵⁹ Decisions after *Bakke* generally (but not invariably) have sustained affirmative action in higher-education admissions¹⁶⁰ but have struck down affirmative action in other areas, such as government contracting.¹⁶¹

It is possible, then, that the reasoning and the outcome of *Mancari* are products of the time the case was decided, a time when the Supreme Court was just beginning—in a tentative, uncertain manner—to address affirmative action. *Mancari* came hard on the heels of *DeFunis*, which had avoided the issue. And in fact, the Court in *Mancari* stressed what it was not deciding just as much as what it was deciding. The opinion emphasized that the preference “applie[d] only to employment in the Indian service.”¹⁶² It did not, the Court

¹⁵⁶ 416 U.S. 312, 314 (1974) (per curiam).

¹⁵⁷ *Id.* at 315, 319–20.

¹⁵⁸ 438 U.S. 265 (1978).

¹⁵⁹ *Id.* at 316–20.

¹⁶⁰ *See, e.g.*, *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2214 (2016) (upholding the university's affirmative action plan because it was narrowly tailored to achieve the benefits of student body diversity); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (concluding that the Equal Protection Clause did not “prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body”). *But see* *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003) (holding that “the University's use of race in its . . . admissions policy” violated the Equal Protection Clause because it was not “narrowly tailored to achieve respondents' asserted compelling interest in diversity . . .”).

¹⁶¹ *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06, 511 (1989) (striking down a city program that required prime contractors on city construction contracts to subcontract with minority-owned businesses because the city “failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race”).

¹⁶² *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

said, “cover any other Government agency or activity,” and it therefore did not require the Court to consider “the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.”¹⁶³ In other words, the Court treated the case as particular to Indian law, and it did not reach for the broader affirmative-action questions that it had avoided in *DeFunis* and that it would struggle with in *Bakke*.

Since *Mancari* was decided in 1974, the membership of the Supreme Court has turned over completely, and, no less importantly, the Court has developed more definite views about the constitutionality of affirmative-action programs. Although the Court has relied on *Mancari* six times in rejecting equal-protection challenges to federal Indian law (*Fisher*, *Moe*, *Delaware Tribal Business Committee*, *Antelope*, *Yakima Indian Nation*, and *Washington State Commercial Passenger Fishing Vessel*), it has not done so once since 1979. *Mancari* was a unanimous decision, but it is not at all clear that the Court would reach the same result today if it considered the BIA employment preference as a matter of first impression or if it reconsidered *Mancari* in light of subsequent case law. Perhaps the *Mancari* equal-protection approach is an artifact of a Court that was still unsure how to address the constitutionality of affirmative action as a general matter; perhaps the idea of Indian-law exceptionalism gave the Court an easy answer to a hard question. The Court’s most recent move in this area, made in 2013, was its statement in *Adoptive Couple v. Baby Girl* that the Indian-adoption preferences in the Indian Child Welfare Act might “raise equal protection concerns.”¹⁶⁴ There is little evidence either way about whether the Court would analyze a preference for Indians and Indian tribes differently from any other race-based preference.

In short, from the perspective of those of us who are sympathetic to contemporary federal Indian policy, the *Mancari* approach produces generally acceptable results in the application of the equal-protection requirement. The Supreme Court has never struck down any provision of federal Indian law under *Mancari*. But litigants and lower federal courts are putting new pressure on *Mancari*, and the decision is vulnerable to either piecemeal or wholesale reconsideration.¹⁶⁵ The case pretends that an

¹⁶³ *Id.*

¹⁶⁴ 570 U.S. 637, 656 (2013). In 2004, the Court decided not to address whether a federal statute restoring tribal criminal jurisdiction over non-member Indians violated the equal-protection requirement. *United States v. Lara*, 541 U.S. 193, 209 (2004). A later decision by the Ninth Circuit found the equal-protection argument from *Lara* sympathetic but decided that it was foreclosed by *Mancari* and *Antelope*. *Means v. Navajo Nation*, 420 F.3d 1037, 1044–46 (9th Cir. 2005).

¹⁶⁵ See, e.g., Gregory Ablavsky, “*With the Indian Tribes*”: *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1030 (2018) (noting criticisms of *Mancari*

employment preference based on both political status and race is “political rather than racial in nature.” That inartful move is transparently false. The case purports to rest in part on the “unique obligation” of the federal government to Indians, but Congress can abolish that “unique obligation” at any time, thereby completely upsetting the equal-protection analysis. Subsequent decisions equivocate on which of the case’s two rationales is dispositive. And the case was decided early in the arc of the Court’s developing views on affirmative action. *Mancari* has protected federal Indian law from equal-protection challenges for most of the past half century, but there is reason to doubt that it will continue to do so in the years to come.

C. The Case for Rational-Basis Review of Federal Indian Law

There is another way forward in defending the constitutionality of federal Indian law, one that does not rely on the questionable reasoning and doubtful future of *Mancari* but that still draws substantial support from Supreme Court case law. The plenary power that Congress has over Indians and Indian tribes, as described time and again by the Supreme Court over the past 135 years, precludes the application of strict scrutiny and compels the application of rational-basis review to federal statutory and regulatory classifications involving Indians or Indian tribes. Like *Mancari*, the plenary-power approach set out here validates most (or even all) of federal Indian law under the equal-protection requirement. And the plenary-power approach is consistent with how the Court analyzes equal-protection questions under federal immigration law—another policy domain in which Congress has plenary power.

by litigants); Gregory Smith & Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari*, FEDERAL LAWYER, Apr. 2013, at 51–55 (2013) (detailing challenges to *Mancari* brought in the lower courts); *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (suggesting the possibility that, following *Adarand*, “*Mancari*’s days are numbered”); *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 403–04 (D. Mass. 2012) (criticizing *Mancari* as based on an “irrational assumption” about the significance of race and tribal membership). See also En Banc Brief of Individual Plaintiff-Appellees at 2–3, 32, *Brackeen v. Bernhardt*, No. 18–11479 (5th Cir., Jan. 7, 2020) (arguing for narrow interpretation of *Mancari*). As Carole Goldberg notes, “affirmative action opponents” have undertaken “to confine or to overturn *Mancari* through scholarly work, litigation, and legislation.” Goldberg, *supra* note 75, at 951. See also Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1375 (2002) (arguing that the courts “use racialization to trigger strict scrutiny under equal protection law”).

1. The plenary-power approach to equal protection

The argument is straightforward. As explained above,¹⁶⁶ the congressional plenary power over Indians and Indian tribes is a general police power, similar in scope and substance both to the police power that states exercise within their borders and the police power that Congress exercises over places of exclusive federal jurisdiction, such as the District of Columbia, U.S. territories and possessions, and military installations.¹⁶⁷ With respect to Indians and Indian tribes, then, Congress has the power to control matters that otherwise would be subject to comprehensive state regulation—such as education, public health and safety, housing, land ownership, land use, the protection and exploitation of natural resources, crimes and criminal punishment, child welfare and child custody, and testate and intestate succession.¹⁶⁸ Moreover, this congressional authority is exclusive of state authority, preempting the traditional police power of the states, at least as to matters within Indian country.¹⁶⁹ Although Congress recognizes significant powers of tribal self-government, it holds the exclusive authority, as between the federal government and the state governments, to exercise traditional police power over Indians and Indian tribes.

But unlike a state's police power, which is general over all persons within the state (apart from Indians and Indian tribes), the congressional plenary power over Indians and Indian tribes is not general over all persons within the U.S. By definition, this plenary power is limited to Indians and Indian tribes because the Tenth Amendment otherwise reserves the general police power to the states.¹⁷⁰ In order to exercise its police power over Indians and Indian tribes, Congress necessarily distinguishes between Indians and non-Indians, between tribal members and non-members, and between tribes and all other groups subject to U.S. jurisdiction. But almost every (perhaps every) segment of federal Indian law—whether it references individual Indians, tribal members, or Indian tribes—directly or indirectly incorporates Indian descent and, thus, race.¹⁷¹

This is where the conflict between the congressional plenary power and the equal-protection requirement arises. The Court cannot both recognize the congressional plenary power over Indians and Indian tribes and also demand that Congress exercise that power without marking off Indians and Indian tribes for separate treatment. Congress cannot, for example, provide a

¹⁶⁶ See *supra* Section I.A.

¹⁶⁷ COHEN'S HANDBOOK, *supra* note 8, § 5.02.

¹⁶⁸ See *supra* Section I.A.

¹⁶⁹ COHEN'S HANDBOOK, *supra* note 8, § 5.02.

¹⁷⁰ See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (stating that the police power is "reserved to the States by the Tenth Amendment").

¹⁷¹ See *supra* Section I.A.

comprehensive program for the primary and secondary education of Indian children without differentiating between Indian children and non-Indian children, and Congress cannot recognize or otherwise provide for self-government by tribal members without distinguishing between such members and non-members. The exercise of the plenary power makes such distinctions unavoidable. To require that Congress exercise its plenary power without using a classification involving Indians or Indian tribes is to forbid Congress from exercising the power at all.

Under the Court's standard approach to the equal-protection requirement, a race-based classification triggers strict scrutiny, and strict scrutiny requires that the underlying legislation or regulation be "narrowly tailored" to achieve a "compelling governmental interest." To permit only such federal Indian legislation as would pass review under the strict-scrutiny standard would be to limit Congress to legislation furthering only compelling governmental objectives—hardly the material that makes up much of Title 25 of the U.S. Code. The plenary power is so extensive that it displaces and substitutes for the general police power of the states; it permits Congress to regulate even the most quotidian matters for Indians and Indian tribes, such as the number of witnesses needed for an attested will or the requirements for obtaining a hunting license.¹⁷² This is not the stuff of compelling governmental interests.

The congressional plenary power over Indians and Indian tribes is therefore inconsistent with strict scrutiny of federal Indian legislation. Recognition of this inconsistency is implicit in *Mancari*, even though the Court clumsily tried to avoid that difficulty by insisting that the classification used in the BIA employment preference was "political rather than racial in nature." But the unarticulated premise of *Mancari* is correct all the same: As between the congressional plenary power over Indians and Indian tribes and strict scrutiny of federal Indian law, one of the two must give way. The Supreme Court has recognized the congressional plenary power for well over a century, and apart from the doubts raised by Justice Thomas, the Court has shown no inclination to reconsider it. The plenary power, then, must trump strict scrutiny.

For that reason, the right approach in reviewing federal Indian law under the equal-protection requirement is to determine whether the legislation or regulation at issue is a reasonable exercise of Congress's plenary power over Indians and Indian tribes. As discussed in greater detail below, this approach is similar to—but different from—the Court's approach in *Mancari*. Admittedly, this approach implies a forgiving standard of review, and it generally validates most federal Indian law (with different effects on

¹⁷² It makes no difference that Congress typically allows tribal governments to regulate such matters. The critical point is that the plenary power permits Congress to regulate such matters as they relate to Indians.

state laws). It does, however, reconcile the congressional plenary power over Indians and Indian tribes with the equal-protection requirement, rather than use the latter to defeat the former. In short, it puts federal Indian law on a more definite and more secure equal-protection foundation.

2. The parallel to immigration law

The plenary-power approach described here is precisely the approach taken by the Supreme Court for immigration law.¹⁷³ The Court has recognized congressional plenary power over immigration policy for well over a century.¹⁷⁴ Justice Clark wrote in *Boutilier v. INS* that “[i]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess characteristics which Congress has forbidden.”¹⁷⁵ In *Department of Homeland Security v. Thuraissigiam*,¹⁷⁶ decided in June of 2020, the Supreme Court reaffirmed the congressional plenary power, saying that “the Constitution gives ‘the political department of the government’ plenary authority to decide which aliens to admit”¹⁷⁷ and that “the Constitution gives Congress plenary power to set requirements for admission.”¹⁷⁸

The Court’s initial recognition and pronouncement of this congressional plenary power in *Chae Chan Ping v. United States* (also known as *The Chinese Exclusion Case*)¹⁷⁹ followed the Court’s recognition and pronouncement of the plenary power over Indians and Indian tribes in *United*

¹⁷³ To be clear, I am not suggesting that Indians, whether or not tribal members, are aliens or that they should be treated as such. Under Section 1 of the Fourteenth Amendment and the Indian Citizenship Act of 1924, all Indians are citizens of the United States. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401(b). *But see* Cleveland, *supra* note 103, at 77 (“Natural-born citizenship for Indians born as tribal members continues to be bestowed by statute, rather than as a matter of constitutional right, and commentators have questioned whether Congress, under the plenary power doctrine, might retain power to de-naturalize Indians.”). Instead, I am arguing that the congressional plenary power over Indians and Indian tribes is parallel to the congressional plenary power over immigration and that the two plenary powers have parallel implications for the equal-protection requirement.

¹⁷⁴ BEN HARRINGTON, CONG. RSCH. SERV., R44969, OVERVIEW OF THE FEDERAL GOVERNMENT’S POWER TO EXCLUDE ALIENS 1–4 (2017). *See generally* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (explaining persistence of plenary power doctrine in immigration law).

¹⁷⁵ 387 U.S. 118, 123 (1967).

¹⁷⁶ 140 S. Ct. 1959 (2020).

¹⁷⁷ *Id.* at 1982.

¹⁷⁸ *Id.* at 1980 n.26. *See also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (“[I]n general, the [plenary-power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.”).

¹⁷⁹ 130 U.S. 581, 606 (1889).

States v. Kagama by only three years.¹⁸⁰ *Chae Chan Ping* was decided in 1889; *Kagama* was decided in 1886. The parallels between the two cases are striking. Both decisions were unanimous. Both decisions identified a congressional plenary power over a defined policy area—immigration in *Chae Chan Ping*, Indians and Indian tribes in *Kagama*. Both reflect the implicit, self-confident assumption of federal supremacy prevailing in the decades following the Civil War. And notwithstanding that both decisions lean heavily on the endemic racism and nationalism of the late nineteenth century, both remain foundational precedents.¹⁸¹

Additionally, both decisions were unable to locate a precise constitutional basis for the plenary powers that they described. Instead, both invoked the amorphous but important idea of “national sovereignty” as the constitutional justification. In *Chae Chan Ping*, upholding the constitutionality of the Scott Act (which banned the return of Chinese workers to the U.S.),¹⁸² Justice Field wrote:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . . The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.¹⁸³

And in *Kagama*, upholding the constitutionality of the Major Crimes Act (which made certain crimes committed by Indians federal offenses),¹⁸⁴ Justice Miller wrote:

¹⁸⁰ 118 U.S. 375, 383–85 (1886).

¹⁸¹ In a thorough and penetrating analysis, Sarah H. Cleveland identifies *Kagama* as inaugurating a “plenary power era” in which the Supreme Court attributed to the federal government plenary power over Indians and Indian tribes, immigrants and aliens, and the territories of the United States. *See generally* Cleveland, *supra* note 103. In other words, she has explored at length the parallel origins of the congressional plenary power over Indian policy and the congressional plenary power over immigration policy. For Cleveland’s views on the nativism, imperialism, and bigotries that, in part, motivated the turn toward plenary powers, see *id.* at 258–67.

¹⁸² Pub. L. 50–1064, 25 Stat. 504.

¹⁸³ 130 U.S. at 603–04, 609.

¹⁸⁴ 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153).

It seems to us that this [*sc.* imposing federal jurisdiction over the designated crimes] is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.¹⁸⁵

In both *Chae Chan Ping* and *Kagama*, then, the Court in effect held that power over the policy area in question—immigration or Indians and Indian tribes—must be located *somewhere* in government and that because those policy areas directly implicate national sovereignty, the power must reside with the federal government and, specifically, with Congress.

When nearly a century later the Supreme Court confronted the application of the equal-protection requirement to laws enacted under the congressional plenary powers recognized by *Chae Chan Ping* and *Kagama*, the Court determined that the proper approach is to use the rational-basis standard of review. In 1974, the Court's unanimous decision in *Mancari* grounded rational-basis review of federal Indian law in the notion that, in part because of the federal government's "unique obligation," the distinctions drawn by Congress involving Indians or Indian tribes are "political rather than racial in nature." Just two years later, in 1976, the Court's unanimous decision in *Mathews v. Diaz* grounded rational-basis review of federal immigration law directly in the congressional plenary power.¹⁸⁶

Diaz considered an equal-protection challenge to a federal statute making aliens ineligible to participate in Medicare unless they had been admitted to the U.S. for permanent residence and had resided in the U.S. for five years.¹⁸⁷ The Court noted that the Fifth Amendment protects all aliens within the U.S. "from deprivation of life, liberty, or property without due process of law"¹⁸⁸ but also that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."¹⁸⁹ The Court reiterated its recognition of the plenary power of the "political branches of the Federal Government"

¹⁸⁵ 118 U.S. at 383–85.

¹⁸⁶ 426 U.S. 67, 83–84 (1976).

¹⁸⁷ *Id.* at 69–70.

¹⁸⁸ *Id.* at 77.

¹⁸⁹ *Id.* at 79–80.

over immigration, and it determined that “[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”¹⁹⁰ In rejecting the strict-scrutiny standard, the Court held that neither the requirement of admission for permanent residence nor the requirement of residency for five years was “wholly irrational.”¹⁹¹ The Court conceded that, under its earlier decision in *Graham v. Richardson*,¹⁹² any state laws regulating aliens generally are subject to strict scrutiny, but the Court insisted that there is no “political hypocrisy” in recognizing that “the Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.”¹⁹³

¹⁹⁰ *Id.* at 81–82.

¹⁹¹ *Id.* at 82–83.

¹⁹² 403 U.S. 365 (1971).

¹⁹³ *Diaz*, 426 U.S. at 86–87. The Court in *Graham* reasoned that alienage is a suspect classification that triggers strict scrutiny under the Equal Protection Clause. 403 U.S. at 372. But under *Diaz*, federal classifications involving alienage are subject only to rational-basis review. 426 U.S. at 83. Additionally, in later decisions, the Supreme Court determined that state law classifications involving aliens with respect to “core governmental functions” (such as law enforcement and public-school teaching) are subject only to rational-basis review. *See, e.g.,* *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (upholding a state statute limiting eligibility for the police force to United States citizens because “the police function is one where citizenship bears a rational relationship to the special demands” of the job); *Yoshino*, *supra* note 25, at 756 n.65 (describing *Foley*’s determination that policing is a basic government function and thus strict scrutiny is not applicable). Commentators have questioned whether even *Graham* provides much protection to aliens. *See, e.g.,* Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 102–03 (2016) (discussing how decisions subsequent to *Graham*, such as the interpretation of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), have “upheld alienage-based restrictions in state public benefits schemes under a rational basis scrutiny historically reserved for the federal government’s immigration regulations”). Finally, *Diaz* itself has come in for heavy criticism. *See, e.g.,* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications after Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 435–37 (1997) (describing the Court in *Diaz* as having played the “plenary power card” despite earlier in *Graham* finding alienage classifications inherently suspect); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1085–86 (1979) (arguing that the Court’s application of a “low standard of review” in *Diaz* was inconsistent with the idea in *Graham* “that aliens require special constitutional protection”); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, SUP. CT. REV. 275, 314–17, 324–36 (1977) (arguing that *Diaz* wrongly subjected a federal law to a lower level of scrutiny than the strict scrutiny used for laws passed by state governments with regard to the rights of immigrants).

Diaz reaches the analytically correct result, and parallel considerations should drive the same outcome in federal Indian law.¹⁹⁴ As the Supreme Court has recognized for well over a century, Congress has plenary power over immigration matters and plenary power over Indian and tribal

¹⁹⁴ To be clear, I use the term “correct” to characterize the court’s doctrinal analysis—not to make a normative judgment about whether it is right that Congress should have plenary power over immigration (or over Indians) or whether it is right that federal classifications involving aliens (or Indians) should not be subject to strict scrutiny. Instead, my point is that, assuming a congressional plenary power over a group that constitutes a suspect class, the exercise of that power should be reviewed only under a rational-basis standard. Like the congressional plenary power over Indians, the congressional plenary power over immigration remains intensely controversial. *See, e.g.*, Martin, *supra* note 174, at 30 (“It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.”); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 381–82 (2004) (positing that plenary power should not serve as a barrier to constitutional challenges in immigration law); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 36 (2003) (stating that “lawyers and legal scholars . . . have a responsibility to call into question” the issues springing from the government’s plenary power over immigration and Indians); T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 151–81 (2002) (criticizing the plenary power in immigration law); Cleveland, *supra* note 104, at 124–34 (discussing the Supreme Court’s shift from a theory based in the Commerce Clause to one “of inherent power” in order to justify Congress’s exercise of national power over resident aliens); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–19 (2000) (acknowledging that congressional plenary power “has been the subject of much scholarly commentary”); Motomura, *supra* note 178, at 547–48, 600–13 (arguing that protecting rights of immigrants with “subconstitutional” reasons, without having to confront the government’s plenary powers, leads to a series of problems including overbroad, underinclusive, or unpredictable judicial norms); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854–63 (1987) (describing the “baleful influence” of the Court’s decision in *The Chinese Exclusion Case* and the need for constitutional restraints on Congress’s plenary power over immigration, alienage, and naturalization); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 25–29 (1985) (arguing that the doctrine of the *Chinese Exclusion Case* allows “[o]fficial racial discrimination” and should “join the relics of a bygone, unproud era”); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54–58 (1984) (determining that *Plyler v. Doe* was “a fundamental break with classical immigration law’s concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership”); Rosberg, *supra* note 193, at 317 (“[T]he proposition that the federal government has nearly limitless power [to control immigration] is open to serious question on constitutional, historical, and logical grounds.”); *cf.* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 287 (2000) (“If our immigration law is not a kind of ‘laboratory of autocracy’ but is instead simply a part of our constitutional law, the Court should say so.”).

matters.¹⁹⁵ In both situations, the plenary power ultimately derives from the concept of national sovereignty, and in both cases, the plenary power is exclusive and preemptive of state power. In *Diaz*, the Court acknowledged that the federal government cannot exercise its plenary power over aliens without drawing distinctions between aliens and citizens—or even among aliens—that would fail the equal-protection requirement in other contexts.¹⁹⁶ And in *Diaz*, the Court understood that this precludes application of the strict-scrutiny standard and compels application of the rational-basis standard for federal immigration law.¹⁹⁷ Identical reasoning, *mutatis mutandis*, precludes application of the strict-scrutiny standard and compels application of the rational-basis standard for federal Indian law.

That is entirely proper, viewed in terms of how the equal-protection requirement ought to function when the federal government exercises a plenary power of this type. Under its standard approach to equal protection, the Supreme Court applies strict scrutiny whenever government uses one of its general powers—such as the federal government’s power to regulate interstate commerce or a state government’s police power—in a manner that singles out a group for preferential or dispreferential treatment based on a suspect classification, such as race or religion. And under the standard approach, the Court applies rational-basis review whenever government uses one of its general powers to legislate in a manner that singles out a group of individuals for preferential or dispreferential treatment based on something other than a suspect classification.

In either case, the Court begins the equal-protection analysis by defining the universe of individuals potentially reached by the particular governmental power and then looks for improper distinctions within that universe. The federal government’s power to regulate interstate commerce is very broad, and the universe of individuals reached by it effectively includes all persons subject to U.S. jurisdiction. Congress may not, then, use its general power to regulate interstate commerce in a manner that singles out Asian Americans or Roman Catholics for a burden particular to them. It may not, for example, forbid Asian Americans or Roman Catholics from purchasing consumer goods in one state and transporting them to another state. Similarly, a state’s police power is very broad, and the universe of individuals reached by it effectively includes all persons subject to the state’s jurisdiction. A state may not, for example, use its police power to impose a

¹⁹⁵ For immigration, the Court sometimes locates that power in Congress and the president (as the political branches of government) and sometimes just in Congress; for Indians and Indian tribes, the Court usually locates that power only in Congress. But that difference is inconsequential here.

¹⁹⁶ 426 U.S. at 79–80.

¹⁹⁷ *Id.* at 84.

limitation on the number of Asian Americans or Roman Catholics living within any of the state's municipalities.

Thus, in reviewing the exercise of a general governmental power under the equal-protection requirement, the Court's standard approach requires that the government legislate even-handedly as to any suspect class. Non-suspect classifications are permissible and do not trigger the requirement of even-handedness. For example, Congress, in regulating interstate commerce, has established a minimum age for the purchase of products containing nicotine.¹⁹⁸ Those individuals falling under the minimum age are singled out for unfavorable treatment, but the classification is not suspect for equal-protection purposes. Similarly, state legislatures, in regulating public health, prohibit unvaccinated children from attending public schools.¹⁹⁹ Again, there is a legal dispreference imposed on a particular group, but the group is not defined by a suspect classification.

This standard approach to the equal-protection requirement breaks down when it confronts a governmental power that reaches only a particular group that is itself defined by a suspect classification. In those cases, the universe of individuals potentially reached by the governmental power is necessarily limited to the suspect class.²⁰⁰ This is the problem presented by the congressional plenary power over aliens and the congressional plenary power over Indians and Indian tribes. Under more than a century of Supreme Court case law, it is a hard, constitutional fact that Congress may legislate as to aliens, Indians, and Indian tribes in ways that it cannot legislate as to everyone else. But alienage is a suspect classification for equal-protection purposes; so too is the racial component inherent in Indian descent. It simply does not work to require that Congress treat aliens and non-aliens even-handedly when Congress exercises its plenary power over immigration because that plenary power does not reach beyond aliens.²⁰¹ Similarly, it does not work to

¹⁹⁸ Family Smoking Prevention and Tobacco Control Act, § 102, 21 U.S.C. § 301.

¹⁹⁹ See, e.g., N.Y. PUB. HEALTH LAW § 2164(7) (McKinney 2019) ("No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school . . . without . . . acceptable evidence of the child's immunization. . .").

²⁰⁰ Cf. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 500 (2020) ("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.").

²⁰¹ A handful of scholars and federal judges have seen this connection between the congressional plenary power over immigration and the necessity of rational-basis review of federal classifications involving aliens. Victor C. Romero, noting that "as long as Congress acts solely within immigration law, affecting only the entry and deportation of noncitizens, its plenary power ensures that there will be no judicial review of Congressional alienage classifications on equal protection grounds," argues that "[t]his result has some appeal: a sovereignty charged with naturalization powers must make distinctions between citizens and noncitizens in order to create a coherent immigration policy, and, to this end, Congress must

require that Congress treat Indians and non-Indians even-handedly when Congress exercises its plenary power over Indians and Indian tribes because that plenary power does not reach beyond Indians and Indian tribes.

And as the Court has discovered, it is not even workable, for equal-protection purposes, to redefine the universe in those cases to include all individuals potentially reached by the congressional plenary power and then to require even-handedness within that universe. The Court maintains, for example, that the plenary power over immigration includes the power to make distinctions not just between aliens and non-aliens but also among different aliens. Thus, the federal statute upheld by the Court in *Diaz* made some aliens eligible for Medicare (those who had been admitted for permanent residency and who had lived in the U.S. for at least five years) and made all other aliens ineligible for Medicare.²⁰² The same considerations apply to federal Indian law and justify similar results. In exercising its plenary power over Indians and Indian tribes, Congress necessarily makes distinctions among different Indians, different Indian tribes, and the members of different Indian tribes. Those distinctions run from the most basic issues, such as whether to recognize a tribe and whether to recognize certain lands as tribal lands, to very complex issues, such as whether a particular tribe may exercise its retained treaty rights for off-reservation hunting and fishing.²⁰³ Just as there is no equal-protection requirement to treat all aliens the same, so too there is no equal-protection requirement to treat all Indians or all Indian tribes the same.

Faced with the immense difficulties inherent in trying to apply its standard equal-protection approach to the congressional plenary power over immigration, the Supreme Court has determined that the exercise of that power is subject only to rational-basis review. Federal immigration legislation satisfies the equal-protection requirement if the legislation is a reasonable exercise of the congressional plenary power. The Court has pursued a slightly different approach for Indians and Indian tribes, holding in

establish alienage classifications in immigration law.” Romero, *supra* note 193, at 435. Similarly, Howard F. Chang reasons: “To deny that the federal government has the power to discriminate against aliens is to cast doubt on the federal power to exclude aliens. Thus, the Court refuses to apply close scrutiny to discrimination by the federal government against aliens, especially in the context of immigration policy.” Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2112 (1997). A federal district court judge argued that the equal-protection requirement “simply makes no sense in [the immigration] context because drawing distinctions between aliens and citizens is inherent to immigration policy and the conduct of foreign relations.” *United States v. Maru*, 479 F. Supp. 519, 522 (D. Alaska 1979).

²⁰² 426 U.S. at 82–83.

²⁰³ See e.g., COHEN’S HANDBOOK, *supra* note 8, §§ 3.02–3.03 (discussing the primary federal definitions of Indian Law, requirements to be recognized as a tribe or member of a tribe, and application of federal statute based on these distinctions); *id.* at § 18.03 (outlining the allocation of hunting, fishing, and gathering rights on reservations).

Mancari that any “special treatment” of Indians that “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . . will not be disturbed.”²⁰⁴ The better approach would be for the Court to harmonize its equal-protection analysis of the plenary power over Indians and Indian tribes with its equal-protection analysis of the plenary power over immigration. Doing so would put the equal-protection status of federal Indian law on a more secure foundation.

3. The content of rational-basis review under the plenary-power approach

To determine that the congressional plenary power over Indians and Indian tribes requires the application of rational-basis review is, as stated earlier, to establish a forgiving legal standard. Just as strict scrutiny sets an almost impossibly high bar for governmental action, rational-basis review sets a low bar that governmental action rarely fails to clear.²⁰⁵ And the specific review appropriate for federal Indian law would uphold the constitutionality of any federal statute or regulation that represents a reasonable exercise of the plenary power. This has important implications, several of which are developed in greater detail in Part II.

A fuller exposition of rational-basis review under the plenary-power approach requires, at the threshold, a more precise understanding of the plenary power itself. The case law suggests both a broad reading and a narrow reading of the power. Under the broad reading, the plenary power enables Congress to enact almost any legislation concerning Indians and Indian tribes, subject to the general constitutional limits on congressional power such as those set out in the Bill of Rights. This broad reading allows federal legislation without regard to whether the legislation promotes or harms the interests of Indians and Indian tribes. There is considerable support for the broad reading in the Supreme Court’s decisions. Among other notorious examples, the Supreme Court has said that Congress may unilaterally abrogate a treaty with an Indian nation²⁰⁶ and that Congress may take “unrecognized Indian title” to real property without paying just compensation.²⁰⁷ The broad reading of the congressional plenary power includes even the power to renounce the government’s obligation to the Indians and to destroy tribal self-government and tribal sovereignty.

Under the broad reading, federal Indian preferences *and* federal Indian dispreferences satisfy the equal-protection requirement. Valid

²⁰⁴ *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

²⁰⁵ Yoshino, *supra* note 25, at 755–56.

²⁰⁶ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903).

²⁰⁷ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279–82 (1955).

exercise of the plenary power, on this reading, is not conditioned on favorable legislative or regulatory outcomes for Indians or Indian tribes. Superficially, this result appears to be a step back from *Mancari* because *Mancari* says that only laws “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians” qualify for rational-basis review.²⁰⁸ But the Court soon compromised that aspect of *Mancari*. *Antelope* and *Yakima Indian Nation* applied rational-basis review even to statutes that were disadvantageous both to individual Indians and to Indian tribes.

Under the narrow reading, by contrast, the plenary power enables Congress to enact only legislation that protects and promotes the interests of Indians and Indian tribes. There is support for this reading in case law as well, although even the Supreme Court seems to have lost sight of it. The congressional plenary power originated with the federal government’s extinguishment of tribal independence during the eighteenth and nineteenth centuries and with the moral, political, and legal responsibilities that followed from that extinguishment. When the Supreme Court announced the congressional plenary power in *Kagama*, it said that the Indian tribes had become “the wards of the nation” and “communities dependent on the United States.”²⁰⁹ Consequently, the Court held, the “power of the General [*sc.* federal] Government” over the Indians and the Indian tribes was “necessary to their protection.”²¹⁰ At least in general terms, *Kagama* understood the congressional plenary power as necessary to promote and to protect the interests of Indians and Indian tribes. Other plenary-power decisions follow that reasoning.²¹¹

Make no mistake about *Kagama*. The thinking behind the decision and the language used to express that thinking reflect an ugly, patronizing racism that the reader today finds embarrassing and revolting. *Kagama* is permeated with stark assumptions about European-American superiority of

²⁰⁸ *Mancari*, 417 U.S. at 555.

²⁰⁹ 118 U.S. 375, 383–84 (1886) (emphasis omitted).

²¹⁰ *Id.* at 384.

²¹¹ *See, e.g.,* United States v. Sandoval:

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders

231 U.S. 28, 45–46 (1913); *see also id.* at 48 (referring to the plenary power as the congressional power “to enact laws for the benefit and protection of tribal Indians as a dependent people”); *cf.* Newton, *supra* note 103, at 273 (“Some saw *Mancari* as the Court’s signal that it would in the future ‘tame’ the Plenary Power Doctrine of *Kagama* by viewing it as derived from guardianship duties and thus possibly limited to congressional actions benefiting Indians.”).

the type that Rudyard Kipling later would call “The White Man’s Burden.” And the decision takes for granted that the Indians of the late nineteenth century, as “remnants of a race once powerful, now weak and diminished in numbers,” cannot govern or provide for themselves.²¹² As hateful as all that is today, *Kagama* nonetheless suggests that the congressional plenary power is ultimately a power to legislate only in the interests of Indians and Indian tribes—for example, by recognizing tribal sovereignty, by facilitating Indian economic development, and by ensuring the integrity of tribal lands, religions, and culture. On this reading, *Kagama* does not give Congress *carte blanche* to undermine or destroy the well-being of Indians and Indian tribes—for example, by abrogating tribal sovereignty, by taking tribal lands without compensation, or by singling out Indians for unique burdens. What counts as promoting the interests of Indians and Indian tribes has changed since *Kagama* was decided in 1886, but on this reading, it remains true that the congressional plenary power is a power to help but not to hurt.²¹³

The narrow reading of the congressional plenary power implies that a federal preference for Indians and Indian tribes generally satisfies the equal-protection requirement but that a federal dispreference for Indians and Indian tribes may or may not satisfy the equal-protection requirement, depending on whether the dispreference in fact furthers Indian or tribal interests. The results of that analysis are not necessarily self-evident. Many Indian dispreferences cannot be said to further the interests of Indians or Indian tribes, but in some cases, the analysis will be close enough for reasonable minds to differ. Protecting tribal sovereignty, for example, may mean upholding actions of tribal governments that disadvantage individual tribal members.²¹⁴

On either the broad or the narrow reading of the congressional plenary power, the rational-basis standard would not apply to many state laws concerning Indians and Indian tribes. Except for state laws resting on a delegation of legislative authority from Congress under its plenary power, state Indian laws generally would be subject to strict scrutiny. This is the result that should follow as well from *Mancari*, although some sloppiness by the lower courts at times has resulted in state laws being reviewed under the

²¹² *Kagama*, 118 U.S. at 383–84.

²¹³ In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), which marks the high point of judicial deference to the congressional plenary power over Indians and Indian tribes, the Supreme Court again justified the plenary power by reference to the Indians’ “dependency” on the federal government and the congressional responsibility for “the care and protection of the Indians.” *Id.* at 564. “Congress,” the Court said, has “a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests . . .” *Id.* at 565. The outcome in *Lone Wolf* certainly was not benevolent. In that case, the Supreme Court held that Congress could unilaterally abrogate a prior treaty and force allotment on the Indian tribes over their objections. *Id.* at 566–67.

²¹⁴ See *infra* Part II.A.

rational-basis standard.²¹⁵ Application of strict scrutiny to state laws will have mixed results for Indians and Indian tribes. Some state laws are unfavorable to Indians and Indian tribes, and the strict-scrutiny standard will provide an important means for defeating them. But some state laws are favorable to Indians and Indian tribes, such as laws recognizing Indian tribes that are not recognized by the federal government.²¹⁶ Those laws would remain vulnerable under a strict-scrutiny standard.

Finally, the plenary-power approach—again, on either the broad or the narrow reading of the plenary power—does not perpetuate the transparent falsehood, originating with *Mancari*, that the distinctions drawn by federal Indian law are “political rather than racial in nature.” As long as the “political rather than racial in nature” rationale anchors the equal-protection analysis of federal Indian law, federal judges with good intentions will pursue the hopeless exercise of trying to determine whether particular federal laws belong on the “political” or the “racial” side of the ledger,²¹⁷ and federal judges with other intentions will see an opportunity to bring down the whole of federal Indian law by pointing out that the classifications inevitably incorporate race. Reformulating rational-basis review as a function of the congressional plenary power over Indians and Indian tribes avoids that problem.

II. APPLYING RATIONAL-BASIS REVIEW TO INDIAN LAW

Using the congressional plenary power over Indians and Indian tribes as the starting point for equal-protection analysis would validate much of federal Indian law; the results for state laws would be mixed. Federal Indian preferences would present the easiest cases because, under both the broad and the narrow readings of the congressional plenary power, the underlying classifications would be subject to rational-basis review. By contrast, federal Indian dispreferences would be more likely to draw strict scrutiny under the narrow reading of the plenary power. To complicate matters, certain federal Indian laws act as both a preference and a dispreference. For example, the requirement in *Fisher* that child-custody matters involving tribal members be

²¹⁵ See, e.g., *Livingston v. Ewing*, 455 F. Supp. 825, 830 (D.N.M. 1978) (using rational-basis review for a state museum policy providing an Indian preference).

²¹⁶ COHEN’S HANDBOOK, *supra* note 8, at § 3.02.

²¹⁷ See, e.g., Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. U. L. REV. 1041, 1043 (2012) (explaining that courts determine whether a classification is political or racial and then base the corresponding level of scrutiny on this distinction); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68, 1026 (2011) (arguing for a framework that recognizes that the “political and racial elements of Indianness are inseparable” because “[n]either the problems encountered by Indian people nor the solutions to those problems can be adequately addressed without attention to both” elements).

litigated in tribal court operated to the advantage of the tribe and to the disadvantage of the specific member who wanted to litigate in state court. Similarly, the exclusion of the Kansas Delawares from the zero-sum federal distribution scheme in *Delaware Tribal Business Committee* operated to the disadvantage of the Kansas Delawares and the corresponding advantage of the Cherokee Delawares and the Absentee Delawares. With those difficulties in mind, this Part shows how the plenary-power approach would play out for specific federal and state laws involving Indian classifications, some of which have been or currently are the targets of equal-protection challenges in the federal courts.

A. Federal Indian Preferences

A number of federal statutes and regulations confer preferential treatment on Indians and Indian tribes (or, at least, they are perceived to confer preferential treatment on Indians and Indian tribes). As long as *Mancari* remains good law and as long as the Supreme Court continues to apply *Mancari* expansively, these statutes and regulations will satisfy the equal-protection requirement. Similar outcomes follow from the plenary-power approach, on both the broad and the narrow readings of the plenary power.

Consider first the employment policy at issue in *Mancari*. In any case where both an Indian and a non-Indian were under consideration for promotion within the BIA, the agency gave preference to the Indian.²¹⁸ The policy specifically defined the term “Indian” to include only an individual who was a member of a federally recognized Indian tribe and who had “one-fourth or more degree Indian blood.”²¹⁹ It thus incorporated Indian descent twice over: directly, in the requirement of having “one-fourth or more degree Indian blood” and indirectly, insofar as most (or even all) Indian tribes require Indian descent as a condition of membership. But whatever difficulties the Indian-descent component of the employment policy may present under the standard approach to equal-protection analysis, those concerns recede under the plenary-power approach. The advancement of Indians within the BIA represents a reasonable exercise of the congressional plenary power over Indians and Indian tribes, which is dispositive in favor of the constitutionality of the preference.

Next, consider the Indian Child Welfare Act of 1978, commonly known as “ICWA.”²²⁰ Congress enacted ICWA after determining that state child-protection agencies routinely removed Indian children from their families at much higher rates than non-Indian children and that, after

²¹⁸ *Morton v. Mancari*, 417 U.S. 535, 538 (1974).

²¹⁹ *Id.* at 553 n.24.

²²⁰ Pub. L. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963).

removal, the agencies and the state courts frequently placed Indian children in foster care or adoption with non-Indian families.²²¹ These practices presented the obvious and serious concern of undermining Indian familial and tribal integrity. Consequently, ICWA overrides state child-welfare and child-custody laws in a several respects. It establishes exclusive tribal-court jurisdiction over child-welfare and child-custody proceedings involving an Indian child who is resident or domiciled on the tribe's reservation,²²² it provides for concurrent state and tribal jurisdiction over child-welfare and child-custody proceedings involving any other Indian child,²²³ and it gives the Indian child's custodian and the tribe a right of intervention in any such proceedings in state court.²²⁴ Perhaps most controversially, ICWA creates preferences in adoption proceedings for placement of an Indian child with a member of the child's extended family, another member of the child's tribe, or another Indian family.²²⁵ These preferences modify the traditional state-law approach to custody determinations. To the extent that a tribal member who is the biological parent of an Indian child prefers the traditional state-law approach, ICWA may work to the disadvantage of the tribal member in that case, even though it generally works to the advantage of tribes.²²⁶

As demonstrated by *Brackeen v. Zinke*,²²⁷ the recent federal district court decision declaring ICWA unconstitutional, the *Mancari* approach is problematic here. ICWA defines the term "Indian child" as an unmarried individual under the age of eighteen who is "a member of an Indian tribe" or who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."²²⁸ In the view of some, including the federal judge who decided *Brackeen*, the second part of this definition removes the classification of "Indian child" from the *Mancari* "political rather than racial in nature" rationale. After all, the Supreme Court in *Mancari* determined that a classification turning on both membership in an Indian tribe and Indian descent was a purely political classification; but under ICWA, the *Brackeen* judge said, the classification turns on either membership in an Indian tribe or on Indian

²²¹ 25 U.S.C. § 1901 (statement of Congressional findings antecedent to Indian Child Welfare Act).

²²² *Id.* § 1911(a).

²²³ *Id.* § 1911(b).

²²⁴ *Id.* § 1911(c).

²²⁵ *Id.* § 1915(a).

²²⁶ In *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), for example, Indian parents had attempted to avoid the application of ICWA so that adoption would take place under state law rather than tribal law.

²²⁷ See generally *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (holding that portions of ICWA violate the equal-protection component of the Fifth Amendment).

²²⁸ 25 U.S.C. § 1903(4).

descent alone.²²⁹ Thus, the judge reasoned, ICWA falls outside *Mancari* and, under the strict-scrutiny standard, fails the equal-protection requirement.²³⁰

To be sure, there are sound—even compelling—criticisms of the district court’s technical analysis, and it may well be that the full Fifth Circuit or the Supreme Court will hold that the requirements of eligibility for tribal membership and biological descent from a tribal member are sufficient to bring ICWA within the “political rather than racial in nature” rationale. But the plenary-power approach avoids that problem entirely. Under the plenary-power approach, the relevant question—the only question—for determining the correct standard of review is whether ICWA represents a reasonable exercise of the congressional plenary power over Indians and Indian tribes. The answer is self-evident. Child welfare and child custody are matters of traditional regulation under the state police power. But the plenary power confers on Congress a general police power with respect to Indians and Indian tribes, and ICWA rests on that plenary power. Once again, this is dispositive.

Federal law provides many other preferences for Indians and Indian tribes—some of them politically controversial but all of them constitutionally valid when analyzed under the plenary-power approach. The exemption from state taxation challenged in *Moe* and the exercise of reserved fishing rights challenged in *Washington State Commercial Passenger Fishing Vessel* both satisfy the equal-protection requirement under the plenary-power approach.²³¹ The Indian Gaming Regulatory Act, commonly known as “IGRA,”²³² generally requires states to enter into agreements with Indian tribes to allow high-stakes gaming enterprises under tribal ownership.²³³ IGRA has generated fierce opposition, not least from non-Indian gaming interests. The Reindeer Industry Act of 1937 generally prohibits private ownership of reindeer but allows certain Alaska Natives to maintain reindeer herds,²³⁴ a rule that the Ninth Circuit found problematic, even under

²²⁹ *Brackeen*, 338 F. Supp. 3d at 536.

²³⁰ The district court held that “[b]y deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, ICWA’s jurisdictional definition of ‘Indian children’ uses ancestry as a proxy for race and therefore ‘must be analyzed by a reviewing court under strict scrutiny.’” 338 F. Supp. 3d at 533–34 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (emphasis in original).

²³¹ See *supra* notes 31, 35 and accompanying text. Note that the exemption from state taxation is a function not of affirmative federal legislation or regulation but of the inherent inability of state governments to regulate Indians within Indian country. The reserved fishing rights are a function of a treaty between the federal government and the relevant tribe or tribes.

²³² Pub. L. 100-497, 102 Stat. 2467 (codified as amended in scattered sections of 18 and 25 U.S.C.)

²³³ 25 U.S.C. § 2710.

²³⁴ Pub. L. 75-413, 50 Stat. 900.

Mancari.²³⁵ Similarly, the Bald and Golden Eagle Protection Act generally prohibits any person from taking, possessing, or transporting bald or golden eagles, including the feathers of bald or golden eagles,²³⁶ but the statute includes an exception for “the religious purposes of Indian tribes.”²³⁷ And Congress has enacted numerous programs to provide education,²³⁸ health care,²³⁹ housing,²⁴⁰ and other social services²⁴¹ to Indians and members of Indian tribes. For all these federal preferences, the critical question under the plenary-power approach is whether the underlying statute represents a reasonable exercise of the congressional plenary power over Indians and Indian tribes. Under that approach, they all satisfy the equal-protection requirement.

B. Federal Indian Dispreferences

Those who incline to think that federal Indian law invariably gives preferential treatment to Indians and Indian tribes should think hard about both the past and the present. Through the long history of the Republic, federal Indian policy has often been brutal and inhumane. The current policy, in place for the last half century, is one of tribal self-determination, which encourages and supports the formation and maintenance of institutions for tribal self-government and the development of tribal economies.²⁴² But previous policies were far less benign; many were aimed at the eradication of tribal sovereignty and the destruction of tribal identity and tribal culture.

Beginning with the presidency of James Madison in the early nineteenth century, the federal government implemented a policy of removal—the forced migration of eastern tribes to lands west of the Mississippi River.²⁴³ Then, as non-Indian settlement expanded westward, the federal government changed to a reservation policy, under which Indian tribes generally were confined to reservations and “groomed for assimilation” into the non-Indian mainstream.²⁴⁴ In the late nineteenth century, the ground shifted again when the federal government implemented an allotment policy under which tribal lands were parceled out to individual Indians and their families, with “surplus” tribal lands made available for non-Indian

²³⁵ See *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997) (stating that the government’s interpretation of the Reindeer Industry Act raised a “grave” equal protection question).

²³⁶ 54 Stat. 250 (codified at 16 U.S.C. § 668).

²³⁷ 16 U.S.C. § 668a.

²³⁸ COHEN’S HANDBOOK, *supra* note 8, § 22.03.

²³⁹ *Id.* § 22.04.

²⁴⁰ *Id.* § 22.05.

²⁴¹ *Id.* § 22.06.

²⁴² *Id.* § 1.07; JOHN R. WUNDER, “RETAINED BY THE PEOPLE:” A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 159–63 (1994).

²⁴³ COHEN’S HANDBOOK, *supra* note 8, § 1.03.

²⁴⁴ *Id.*

settlement, resulting in an astounding decrease in the tribal land base.²⁴⁵ Congress renounced the allotment policy in the 1930s as part of a broader federal effort to rebuild tribal institutions and tribal culture.²⁴⁶ But after the Second World War, Congress initiated a policy of termination—an unprecedented effort to eradicate tribal sovereignty, tribal culture, and tribal institutions by discontinuing the government-to-government relationships between the U.S. and designated tribes.²⁴⁷ The destructive practices of the termination era continued until Congress adopted the current policy of self-determination in the late 1960s and the early 1970s.

For the last 135 years, the assumed constitutional authority for these widely varied policies, including those most inimical to Indians and Indian tribes, has been the congressional plenary power. Consistent with the broad reading of that power, the thinking has been that nothing requires Congress to use the power to benefit Indians and Indian tribes; and in any case, even some of the harsher policies, such as forced assimilation, were thought by contemporaries to be in the long-term interests of individual Indians (although not of the tribes). The narrow reading of the power, by contrast, gives Congress expansive authority over Indians and Indian tribes only to protect and promote the interests of Indians and Indian tribes. That, in turn, requires greater discernment about the underlying purposes and effects of sometimes ambiguous federal legislation.

For example, the Indian Civil Rights Act of 1968 imposes many (but not all) of the provisions of the Bill of Rights and the Fourteenth Amendment as constraints on tribal-governmental action.²⁴⁸ The legislation is unfavorable to Indian tribes. It represents an unwanted federal imposition of limitations on tribal governments that Congress passed over the objections of the Indian lobby.²⁴⁹ But the Indian Civil Rights Act is favorable to individual Indians who are in a position to invoke its protections, such as the rights of free speech and due process, against tribal governments. On the broad reading of the plenary power, the favorable and unfavorable implications of the legislation are irrelevant; the legislation is a reasonable exercise of the congressional plenary power either way. On the narrow reading, the determination becomes somewhat closer, although the underlying congressional purpose of protecting individual Indians' civil rights should control the result.

Consider other Indian dispreferences. The rule in *Fisher* requiring a member of an Indian tribe to litigate a child-custody proceeding in tribal court was favorable to Indian tribes but unfavorable to any individual Indian who

²⁴⁵ *Id.* § 1.04.

²⁴⁶ *Id.* § 1.05; WUNDER, *supra* note 242, at 63–71.

²⁴⁷ COHEN'S HANDBOOK, *supra* note 8, § 1.06.

²⁴⁸ Pub. L. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1301–1304).

²⁴⁹ PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 169–70 (1991).

preferred litigation in state court. The Supreme Court, citing *Mancari*'s "political rather than racial in nature" rationale and its "unique obligation" rationale, rejected the equal-protection challenge to the jurisdictional rule.²⁵⁰ The plenary-power approach produces the same outcome in *Fisher* on the narrow reading of the plenary power. The general purpose of exclusive jurisdiction for the tribal court was the promotion of tribal self-government. It therefore represents a legitimate—indeed, a paradigmatic—exercise of the congressional plenary power over Indians and Indian tribes, even on the narrow reading. And the broad reading of course legitimates the rule of exclusive tribal-court jurisdiction, just as the broad reading legitimates most or all federal Indian legislation.

The application of the Major Crimes Act to the Indian defendant in *Antelope* was plainly disadvantageous. The defendant was convicted of felony murder even though he could not have been charged with felony murder if he had been a non-Indian defendant tried under state law.²⁵¹ Invoking the "political rather than racial in nature" rationale, the Supreme Court rejected the defendant's equal-protection challenge. Under the plenary-power approach, the result is the same under the broad reading of the plenary power but different under the narrow reading of that power. The general purpose of the Major Crimes Act was not to protect or to promote the interests of Indians and Indian tribes, much less of individual Indians. Instead, the legislation, which Congress passed because of dissatisfaction with how tribal law addressed crimes committed by Indians against Indians, was part of a federal scheme to strip Indian tribes of the authority to prosecute and to punish felonies. On the narrow reading of the congressional plenary power, then, the Major Crimes Act (at least as applied to the defendant in *Antelope*) is not a reasonable exercise of the plenary power and does not shield the underlying classification from strict scrutiny.

There is an important point to note here. Some advocates of tribal interests understandably may find it distressing that the plenary-power approach subjects some federal Indian dispreferences to rational-basis review. That arguably is a step backwards from *Mancari*, which purports to apply rational-basis review only to federal legislation and regulation furthering the federal government's "unique obligation toward the Indians."²⁵² But in fact, the law has already moved past that point. The Court's decisions in *Antelope* and *Yakima Indian Nation* ignored the "unique obligation" rationale when reviewing challenges to federal Indian dispreferences. More generally, the Court has selectively exploited the "political rather than racial in nature" rationale and the "unique obligation"

²⁵⁰ *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390–91 (1976).

²⁵¹ *United States v. Antelope*, 430 U.S. 641, 644 (1977).

²⁵² *Morton v. Mancari*, 417 U.S. 535, 536 (1974).

rationale to reject equal-protection challenges to all federal Indian preferences and dispreferences. The plenary-power approach, on the broad reading of the power, yields similar outcomes. By contrast, on the narrow reading of the power, the plenary-power approach at least subjects federal Indian dispreferences to strict scrutiny when those dispreferences do not protect or promote the interests of either individual Indians or Indian tribes. This reclaims some of the ground given up by *Antelope* and *Yakima Indian Nation*.²⁵³

Finally, the scope of the plenary-power approach should not be misunderstood. The plenary-power approach does not have unlimited application. It is specific to the equal-protection requirement, and it does not insulate federal Indian law from the other provisions of the Bill of Rights. The plenary-power approach derives from the need to reconcile the equal-protection requirement, which generally *forbids* drawing legal distinctions based on a suspect classification, with the congressional plenary power over Indians and Indian tribes, which generally *requires* drawing legal distinctions based on a suspect classification. Other rights provisions in the Constitution present no such difficulty. Thus, for example, federal takings for public use generally trigger the Fifth Amendment requirement to pay just compensation, whether the property taken is Indian or non-Indian.²⁵⁴

C. State Indian Preferences and Dispreferences

At least in theory, the states have limited authority over Indians and Indian tribes both because the tribes retain inherent sovereignty and because the Supreme Court treats the congressional plenary power as preempting state power.²⁵⁵ The Court's foundational decision in *Worcester v. Georgia*, which rejected Georgia's attempt to regulate the activities of non-Indians on Cherokee lands, stated firmly that, within Indian country, the "laws of Georgia can have no force."²⁵⁶ But state laws nonetheless reach Indians and Indian tribes in any of several ways. First, state laws of general applicability cover Indians living, working, or otherwise present outside Indian country. Second, Congress sometimes delegates federal power over Indians and Indian

²⁵³ Cf. Johnson & Crystal, *supra* note 42, at 605–06 (1979) (asserting and describing how the *Antelope* "opinion may be said to expand the *Mancari* rule").

²⁵⁴ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980). Even there, however, the Supreme Court has found the need to allow some accommodation with the congressional plenary power. Recognizing that the plenary power allows Congress considerable latitude in the management of Indian property, the Court distinguishes between compensable takings and non-compensable "act[s] of congressional guardianship over tribal property" by inquiring whether Congress makes a "good faith effort to give the Indians the full value of the land." *Id.* at 389 (internal quotation omitted).

²⁵⁵ COHEN'S HANDBOOK, *supra* note 8, § 6.01.

²⁵⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

tribes to the states. Third, state laws specifically directed at Indians or Indian tribes sometimes regulate (or attempt to regulate) Indians and Indian tribes despite the broad preemptive effect of federal authority. The equal-protection results under the plenary-power approach differ in these different contexts.

Consider first state laws of general applicability that cover Indians living, working, or otherwise present outside Indian country. An American Indian, whether or not a member of a recognized tribe, is a citizen of the United States and a resident of a particular state to the same extent and under the same terms as a non-Indian. Thus, a member of the Cherokee Nation of Oklahoma who lives and works in Manhattan is both a citizen of the U.S. and a resident of New York, and she is subject to New York law just as a non-Indian in New York is subject to New York law. Application of the equal-protection requirement is straightforward here. The Equal Protection Clause applies to New York, just as it applies to every other state, and it overrides any legislation or regulation of New York or of New York's counties and municipalities that violates its terms.

State laws of general applicability are not the product of the congressional plenary power over Indians and Indian tribes, and so they fall outside the plenary-power approach. Instead, such laws remain subject to the Supreme Court's standard approach under the Equal Protection Clause, with rational-basis review for laws that do not use a suspect classification. For example, a New York state income-tax statute applying a graduated rate schedule to all New York taxpayers would not differentiate between the citizen of the Cherokee Nation living and working in Manhattan and any non-Indian living and working in Manhattan. It would be subject to rational-basis review, and it would not violate the Equal Protection Clause. But a New York state income-tax statute applying higher tax rates to New York taxpayers of the American Indian race would trigger strict scrutiny under the Equal Protection Clause and surely would be unconstitutional—just as would a New York state income-tax statute applying higher tax rates to Asian Americans or to Roman Catholics. No special analysis—no departure from the standard approach to the equal-protection requirement—would be necessary or even appropriate to reach those results.

Next are state laws applicable to Indians and Indian tribes under a delegation of federal authority. Although the states generally may not regulate Indians or Indian tribes for matters within Indian country, Congress sometimes delegates its regulatory authority to the states. The preeminent example is a federal statute, known as "Public Law 280," enacted by Congress in 1953.²⁵⁷ Public Law 280, which has been widely criticized, generally transfers federal criminal and civil jurisdiction within Indian country to several designated

²⁵⁷ Pub. L. No. 83-280, 67 Stat. 588 (codified in scattered sections of 18 and 28 U.S.C.).

states.²⁵⁸ Setting aside specific carve-outs by Congress and retrocessions by the states, the following sixteen states, sometimes referred to as the “Public Law 280 states,” today have full or partial criminal and civil jurisdiction over Indian country within their borders: Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wisconsin.²⁵⁹

In exercising this delegated federal power, a Public Law 280 state may draw distinctions and make classifications involving Indians and Indian tribes. For example, the Revised Code of Washington, in accepting partial civil jurisdiction over the Indian reservations within the state, provides that “[a]ny tribal ordinance or custom . . . adopted by an Indian tribe, band, or community . . . shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action”²⁶⁰ The code also provides for the retrocession to the federal government of criminal jurisdiction for seven Indian reservations (the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, Tulalip, and Colville Confederated Tribes reservations) but not for any of the twenty-two other Indian reservations within the state.²⁶¹ Under the Supreme Court’s standard approach to the equal-protection requirement, these distinctions and classifications are problematic because they directly or indirectly incorporate Indian descent.

Using the plenary-power approach, the equal-protection analysis of state laws enacted under a delegation of the congressional plenary power follows the equal-protection analysis of federal Indian laws. Thus, if such a statute or regulation represents a reasonable exercise of the plenary power, it satisfies the equal-protection requirement. This is effectively the same result that the Supreme Court has reached under *Mancari*. In *Yakima Indian Nation*, the Court used *Mancari* to reject an equal-protection challenge brought by Indian tribes to the State of Washington’s assumption of partial civil and criminal jurisdiction under Public Law 280.²⁶²

Much more problematic would be state laws involving Indians or Indian tribes that are not enacted pursuant to a delegation of the congressional plenary power. Consider, for example, a hypothetical state statute denying Indians and tribal members licenses for non-treaty fishing. During the 1960s

²⁵⁸ 18 U.S.C. § 1162. The original transfers of jurisdiction were made either unilaterally by the federal government or by agreement between the federal government and the relevant state government—but without the consent of the affected tribes. However, the Indian Civil Rights Act of 1968 provides that no additional jurisdictional transfers may be made without tribal consent—and, in fact, no additional transfers have been made since. 25 U.S.C. § 1326.

²⁵⁹ Carole Goldberg, *Questions and Answers about Public Law 280*, TRIBAL LAW AND POLICY INSTITUTE, <http://www.tribal-institute.org/articles/goldberg.htm> [https://perma.cc/9KDB-6D2H].

²⁶⁰ WASH. REV. CODE § 37.12.070 (2020).

²⁶¹ WASH. REV. CODE § 37.12.100 (2020).

²⁶² *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979).

and the 1970s, attempts by tribal members in the State of Washington to exercise their treaty-based, off-reservation fishing rights provoked a vicious backlash among non-Indian fishing interests. The conflict culminated in a decision by a federal district court judge to enforce the Indians' right to fish in what the treaties call the tribes' "usual and accustomed" fishing places.²⁶³ The district court's ruling ultimately was upheld by the Supreme Court,²⁶⁴ and various sub-proceedings in the case continue to the present.²⁶⁵ It is said by some to be the longest-running civil matter in the history of the federal courts.

Suppose that the State of Washington—which resisted the district court's ruling with all the tenacity and ugliness of the southern states in resisting desegregation during the 1950s and the 1960s²⁶⁶—had passed a statute categorically denying commercial and recreational fishing licenses to any Indian outside the "usual and accustomed" fishing areas covered by the treaties. That hypothetical statute would have differentiated between Indians and non-Indians, thereby incorporating the suspect classification of race. And the hypothetical statute would not have been enacted pursuant to a delegation of the congressional plenary power over Indians and Indian tribes. The statute, therefore, would have been reviewed under the Supreme Court's standard approach to the Equal Protection Clause; it would have triggered strict scrutiny, and it surely would have been unconstitutional.²⁶⁷

Note that the plenary-power approach would not protect state laws giving preferential or dispreferential treatment to Indians or Indian tribes from strict scrutiny under the equal-protection requirement. The lower level of scrutiny turns precisely on the plenary power over Indians and Indian tribes, and that power is an attribute of the federal government rather than of the states. This arguably represents a departure of sorts from the case law under *Mancari*. Although a few federal courts have held that the *Mancari* framework does not apply to state statutes not enacted under a delegation of

²⁶³ *United States v. Washington*, 384 F. Supp. 312, 333 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

²⁶⁴ *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

²⁶⁵ *See, e.g., Washington v. United States*, 138 S. Ct. 1832, 1832 (2018) (per curiam) (affirming judgment "by an equally divided court" in on-going sub-proceeding case).

²⁶⁶ *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123, 1126 (9th Cir. 1978) ("Agencies of the State of Washington and various of its constituencies continue to attack the judgment in *United States v. Washington* The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.").

²⁶⁷ *See* COHEN'S HANDBOOK, *supra* note 8, § 14.03 ("Most states at one time or another have enacted particular laws treating Indians as a distinct class. When these are based simply on discrimination against Indians unrelated to the distinct status of tribes, they are invalid under the Fourteenth and Fifteenth Amendments and the statutes enforcing them.").

the congressional plenary power,²⁶⁸ some have held otherwise, including the Fifth Circuit Court of Appeals.²⁶⁹

III. OTHER RESPONSES TO THE EQUAL-PROTECTION CHALLENGE

Scholars writing about federal Indian law have offered a number of responses to the equal-protection challenge. These range from reiterating and defending the basic reasoning of *Mancari* (usually with modifications) to arguing that the equal-protection requirement categorically does not apply to classifications involving Indians or Indian tribes. Like the plenary-power approach, these responses generally defend the constitutionality of federal Indian law, and like the plenary-power approach, they generally are not necessary if the Supreme Court respects the *Mancari* line of cases. In my view, the plenary-power approach presents the best option for persuading the Supreme Court to reject the equal-protection challenge to federal Indian law if the Court does not adhere to *Mancari*. But there is considerable merit in many of the other thoughtful approaches developed by Indian law scholars. The purpose of this part is to situate the plenary-power approach in the relevant academic literature and in doing so, to note specific points on which some of the other responses may not be fully persuasive or may not represent the best approach to defending federal Indian law.

No previous work has considered the full implications of the congressional plenary power for the equal-protection requirement. But there have been a few references by Indian law scholars to the equal-protection deference that the Supreme Court gives to federal immigration law. Philip Frickey, writing shortly after *Adarand*, suggests that “in the field of immigration law and alienage regulation, in which the Court has accorded Congress a plenary power, the Court will be reluctant to upset longstanding

²⁶⁸ See, e.g., *Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 936–42 (D. Alaska 1999) (invalidating local government employment preference for Alaska Natives); *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1529–1531 (D.N.M. 1990) (invalidating city ordinance allowing only tribal Indians to sell wares within a specified city district).

²⁶⁹ See, e.g., *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1214–16 (5th Cir. 1991) (upholding an exemption under Texas law for Native American Church use of peyote in religious ceremonies). There is a cogent argument that *Mancari* applies to state-law classifications involving Indians and Indian tribes. The “political rather than racial in nature” rationale of *Mancari* does not depend, as an analytic matter, on what government makes the classification. If a federal classification involving Indians is “political rather than racial in nature,” so too is a state classification involving Indians. See, e.g., Williams, *Indians as Peoples*, *supra* note 125, at 865 (1991) (arguing that states should be able to use the “Indian” classification in the same manner as the federal government). Although the “unique obligations” rationale does not apply in the case of state laws, the Supreme Court has rejected equal-protection challenges to federal Indian laws on the basis of the “political rather than racial in nature” rationale alone, as in *Antelope* and *Yakima Indian Nation*.

arrangements, even though they might arguably involve some discriminatory element.”²⁷⁰ Frickey then identifies the connection between federal immigration law and federal Indian law:

Federal Indian law is, of course, also a field in which the Court has long accorded Congress plenary power. Indeed, in my judgment, it is far from a coincidence that plenary power exists in both immigration law and federal Indian law: there are parallel reasons for plenary power in both. Might this not leave *Mancari* good law despite its tension with *Adarand*? And if judicial deference remains the norm in federal Indian law, might not the courts defer to federal policies toward Indians even if . . . they do not fit within the four corners of *Mancari*?²⁷¹

But after drawing the analogy and provocatively asking about its equal-protection implications, Frickey pursues the point no further.

Similarly, an outstanding *amicus curiae* brief in *Brackeen*, written by Sarah Krakoff and Matthew L.M. Fletcher and filed on behalf of more than a dozen other prominent Indian-law scholars, argues that the Court’s treatment of the congressional plenary power over immigration policy under the equal-protection requirement justifies corresponding equal-protection deference for federal Indian law:

The [Supreme] Court’s approach to Congressional classifications in the Indian law context is similar to other areas where Congress’s lawmaking authority is broad or exclusive. In immigration law, Congress has “plenary power to make rules” for the admission and exclusion of aliens. . . . Courts reviewing equal protection challenges to immigration classifications therefore only inquire whether Congress had a “facially legitimate and bona fide reason.” . . . Similarly, congressional classifications rooted in the Constitution’s District and Territories Clauses are subject only to rational basis review. . . . As these cases reflect, there is nothing unusual in affording Congress leeway in areas where the Constitution has delegated broad and exclusive authority to the legislative branch.²⁷²

But as with Frickey’s brief reference to the congressional plenary power over immigration policy, the *amicus curiae* brief does not examine the matter further. That of course is fully appropriate for an argument that a lower

²⁷⁰ Frickey, *Adjudication and Its Discontents*, *supra* note 103, at 1766.

²⁷¹ *Id.*

²⁷² Brief of Indian Law Scholars as *Amici Curiae* in Support of Defendants at 15–16, *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019) (No. 18-11479) (internal citations omitted).

federal court should respect the Supreme Court's decision in *Mancari*, but it leaves the plenary-power approach unexplored and undeveloped.²⁷³

A. Responses within the Mancari Framework

Several academic responses aim to justify or to rehabilitate *Mancari*. In a characteristically insightful article, Matthew L.M. Fletcher undertakes “to marry the holding in cases like *Morton v. Mancari* to the text and structure of the Constitution.”²⁷⁴ Fletcher says that “[i]t is the settled law of the land that when Congress legislates to fulfill its trust relationship with Indian tribes, Congress is entitled to significant deference,”²⁷⁵ a proposition that he calls the “political classification doctrine.”²⁷⁶ He reasons that, under the Indian Commerce Clause of Article I,²⁷⁷ the Indians Not Taxed Clause of the Fourteenth Amendment,²⁷⁸ and other constitutional provisions,²⁷⁹ Congress “first and foremost as a political matter decides which persons are Indians, and [Congress] must do so in deference to tribal membership or citizenship criteria.”²⁸⁰ Similarly, he says, Congress and the executive branch share constitutional authority for deciding “which entities constitute ‘Indian tribes.’”²⁸¹

Fletcher argues that because the Constitution assigns these determinations to the political branches, “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.”²⁸² More specifically, Fletcher notes that, like the decision whether to recognize a foreign state, the determination of tribal status has long been regarded as a political question for justiciability purposes.²⁸³ The

²⁷³ In an earlier article, Krakoff, one of the authors of the brief, suggests that “*Mancari* has . . . become an extension of Congress’s plenary power over Indian affairs” Krakoff, *supra* note 217, at 1059. And with skepticism, David Williams notes that the Supreme Court “could hold that the equal protection clause is not incorporated against the federal government when it comes to Indian tribes” so that “Indians would be like aliens: the equal protection clause [would] involve[] one standard for the central government and another for the states.” Williams, *Indians as Peoples*, *supra* note 125, at 810.

²⁷⁴ Fletcher, *supra* note 200, at 504.

²⁷⁵ *Id.* at 500.

²⁷⁶ *Id.* Although other scholars use the term “political classification doctrine” to refer only to the “political rather than racial in nature” rationale of *Mancari*, Fletcher appears to use it to refer both to that rationale and the “unique obligation” rationale collectively.

²⁷⁷ U.S. CONST., art. I, § 8, cl. 3.

²⁷⁸ U.S. CONST., XIV amend., § 2.

²⁷⁹ Fletcher, *supra* note 200, at 500, 506.

²⁸⁰ *Id.* at 504.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 504–05.

Supreme Court effectively said as much in *United States v. Sandoval*,²⁸⁴ and it expressly said so in *Baker v. Carr*.²⁸⁵ Fletcher argues that the deference called for by *Mancari* is analogous to that called for by the political-question doctrine and that the federal courts should treat determinations about Indian status, even those made solely by reference to race or ancestry, as all but dispositive.²⁸⁶ In his view, the only role for the federal courts here is to ensure that the classifications involving Indians and Indian tribes made by the political branches are “rationally related to the duty of protection owed by the United States to Indians and Indian tribes.”²⁸⁷

Fletcher is one of the leading contemporary thinkers about federal Indian law, and his effort to put *Mancari* on a more solid constitutional foundation deserves close attention from the federal courts. But one may still examine his argument to see whether any questions arise. Fletcher correctly maintains that in the first instance, the Constitution allocates the recognition of Indian tribes and determinations of tribal and Indian status to the legislative and executive branches.²⁸⁸ That much is clear, and that much is consistent with settled law. But the constitutional allocation of a particular function to Congress or to the president (or to Congress and the president together) does not necessarily make the exercise of that function unreviewable by the federal courts, and it does not necessarily imply that the federal courts must review the exercise of that function under a deferential standard. As John Harrison notes: “All of Congress’s powers are committed to it by the text [of the Constitution], yet most exercises of those powers do not give rise to political questions.”²⁸⁹

What, then, is special about determinations of tribal status and Indian status that entitles those determinations to what Fletcher calls “a very deferential standard of review from Article III courts”?²⁹⁰ Determinations about tribal status are easy; according to the Supreme Court, recognition of Indian tribes is covered by the political-question doctrine.²⁹¹ But Fletcher

²⁸⁴ *United States v. Sandoval*, 231 U.S. 28, 47 (1913).

²⁸⁵ *Baker v. Carr*, 369 U.S. 186, 215–17 (1962); see John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 461 (2017) (noting that recognition of tribal status is a political question). As with certain other political questions, the deference of the federal courts on determinations of tribal status is not absolute; as the Court noted in *Baker v. Carr* (citing *Sandoval*), a determination of tribal status must involve a group that is “distinctly Indian,” and “the courts will strike down any heedless extension of that label.” 369 U.S. at 216–17.

²⁸⁶ Fletcher, *supra* note 200, at 519.

²⁸⁷ *Id.* at 505.

²⁸⁸ *Id.* at 504.

²⁸⁹ Harrison, *supra* note 285, at 500.

²⁹⁰ Fletcher, *supra* note 200, at 504.

²⁹¹ For some reason, Fletcher pulls his punch here. He argues that “[t]he 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.” *Id.* at 522 (emphasis added). But under *Sandoval* and *Baker*, a determination of tribal status is *actually* a political question. *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Baker v. Carr*, 369 U.S. 186, 215–17 (1962).

aims more broadly. He rejects what he calls the “compromise position,” which concedes deferential review for classifications involving Indian tribes but not for classifications involving Indians.²⁹² The compromise position, he says, animated the district court’s decision in *Brackeen*, holding that ICWA is unconstitutional because the statute’s definition of “Indian child” reaches beyond enrolled tribal members.²⁹³ For Fletcher, there must also be a basis for deference to classifications involving individual Indians.

Fletcher makes two arguments in support of this point. First is an argument from the text and the structure of the Constitution:

The Constitution denies Article III courts the power to review decisions made by Congress and the executive branch recognizing . . . Indian tribes. I argue the Constitution also denies Article III courts the full power to review decisions made by Congress and the executive branch recognizing and classifying individual Indians. The relevant Constitutional texts are the Indians Not Taxed Clause and the [Indian] Commerce Clause. The structural argument rests with the fact that the Constitution leaves the concurrent powers to define “Indians not taxed” and “Indian tribes” to the federal and state political branches.²⁹⁴

That is, “[t]he Constitution authorizes and requires the federal government to define who is Indian.”²⁹⁵ Again, this is simply the argument that, because the Constitution allocates a particular function to one (or both) of the political branches, the courts must stand down; again, that argument is problematic. Article I allocates the legislative power of the United States to Congress, but the courts do not—and cannot, consistent with *Marbury v. Madison*²⁹⁶—give general deference to Congress in its legislative determinations. Similarly, Article II allocates the executive power of the United States to the president, but the courts do not give general deference to the executive branch. As Harrison says, most exercises of congressional Article I powers “do not give rise to political questions.”²⁹⁷ The same is true of most exercises of presidential Article II powers. Calling a determination of Indian status a “political choice”²⁹⁸ does not rescue the position. Almost every decision

²⁹² Fletcher, *supra* note 200, at 502–04.

²⁹³ *Id.* at 502–03. For an example of the “compromise position” in the academic literature, see Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1359 (1997) (arguing that “classifications based on Indian-tribe membership” are not “based on race” but that “[c]lassifications based only on being an Indian” are “racial”).

²⁹⁴ Fletcher, *supra* note 200, at 520.

²⁹⁵ *Id.*

²⁹⁶ 5 U.S. (1 Cranch) 137, 176 (1803).

²⁹⁷ Harrison, *supra* note 285, at 500.

²⁹⁸ Fletcher, *supra* note 200, at 520.

made by Congress or the president is a political choice; they are, after all, the political branches. A political choice is distinct from a political question.

Second, Fletcher argues that the meaning of the term “Indian” is “inherently and necessarily political.”²⁹⁹ This is a normative argument. Fletcher says that the deference provided to determinations about tribal status under the political-question doctrine “must” apply also to determinations about Indian status and that such determinations “should” be reviewed under the rational-basis standard.³⁰⁰ He supports the position by analogizing Indians to foreigners, by invoking the wide latitude of Congress to define the scope of the federal government’s duty of protection to Indians and Indian tribes, by suggesting a parallel between determinations of Indian status and tribal status, and by questioning the institutional capacity of the judiciary to make decisions about Indian status.³⁰¹

Again, Fletcher offers a deeply intriguing defense of federal Indian law against the equal-protection challenge. That said, three specific concerns, which arise under both his textual-structural argument and his normative argument, merit consideration. First, to say that a determination about tribal status or Indian status is a political classification is not necessarily to say that such a determination is not also a racial classification. Fletcher assumes a sharp dichotomy on this point. He reasons: “The text of the Constitution itself demands that Congress determine who is an ‘Indian’ for the purposes of regulating commerce and apportionment. Classifications of Indian status, thus, are not impermissible race-based classifications but rather constitutionally mandated political determinations.”³⁰² This is similar to the move that the Supreme Court made in *Mancari* with the “political rather than racial in nature” rationale.

But the underlying “either-or” assumption has not been justified. A status determination can be both political and racial, just as it can be both political and religious—in the case, for example, of a legislative determination to define who qualifies as a Christian and then to treat all Christians favorably or unfavorably under federal law. Fletcher labors mightily (and in my view successfully) to demonstrate that determinations about Indian status are essentially political, both because those determinations are made by the political branches and because they have political attributes and political implications.³⁰³ But that does not mean that those determinations are not also racial. That, after all, is the fundamental and longstanding objection to the *Mancari* “political rather than racial in nature” rationale.

²⁹⁹ *Id.* at 532

³⁰⁰ *Id.* at 532–33.

³⁰¹ *Id.* at 532–44.

³⁰² *Id.* at 532.

³⁰³ *Id.* at 532–44.

Second, judicial deference to a legislative or administrative determination about tribal status or Indian status is only judicial deference to the determination about *status*. It is not deference to the entire legislative or administrative project in which the status determination is situated, and it does not deprive the federal courts of Article III jurisdiction over any case or controversy that may involve or even turn on resolution of the political question. Even under the strongest form of the political-question doctrine, only the political question itself is non-justiciable; other legal questions that depend on the outcome of the political question remain fully justiciable. The answer provided by Congress or the president to a political question becomes a “datum” that the courts treat as conclusive, but the courts still adjudicate any claim incorporating that datum.³⁰⁴ As Harrison writes: “Because of the political question doctrine, the decision of a non-judicial actor can provide a premise that the court uses in a decision on the merits.”³⁰⁵

To put the point in terms of the *Brackeen* decision about the constitutionality of ICWA, even complete deference by the federal courts to the congressional decision about who is an “Indian” and who is an “Indian child” only reaches the question of who is an “Indian” and who is an “Indian child.” That deference precludes the courts from reviewing where Congress chose to draw lines in defining “Indian” and “Indian child.” But the deference would not make the ICWA *equal-protection issue* non-justiciable. Even accepting without question or review the congressional definitions of “Indian” and “Indian child,” the federal courts would still have to determine whether the use of those definitions in the statute satisfy the equal-protection requirement. The two points are distinct, and only the former would be covered by political-question deference.

Third, the Supreme Court itself has indicated that, although determinations of tribal status are political questions, determinations about Indian status are squarely within the competency of the federal courts to review and to adjudicate. *Baker v. Carr*, citing and quoting *Sandoval*, said that the “Court’s deference to the political departments in determining whether Indians are recognized as a tribe” is subject to the limitation that

³⁰⁴ Harrison, *supra* note 285, at 485–87. In *Baker v. Carr*, the Supreme Court illustrated this point by reference to *Worcester v. Georgia*, one of the foundational cases in federal Indian law. The Court said that, in *Worcester*, “the fact that the tribe was a separate polity served as a datum contributing to the result, and despite the consequences in a heated federal-state controversy and the opposition of the other branches of the National Government, the judicial power acted to reverse the State Supreme Court.” *Baker v. Carr*, 369 U.S. 186, 215 n.43 (1962).

³⁰⁵ Harrison, *supra* note 285, at 487; *see also id.* at 496 (“Justiciability is distinct from subject matter jurisdiction in that a court can have jurisdiction to decide a case that turns on nonjusticiability, and indeed a court can award relief in a case in which an issue is nonjusticiable. When a plaintiff with a meritorious claim relies on the political branches’ recognition of a foreign government, for example, the political question doctrine underlies part of the court’s reasoning in a successful suit.”).

Congress may not “bring a community or body of people within the range of [the congressional plenary] power by arbitrarily calling them an Indian tribe.”³⁰⁶ And then the Court drove the point home that the federal courts do not defer to the political branches on Indian status: “Able to discern what is ‘distinctly Indian,’ . . . the courts will strike down any heedless extension of that label.”³⁰⁷ There is good reason for this differential treatment of determinations of tribal status and determinations of Indian status. Unlike determinations of tribal status, determinations of Indian status do not involve “questions of sovereignty and relations among sovereigns”—one of the limited categories in which the political-question doctrine “attribute[s] finality to political actors’ application of law to fact.”³⁰⁸ Thus, the step from political-question deference for determinations of tribal status to political-question deference for determinations of Indian status is neither short nor simple.³⁰⁹

³⁰⁶ 369 U.S. at 215–16 (quoting *United States v. Sandoval*, 231 U.S. 28, 46 (1913)).

³⁰⁷ *Id.* at 216–17 (quoting *United States v. Sandoval*, 231 U.S. 28, 46 (1913)).

³⁰⁸ Harrison, *supra* note 285, at 460. The other two categories are cases that involve “the process of legal enactment” and cases for which “the Constitution explicitly designates a house of Congress as judge, either of its own members’ elections or of impeachments in the Senate.” *Id.*

³⁰⁹ In setting up his argument, Fletcher praises a recent article by Gregory Ablavsky as a “game-changer” in the application of the equal-protection requirement to federal Indian law. Fletcher, *supra* note 200, at 503. Ablavsky’s article attempts to recover the historical meanings of the words “tribe” and “Indian” as used in the Indian Commerce Clause and the (original) Indians Not Taxed Clause. See generally Ablavsky, *supra* note 165. Ablavsky finds that “Anglo-Americans of the late eighteenth century” used “Indian” both as a political classification and as a racial classification. *Id.* at 1068–69. He argues that, to the extent the use of the word “Indian” in the Constitution is understood in racial terms, the notion of a “colorblind Constitution” is compromised: “[I]f we abandon the legal fiction that ‘Indian’ is a political classification, we must also give up the larger fiction of a colorblind Constitution. Under this interpretation, race is literally written into the text of our Constitution.” *Id.* at 1073. From this, Ablavsky concludes that the equal-protection challenge to federal Indian law must fail: “It is very hard to argue that a classification is unconstitutional when it is mandated by the Constitution itself. This reading strongly suggests that with respect to those people labeled ‘Indians,’ the Constitution itself authorizes distinctions based on ancestry.” *Id.* at 1074. This reasoning is perhaps not as tight as one might wish. That the text of the Constitution incorporates a distinguishing characteristic of individuals or a group of individuals does not mean that *any* legislation classifying individuals or a group of individuals on the basis of that characteristic is exempt from the equal-protection requirement. The Nineteenth Amendment, for example, prohibits the denial of voting rights “on account of sex,” but Congress does not have a general license to draw distinctions on the basis of sex without regard to the equal-protection requirement. U.S. CONST. amend. XIX. It does, however, mean that legislation enacted under a grant of constitutional power for which the Constitution uses that characteristic to define the scope of the power must be reconciled with the equal-protection requirement. This is true of the congressional plenary power over immigration, the exercise of which necessarily involves classifications on the basis of alienage, and it is true of the congressional plenary power over Indians and Indian tribes, the exercise of which involves classifications on the basis of race.

Bethany Berger offers a nuanced and innovative equal-protection argument that, like Fletcher's argument, attempts to justify *Mancari*. Berger maintains that the core of federal Indian law defines the terms of a sovereign-to-sovereign relationship between the federal government and the recognized Indian tribes "rather than the relationship of sovereigns to disadvantaged individuals that characterizes equal protection claims."³¹⁰ She argues that "an antidiscrimination norm lies at the heart of equal protection" and that laws restoring and furthering tribal sovereignty "are consistent with" the general equal-protection objective "of undermining state-sanctioned racial discrimination."³¹¹ In other words, Berger says, "federal Indian policies are normatively consistent with equal protection."³¹²

Berger maintains that the "political rather than racial in nature" rationale of *Mancari* does not "posit[] a counterfactual nonracial status for Indian people" but instead "demonstrat[es] the ways the classification fulfilled the goals emerging from the unique federal relationship" with Indians and Indian tribes.³¹³ Generalizing this point, Berger argues that legislation advancing the interests of tribal sovereignty "is consistent with the spirit of equal protection because it partially reverses discrimination against tribal governments by restoring a measure of their territorial sovereignty."³¹⁴ And so, despite misgivings about what she sees as the Supreme Court's failure "[to] build on [the] potential" of *Mancari*,³¹⁵ Berger argues that Indian preferences—laws that "respond to and partially undo the denial of equal political rights founded in racialized images of native peoples"—"further the goals of equal protection" and should be considered constitutional.³¹⁶

Berger's argument is an heroic effort to meet the equal-protection challenge, but it necessarily marginalizes many of the cases that ground the challenge. Berger reads the Equal Protection Clause as proscribing only governmental discrimination that *harms* historically disadvantaged groups, such as African Americans, but as permitting governmental discrimination that *benefits* such historically disadvantaged groups.³¹⁷ Of course, if current equal-protection doctrine conformed to that reading of the Equal Protection Clause, there would be no equal-protection challenge to federal Indian law in the first place—nor, for that matter, would there be any equal-protection challenge to governmental affirmative action. Berger acknowledges that her starting point, although shared by many other scholars and commentators,

³¹⁰ Berger, *supra* note 125, at 1168.

³¹¹ *Id.* at 1169.

³¹² *Id.* at 1170.

³¹³ *Id.* at 1186.

³¹⁴ *Id.* at 1193.

³¹⁵ *Id.* at 1187.

³¹⁶ *Id.* at 1189.

³¹⁷ *Id.* at 1196.

remains highly contested and that her reading of the Equal Protection Clause has found little traction “in other areas.”³¹⁸ Nonetheless, she argues that the antidiscrimination norm is what informs the *Mancari* “political rather than racial in nature” rationale.³¹⁹ She maintains that the Court used the “political rather than racial in nature” rationale to uphold the BIA employment preference in *Mancari* precisely because the preference was benign with respect to Indian tribes—that is, because it promoted tribal sovereignty.³²⁰

Again, it is an intriguing argument, and it may be normatively right. But it holds limited promise as a strategy for defending federal Indian law in the federal courts. The argument effectively dismisses *Bakke* and *Adarand*, which raise serious doctrinal concerns about affirmative-action programs;³²¹ it effectively dismisses *Antelope*, which applies the “political rather than racial in nature” rationale equally to legislation favoring Indians and legislation disfavoring Indians; and it effectively dismisses the concerns raised by the federal judges who have expressed sympathy for the equal-protection challenge. Ultimately, Berger is making the case to those who already share a particular anti-subordination understanding of the equal-protection requirement. But the argument likely will have little effect on those, such as Chief Justice Roberts, who read the Equal Protection Clause as mandating a color-blind approach—who maintain that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³²² In short, Berger does not really meet the equal-protection challenge to federal Indian law on its own terms. Instead, she maintains that the entire analytic critique of affirmative action and other legislation benefitting historically disadvantaged groups has misunderstood the Equal Protection Clause. Again, the argument might be normatively right, but its prospects for success as a litigation strategy are open to question.

Addie Rolnick challenges the *Mancari* “political rather than racial in nature” rationale, although her general purpose is to argue against the conceptual deficiencies of the rationale itself rather than the outcomes that it produces.³²³ Rolnick rejects the “oppositional framing” of *Mancari*—the political-racial dichotomy; she argues that the term “Indian” denotes “both a

³¹⁸ *Id.* at 1170.

³¹⁹ *Id.* at 1183–88.

³²⁰ *Id.* at 1186.

³²¹ In fact, the constitutional difficulties with affirmative action run even to affirmative action that is “race-neutral” on the surface. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2333 (2000) (arguing that race-neutral efforts to increase minority representation in higher education may constitute “race-conscious state action that may violate the Equal Protection Clause”).

³²² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

³²³ See generally Rolnick, *supra* note 217 (exploring “the legal roots of the political classification doctrine, its ongoing significance, and the descriptive limits and normative consequences of the ideas that it contains”).

racial category and the unique political history of Indian tribes.”³²⁴ She says that *Mancari*, although wrong in suggesting a clean distinction between Indian status as a political classification and Indian status as a racial classification, remains useful in protecting federal Indian law from the equal-protection challenge.³²⁵ Still, she says, the “legal ideology” exemplified by *Mancari* conceals “the relationship between Indian racialization and tribal political status,” and it frustrates understanding of “the anti-racist potential of federal Indian law in light of Indian racial subordination.”³²⁶

Rolnick aims less to justify *Mancari* than to push beyond it. She argues that the “problems” confronting Indians and Indian tribes cannot “be adequately addressed without attention to both the racial and the political elements . . . and the mutually constitutive relationship between them.”³²⁷ She prefers not to treat federal Indian law as “separate from and antithetical to issues of race” but instead to “engage[] the impact of both racialization and political rights.”³²⁸ Rolnick argues for a “conceptual reframing” of both elements of the *Mancari* framework—both the “political” and the “racial”—to yield a “less restrictive interpretation” of Indian law.³²⁹ She develops this framework in two moves. First, she argues that contemporary hostility toward Indians and Indian tribes implicates “racialized ideas about Indians” and works to deny the exercise of specifically Indian political rights (such as tribal sovereignty and reserved hunting and fishing rights).³³⁰ Second, she argues that the protection of Indian political rights becomes “an important tool of anti-racism.”³³¹ But her goal, she insists, is “doctrinally modest”—simply to provide greater context for the “political rather than racial in nature” rationale so that courts might avoid narrow applications of *Mancari*.³³²

Finally, Carole Goldberg describes an argument in defense of Indian law that takes the “political rather than racial in nature” rationale seriously.³³³ She presents the argument with some hesitation; she never fully endorses it, and, in fact, she astutely identifies many of its shortcomings. Goldberg characterizes the argument as maintaining that “Indian classifications are political, not racial, so long as they turn on tribal citizenship rather than ancestry” and that “Indian classifications are no different from permissible

³²⁴ *Id.* at 967.

³²⁵ *Id.* at 969.

³²⁶ *Id.*

³²⁷ *Id.* at 1026.

³²⁸ *Id.*

³²⁹ *Id.* at 1028.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 1029.

³³³ Goldberg, *supra* note 75, at 958. She identifies the argument primarily with Eugene Volokh. See generally Volokh, *supra* note 293 (discussing legal framework for discrimination claims).

classifications based on U.S. or foreign citizenship and should be tested by the same relaxed equal protection standard.”³³⁴ Goldberg finds “much to commend” here but points out that the “political rather than racial in nature” rationale “encounters some difficulties,”³³⁵ including the chronically troubling point that tribal-membership criteria ordinarily require Indian ancestry.³³⁶ Goldberg argues that “[f]ormal, inflexible ancestry requirements . . . are not part of the historic practice of tribes” but instead were introduced into tribal laws and customs under pressure from the federal government, “which was concerned with restricting eligibility for federal benefits and special Indian status.”³³⁷ For that reason, she argues, “classifications that turn on tribal citizenship could be characterized as *race or ancestry plus* classifications, which would return us to the challenges from anti-affirmative action forces.”³³⁸ Goldberg also notes that linking a relaxed standard of review to membership in a recognized Indian tribe provides no equal-protection relief for federal laws concerning non-tribal Indians or conferring initial recognition on an Indian tribe.³³⁹

B. Responses Rejecting the Applicability of the Fourteenth Amendment

Another group of responses argues that the Fourteenth Amendment generally and the Equal Protection Clause specifically do not apply to laws covering Indian tribes or their members. Although scholars have presented this argument in several different versions, the basic idea is reasonably straightforward. The framers of the Fourteenth Amendment, according to this argument, considered Indian tribes and tribal members to be separate from the general citizenry of the United States and of the individual states. Although the Equal Protection Clause has always applied to the states (and at least since *Bolling v. Sharpe* in 1954, to the federal government as well), many Indian tribes still inhabited lands outside the borders of the states at the

³³⁴ Goldberg, *supra* note 75, at 958. This is in effect the theory that Fletcher criticizes as the “compromise position.” Fletcher, *supra* note 200, at 502–03.

³³⁵ Goldberg, *supra* note 75, at 959.

³³⁶ *Id.* at, 960–63.

³³⁷ *Id.* at 961.

³³⁸ *Id.* (emphasis in original).

³³⁹ *Id.* at 963–966. There are other academic responses within the *Mancari* framework. See, e.g., Krakoff, *supra* note 217, at 1122–24 (justifying *Mancari* on a harm-correction reading of the equal-protection requirement); Newton, *supra* note 103, at 286–88 (arguing that exclusively racial classifications of Indians should fall outside the *Mancari* framework and that laws involving classifications of Indian tribes should be treated as discriminatory whenever those laws adversely affect tribes); Johnson & Crystal, *supra* note 42 (arguing for modification to the *Mancari* framework by requiring stricter scrutiny of laws not advancing the federal government’s trust responsibility to Indians and Indian tribes).

time the Fourteenth Amendment was adopted in 1868.³⁴⁰ Also, many tribal Indians, whether or not living within an existing state, were not U.S. citizens in 1868—a point recognized obliquely in the text of the Fourteenth Amendment. And so, the argument runs, the framers of the Fourteenth Amendment never intended the Equal Protection Clause to cover Indian tribes or tribal members—not directly, as a constraint on state governments, and not indirectly, as a constraint on the federal government.

David Williams provides an early and clear articulation of this position. Williams argues that the Equal Protection Clause “does not run to Indians under tribal relations because the clause itself considers them to be a separate people.”³⁴¹ The critical point, in his view, is tribal sovereignty. To the extent that the federal government respects tribal sovereignty, the Equal Protection Clause does not apply to laws concerning Indian tribes and tribal members; to the extent that the federal government overrides tribal sovereignty, “the strict standards of the equal protection clause should come to control government actions.”³⁴² Williams argues that even if the government “may not use racial classifications” in those places where “the writ of the equal protection clause runs,” the “writ has never been extended to Indian Country.”³⁴³ In his view, “[t]he domestic morality of the clause has no more applicability to Indian reservations than it does to Sweden or Nicaragua, because all of that territory is still under the governance of different cultural concepts and has never been fully and permanently invaded by American ideological imperialism.”³⁴⁴

This argument is not primarily normative; Williams finds support for his conclusions in both the text and the history of the Fourteenth Amendment. The text treats tribal Indians as separate from non-tribal Indians and non-Indians. Section 2 of the Fourteenth Amendment, in determining the apportionment of representatives among the states, excludes “Indians not taxed.”³⁴⁵ And section 1, in confirming U.S. citizenship for “[a]ll persons born or naturalized in the United States,” specifically requires that such persons be “subject to the jurisdiction” of the United States—a provision, Williams argues, that was meant to exclude tribal Indians.³⁴⁶ Williams maintains that the “two phrases—‘Indians not taxed’ and Indians ‘not subject to the jurisdiction’ of the United States—turn out to have identical

³⁴⁰ Those tribes lived in the Department of Alaska and in U.S. territories that later would become the states of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming.

³⁴¹ Williams, *Indians as Peoples*, *supra* note 125, at 763.

³⁴² *Id.*

³⁴³ *Id.* at 831.

³⁴⁴ *Id.*

³⁴⁵ U.S. CONST., amend. XIV, § 2.

³⁴⁶ *Id.* at § 1.

meanings.”³⁴⁷ In the debates over the Civil Rights Act of 1866, he says, members of Congress wanted to distinguish between “two vaguely imagined categories of Indians—‘wild’ Indians and ‘domesticated’ ones.”³⁴⁸ The language settled on to make the distinction—roughly but imperfectly corresponding to a distinction between tribal and non-tribal Indians—was that the former were “not taxed.”³⁴⁹ Later, in debating the language for section 1 of the Fourteenth Amendment, Williams says, members of Congress used the term “subject to the jurisdiction” of the United States as the equivalent of excluding “Indians not taxed.”³⁵⁰

Thus, Williams argues, the framers specifically intended to exclude tribal Indians from the reach of the Fourteenth Amendment.³⁵¹ They did so using somewhat indirect and imprecise language about taxation and jurisdiction, but their objective, as expressed in debates over the language of the amendment, is clear. Even if tribal Indians were subject to the overriding sovereignty of the United States, they also were subject to the sovereignty of their tribes. For that reason, tribal Indians constituted “a separate people” who were not fully subject to the jurisdiction of the United States and who were therefore outside the Fourteenth Amendment.³⁵² “And,” Williams argues, “that status did not change even if the federal government had asserted some jurisdiction over them, as long as it had not destroyed their tribal government.”³⁵³ The rule that Williams distills from the history of the Fourteenth Amendment, then, is that the Equal Protection Clause does not apply to any “Indian-specific legislation” that is “consistent with” the

³⁴⁷ Williams, *Indians as Peoples*, *supra* note 125, at 832.

³⁴⁸ *Id.* at 833.

³⁴⁹ *Id.* at 833–36.

³⁵⁰ *Id.* at 836–38.

³⁵¹ *Id.* at 838.

³⁵² *Id.*

³⁵³ *Id.* Williams allows that the understanding of legal commentators during the Reconstruction Era was that the Equal Protection Clause did have some application to Indians “but only in a unique and limited way.” *Id.* at 841. Those commentators, he says, thought that although Indians did not have the “rights of citizens,” the Equal Protection Clause and the Due Process Clause nonetheless guaranteed “rights of personal security and legal redress to ‘persons’ and not citizens.” *Id.* Without providing much specificity, he elaborates that application of the Equal Protection Clause “was limited by the extent of the Indians’ allegiance; they were entitled to receive some protection because they were somewhat exposed to federal power. That limited jurisdiction and limited protection in no way interfered with their separate status under federal law as members of semiforeign sovereigns.” *Id.* Of course, this concession raises more questions than it answers. To argue that the Equal Protection Clause applied in some manner to tribal Indians but not to indicate how it applied to them is to leave open the question of whether laws differentiating tribal Indians from others might trigger heightened scrutiny. That is the question at the heart of the equal-protection challenge to federal Indian law.

“peoplehood” of Indians.³⁵⁴ He maintains that this exempts from heightened equal-protection scrutiny any legislation that promotes tribal sovereignty and tribal self-determination as well as any legislation that does not “positively contradict” tribal sovereignty or tribal self-determination.³⁵⁵ By contrast, it does not permit legislation that singles Indians out for treatment as racially inferior to non-Indians. Legislation of that nature, Williams maintains, must be reviewed under the strict-scrutiny standard.³⁵⁶

The argument is interesting and, as to the *status quo* in 1868, possibly compelling. But the equal-protection challenge to federal Indian law is not about the state of affairs in 1868; it is about the state of affairs today, and much has changed since the Reconstruction Period. Every recognized Indian tribe is now located within the boundaries of one of the states; Congress extended U.S. citizenship to (or, depending on one’s view, imposed U.S. citizenship on) all Indians in 1924;³⁵⁷ and the Supreme Court definitively confirmed in 1954 that the equal-protection requirement applies not only to state government but also to the federal government. Williams argues that

³⁵⁴ *Id.* at 845.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 844.

³⁵⁷ George Beck argues that federal legislation extending U.S. citizenship to tribal Indians is unconstitutional, but his argument is not persuasive. See George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,”* 28 AM. INDIAN CULTURE & RES. J. 37, 57 (2004) (“The doctrine represents raw political power without a solid constitutional basis. It is unconstitutional because it violates the Fourteenth Amendment.”). Beck works from the citizenship clause of the Fourteenth Amendment, which provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. The core of Beck’s argument is as follows. First, Beck notes that the citizenship clause of the Fourteenth Amendment, by using the words “and subject to the jurisdiction thereof,” excludes tribal Indians. Beck, *supra* at 52. That was certainly true when the Fourteenth Amendment was ratified, as the Supreme Court confirmed in 1884. See *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (holding that tribal Indians are not subject to the jurisdiction of the United States simply by reason of birth within the territorial limits of the United States). Second, Beck notes that the Supreme Court ruled in 1967 that because of the citizenship clause, the federal government cannot strip a natural-born citizen of U.S. citizenship. Beck, *supra* at 49. See generally *Afroyim v. Rusk*, 387 U.S. 253 (1967). Third, Beck argues that “[b]y similar constitutional reasoning, Indian citizenship, *explicitly forbidden by the Fourteenth Amendment*, is also beyond legislative authority of Congress to alter by the general power granted in the Naturalization Clause.” Beck, at 50 (emphasis added). This last step is not valid. A rule that Congress cannot take away citizenship that has been conferred by the citizenship clause of the Fourteenth Amendment does not imply a rule that Congress cannot confer citizenship that has not been conferred by the citizenship clause of the Fourteenth Amendment. Beck in effect reads the proviso in the citizenship clause—“and subject to the jurisdiction thereof”—as an outright prohibition on tribal Indians ever acquiring U.S. citizenship through any means other than a later constitutional amendment. That is simply not what *Elk v. Wilkins*, *Afroyim v. Rusk*, and the citizenship clause say.

Congress understood the reference to “Indians not taxed” in section 2 of the Fourteenth Amendment to be the equivalent of excluding persons not “subject to the jurisdiction” of the United States from citizenship under section 1 of the Fourteenth Amendment.³⁵⁸ But even if that was correct in 1868, there are no longer any people who meet that description. *All* American Indians, whether tribal members or not and whether living within or without Indian country, are subject to taxation by the federal government, and *all* American Indians, whether tribal members or not and whether living within or without Indian country, are subject to the jurisdiction of the United States.³⁵⁹ Williams’ argument is good so far as it goes, but somewhere between 1868 and the present, it encounters very serious difficulties.³⁶⁰

Ultimately, the argument works as a response to the equal-protection challenge only if one assumes that the Fourteenth Amendment lays down a rule that Indian tribes and their members, because they were not citizens and were not subject to taxation in 1868, would *never* be covered by the Equal Protection Clause—regardless of whether Indians later became citizens, regardless of whether Indians later became subject to taxation, regardless of whether tribal lands later became geographically incorporated into existing and future states, and regardless of whether the federal government itself later became subject to the equal-protection requirement. Williams adduces strong evidence about what Congress intended for 1868 but no evidence at all about what Congress intended for the century and a half that followed.³⁶¹

³⁵⁸ Williams, *Indians as Peoples*, *supra* note 125, at 832–33.

³⁵⁹ If tribal Indians are not subject to the jurisdiction of the United States, how could Congress have granted universal citizenship to American Indians in 1924? And what would have been the authority for Congress to enact Title 25 of the United States Code?

³⁶⁰ Williams tries to address the legal developments after the ratification of the Fourteenth Amendment, but his arguments never come to terms with the integration of tribal members into contemporary American political life. Williams, *Indians as Peoples*, *supra* note 125, at 850–64. Tribal citizens today are really dual citizens, and there is no reason to think that they are any more beyond the reach of the Fourteenth Amendment than any other dual citizens present in the United States.

³⁶¹ For other arguments rejecting the applicability of the Fourteenth Amendment, in whole or in part, to tribal Indians, see, e.g., Abi Fain and Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 815–22 (2017) (arguing that the framers of the Fourteenth Amendment “never intended for the Amendment’s prohibitions on the use of race as a criterion to prohibit the federal government from enacting legislation that relies on ‘Indian’ as a classification”); Berger, *supra* note 125, at 1171–79 (“Throughout the Reconstruction era, we find a persistent sense of the consistency of Indian and tribal rights with equal protection’s goals, and a conviction that the Fourteenth Amendment should not undermine them.”); Clinton, *supra* note 75, at 1011–12 n.201 (arguing that the Fourteenth Amendment “was not intended to change the relationship between the tribes and the federal government”).

C. Responses under the Indian Commerce Clause

Finally, there have been scholarly responses to the equal-protection challenge that, although distinct from the plenary-power approach set forth in this paper, draw on the Indian Commerce Clause. Carole Goldberg, for example, argues that “the equal protection requirements of the Constitution have only limited application to federal Indian legislation, because the Indian Commerce Clause of the Constitution specifically authorizes the exercise of federal power with respect to tribes in particular.”³⁶² Goldberg observes that the Indian Commerce Clause “envisions measures addressed specifically to Indian nations” but that the “equal protection provisions of the Fifth and Fourteenth Amendments dictate equal treatment in very general terms.”³⁶³ This, she says, implicates the interpretive canon that “more specific provisions should control over more general provisions” and forces the conclusion that “the language of the Indian Commerce Clause should allow federal legislation directed at Indian tribes without triggering the strictest form of scrutiny under Fifth Amendment equal protection.”³⁶⁴

This argument is open to question. Section 8 of Article I of the Constitution confers a number of specific powers on Congress in addition to the plenary power that the Court has located in the Indian Commerce Clause. It cannot be that because these powers are framed in specific terms, they are exempt from the Equal Protection Clause, which is framed in general terms. Consider the very first congressional power mentioned in Section 8—the “Power To lay and collect Taxes, Duties, Imposts and Excises.”³⁶⁵ The Taxing Clause is at least as specific as the Indian Commerce Clause. Under Goldberg’s reasoning, the equal-protection requirement would “have only limited application to federal [tax] legislation, because the [Taxing] Clause of the Constitution specifically authorizes the exercise of federal power with respect to [taxation] in particular.” If Goldberg’s argument were correct, Congress would be free to impose higher rates of taxation on Asian Americans or Roman Catholics, for example, than on persons who fall outside either of those suspect classifications.

Similarly, Section 8 of Article I grants Congress the power “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of

³⁶² Goldberg, *supra* note 75, at 966. See also Goldberg-Ambrose, *supra* note 125, at 172 (arguing that “[b]ecause [A]rticle I of the Constitution specifically authorizes Congress to determine federal policy towards Indian tribes, strict scrutiny analysis [of equal protection] is simply irrelevant”).

³⁶³ Goldberg, *supra* note 75, at 967.

³⁶⁴ *Id.*; cf. Clinton, *supra* note 75, at 1015 (“The mere existence of the Indian [C]ommerce [C]ause suggests that special legislation for the nation’s indigenous peoples is constitutionally justified even if it involves racial classification.”).

³⁶⁵ U.S. CONST. art I, § 8, cl. 1.

the United States”³⁶⁶—again, on Goldberg’s argument, opening the path for Congress to prescribe harsher criminal penalties for counterfeiters who are Asian American or Roman Catholic than for other counterfeiters. And on the analysis would run—through all the other specific powers conferred on Congress by the Constitution, from the Interstate Commerce Clause through the clause granting Congress the exclusive power to legislate for the District of Columbia. Goldberg’s argument that the specific language of the Indian Commerce Clause in Article I trumps the general language of the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment effectively makes most (perhaps all) federal legislation on any subject immune from strict scrutiny under the equal-protection requirement. In attempting to save federal Indian law from the equal-protection challenge, Goldberg’s position would effectively overrule *Bolling v. Sharpe*.

Additionally, Goldberg’s argument would generally deny Indians and Indian tribes the protections against federal power provided by the Bill of Rights. Goldberg reads the Indian Commerce Clause of Article I as “specific” and the Due Process Clause of the Fifth Amendment as “general,” and she maintains that the specific must trump the general.³⁶⁷ But other provisions in the Bill of Rights are also general, such as the First Amendment’s guarantee of “freedom of speech,” the Fourth Amendment’s prohibition against “unreasonable searches and seizures,” the Fifth Amendment’s guarantee of “just compensation” for takings, and the Eighth Amendment’s prohibition against “cruel and unusual punishments.” On Goldberg’s reasoning, those “general” constitutional rights would not constrain the federal government in its exercise of the “specific” power granted by the Indian Commerce Clause—with the effect that Congress, when legislating as to Indians and Indian tribes, could deny free speech, provide for arbitrary searches and seizures, take property without compensation, and impose cruel and unusual punishments.

And even if there might be reasonable disagreements about whether one or more of the provisions in the Bills of Rights are not so general as to give way to the Indian Commerce Clause, remember that Goldberg’s argument turns on her claim that the Due Process Clause of the Fifth Amendment must give way to the Indian Commerce Clause. But the Due Process Clause is what ensures that the federal government cannot deprive any person of “life, liberty, or property, without due process of law.”³⁶⁸ Does anyone really want to maintain that, in exercising its plenary power over Indians and Indian tribes, Congress can deprive Indians of life, liberty, or property without due process of law?

³⁶⁶ *Id.* at cl. 6.

³⁶⁷ Goldberg, *supra* note 75, at 966–67.

³⁶⁸ U.S. CONST. amend. V.

CONCLUSION

Certain problems presented by contemporary federal Indian law defy straightforward resolution, but the equal-protection challenge does not. Established Supreme Court case law points to the congressional plenary power over Indians and Indian tribes as the critical determinant of how the Equal Protection Clause should be applied to Indians and Indian tribes. Just as with the congressional plenary power over immigration, the congressional plenary power over Indians and Indian tribes precludes use of the strict-scrutiny standard and compels use of a rational-basis standard of review. It is rank nonsense to insist, as the Court has maintained since the nineteenth century, that Congress has plenary and exclusive power over Indians and Indian tribes but then to treat the distinctions drawn by Congress between Indians and non-Indians as suspect classifications. The Supreme Court avoids that result in matters involving aliens and naturalized citizens; it should avoid that result in the parallel matters involving Indians or Indian tribes. Properly analyzed, the equal-protection challenge presents no legitimate threat to federal Indian law.