

NOTE

WHO'S IN AND WHO'S OUT: CONGRESSIONAL POWER OVER INDIVIDUALS UNDER THE INDIAN COMMERCE CLAUSE

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INTRODUCTION

INDIAN law sits in uneasy coexistence with modern race law. Preferential treatment for Native Americans,¹ like the Bureau of Indian Affairs (“BIA”) policy to hire tribal members for federal jobs, is far removed from Chief Justice Roberts’s pithy truism—“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”² But the U.S. Supreme Court has twice exempted Indian law from the strict scrutiny given to race-based statutes, once in the early nineteenth century when the Supreme Court interpreted the Indian Commerce Clause³ to give Congress “plenary power” over Indian affairs, and again in the 1970s when it interpreted “Indians” to be a political—not racial—classification.⁴

But at the end of an Indian adoption case in 2013, Justice Thomas questioned if this exception has gone too far. “[N]either the text nor the original understanding of the [Indian Commerce] Clause supports Con-

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¹ A note on terminology: I use the words “Indian” and “Native American” interchangeably to describe the indigenous peoples of North America.

² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

³ U.S. Const. art. I, § 8, cl. 3 (“Congress shall have [p]ower . . . [t]o regulate Commerce . . . with the Indian Tribes . . .”).

⁴ *Morton v. Mancari*, 417 U.S. 535, 552 (1974); Cohen’s Handbook of Federal Indian Law § 5.04, at 414 (Nell Jessup Newton ed., 2012) [hereinafter Cohen’s Handbook] (discussing the “excesses of the [Supreme Court’s] late 19th and early 20th century invocations of a nearly absolute and unreviewable congressional plenary power” (citing, e.g., *United States v. Kagama*, 118 U.S. 375 (1886))).

gress' claim to such 'plenary' power."⁵ How, for instance, could a constitutional provision granting Congress the power over Indian *tribes* include laws like the Indian Child Welfare Act ("ICWA")⁶ that regulates adoptions of individual Native American children? "The Clause does not give Congress the power to regulate commerce with all Indian *persons*," he argued.⁷

In 2015, the BIA issued regulations reinterpreting ICWA's provisions. This new rule requires courts to identify Native American children in adoption proceedings and to follow a strict set of procedures to ensure that Native American children are placed with tribe-affiliated families.

This regulation immediately came under fire. Adoption agencies and professionals filed suit, arguing that singling out Native American children for special burdens in the adoption process is an impermissible use of race. This assertion draws on Justice Thomas's concurrence, challenging the BIA's power to regulate individual Native American families and, by consequence, the delegation of power stemming from Congress's plenary power over Indian affairs.

These equal protection challenges have profound implications. Title 25 of the United States Code, the statutory edifice housing Indian law, rests on the keystone that Congress's regulation of Native Americans is a political, rather than racial, classification. As the Supreme Court forewarned, if congressional legislation singling out tribal Indians for special treatment were "deemed invidious racial discrimination . . . [the] entire Title [25] would be effectively erased."⁸ In short, striking down the BIA's new mandatory ICWA regulation under equal protection doctrine risks wholesale destruction to large swaths of Indian law.

After providing an in-depth background to ICWA and the BIA's new rulemaking in Part I, Part II of this Note explores several responses already proposed by Indian-law scholarship to defend against equality-based attacks. These reactions rely on narrow tailoring, analogies to foreign citizenship, and narrow interpretations of the constitutional use of

⁵ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring). This is Justice Thomas's second critique of the Indian Commerce Clause. He also questioned the relationship between congressional plenary power and tribal sovereignty in *United States v. Lara*, 541 U.S. 193, 214–15, 224–25 (2004) (Thomas, J., concurring).

⁶ Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2012)).

⁷ *Adoptive Couple*, 133 S. Ct. at 2567.

⁸ *Mancari*, 417 U.S. at 552.

“tribe.” But each response fails to foresee and explain how Congress can legislate individual Indian children on the sole basis of their race.

Part III proposes a new response, and a new interpretation of the Indian Commerce Clause. It focuses on the word “Indian” in Article I to argue that the Constitution contains a latent ambiguity highlighted by the BIA’s recent rulemaking. The term “Indian” may refer to two plausible definitions: “Indian” as a racial label for individuals based on their ethnic heritage, or “Indian” as a political designation of individuals based on their political, social, and cultural connections. This Part argues that interpreting “Indian” to encompass only this latter definition best accords with the history of the Indian Commerce Clause, the evolution of judicial precedent, and the doctrine of other constitutional provisions—in particular the First Amendment’s freedom of association.

The effect of this novel interpretation is to recognize a previously unarticulated constitutional limit on Congress’s power to regulate individual Native Americans. Congress may have “plenary power” over Indian affairs when regulating who is entitled to claim the federal benefits and burdens associated with tribal membership. But by interpreting “Indian” as a term limited to those who choose to be Indian, evidenced by their political, social, and cultural connections, federal law cannot reach those who are only Indian by race. This reading grants the ultimate recognition of tribal citizenship and ethnic identity not to the federal government or even to the tribe, but to the eligible individual. And it has the further consequence of rebutting any equal protection challenges that threaten the edifice of Indian law, while preserving claims for individuals who do not identify as Indian and thus who do not accept the consequences of tribal affiliation.

I. THE BIA’S NEW RULEMAKING UNDER ICWA AND ITS EQUAL PROTECTION CHALLENGES

A. Background of ICWA and How the BIA’s Rulemaking Changed Its Interpretation of the Statute

“We stand here to let everyone in this room know and everyone in Indian Country know we are fighting for our children. We want them back home,” announced Amber Crotty, a Navajo Nation Council delegate.⁹

⁹ Bureau of Indian Affairs, Public Meeting—Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings 29–30 (May 14, 2015) (statement of Amber

Crotty was third in line on May 14, 2015. She stood in front of hundreds of Native Americans, tribal leaders, adoption agents, social workers, and lawyers lined up to address the BIA in the open ballroom of the Marriott Hotel in Tulsa, Oklahoma.¹⁰ The hearing was the sixth and final stop for the BIA, part of a nationwide tour it conducted to collect public comments for a proposed regulation announced in March 2015.

The new rule updates the BIA's interpretation of the Indian Child Welfare Act ("ICWA"). Congress passed ICWA in 1978 to respond in part to the "alarmingly high percentage of Indian families" that were "broken up" when Indian children were removed from their homes and placed in "non-Indian foster and adoptive homes" by public and private agencies.¹¹ Admonishing states for failing to "recognize the essential tribal relations of Indian peoples," Congress declared a new policy to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes."¹² ICWA established "minimum Federal standards" for any institution to remove Indian children from their families, and declared a preference for Indian children to be placed "in foster or adoptive homes which will reflect the unique values of Indian culture."¹³ Under ICWA, the Secretary of the Interior, whose department includes the BIA, has the power to issue rules and regulations to carry out its provisions.¹⁴

The BIA published its first set of ICWA guidelines in 1979. The agency reiterated Congress's preference for "keeping Indian children with their families," and for "placing Indian children who must be removed [or who are placed up for adoption] within their own families or Indian tribes."¹⁵ When a state court had "reason to believe a child involved in a child custody proceeding is an Indian," the guidelines instructed the court to "seek verification of the child's status from either

Crotty, Navajo Nation Council Del.), <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-030528.pdf> [<https://perma.cc/V8QB-2LPK>].

¹⁰ Suzette Brewer, War of Words: ICWA Hearings Reignite Ancient Clash over Indian Children, Part 1, Indian Country Today Media Network (May 21, 2015), <http://indiancountrytodaymedianetwork.com/2015/05/21/war-words-icwa-hearings-reignite-ancient-clash-over-indian-children-part-1-160454> [<https://perma.cc/L69E-CZX7>].

¹¹ 25 U.S.C. § 1901 (2012).

¹² *Id.* §§ 1901–02.

¹³ *Id.* § 1902.

¹⁴ *Id.* § 1952.

¹⁵ Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,585–86 (Nov. 26, 1979).

the Bureau of Indian Affairs or the child's tribe."¹⁶ If the adoption was voluntary and the parent "evidence[d] a desire for anonymity," the court should "make its inquiry in a manner that will not cause the parent's identity to become publicly known."¹⁷ In placing the child with an adoptive family, the guidelines expressed a preference—"absent good cause"—for the child to go to a "member of the Indian child's extended family," a "member of the Indian child's tribe," or "[o]ther Indian families."¹⁸ The guidelines specified that "good cause" sufficient to deviate from the BIA's preferences included a "request of the biological parents," the "extraordinary physical or emotional needs of the child," or the "unavailability of suitable families for placement after a diligent search."¹⁹

The BIA's proposed rules withdraw that discretion. Chief among the BIA's anticipated changes are rules that incorporate the agency's updated guidelines, published just one month prior to the rules themselves.²⁰ The guidelines "clarify the minimum Federal standards" and "best practices" under ICWA to ensure "consistent" application by state courts and adoption agencies.²¹ The BIA begins by "broaden[ing] the audience of the guidelines to include both State courts and any agency or other party seeking placement of an Indian child."²² It then makes several substantive shifts, including clarifying that:

- "[I]t is inappropriate [for courts] to conduct an independent analysis, inconsistent with ICWA's placement preferences, of the 'best interest' of an Indian child";²³

¹⁶ *Id.* at 67,586.

¹⁷ *Id.*

¹⁸ *Id.* at 67,594.

¹⁹ *Id.*

²⁰ Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015) (to be codified at 25 C.F.R. § 23).

²¹ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,150 (Feb. 25, 2015).

²² *Id.* at 10,147. This is a change from the 1979 guidelines that asserted "[n]othing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979).

²³ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,149.

- “[A] parent’s desire for anonymity does not override the [courts’] responsibility to comply with ICWA”;²⁴
- “[T]he tribe alone retains the responsibility to determine tribal membership” by emphasizing that “there is no requirement” for a child to have a “certain degree of contact with the tribe” or have a “certain blood degree”;²⁵ and
- “[T]here is no existing Indian family (EIF) exception to application of ICWA.”²⁶

B. Adoption Agencies Bring Suit Claiming the BIA’s New Rulemaking Violates Equal Protection

These provisions immediately drew fire from adoption agencies and professionals who believe the new rules prioritize the rights of tribes over the rights of Native American children and their birth mothers.²⁷ In an open letter to Secretary of the Interior Sally Jewell and Assistant Secretary of the BIA Kevin Washburn, the National Council for Adoption rebuked the agency for making Indian culture the “over-riding consideration when its application would be to the detriment of a child’s

²⁴ Id. at 10,147.

²⁵ Id. at 10,148.

²⁶ Id. The existing Indian family exception is a judicially created doctrine. In jurisdictions that recognize the exception, a child is not a part of an existing Indian family, and therefore not regulated by ICWA’s placement preferences, unless the Indian parent is both a tribal member and maintains a “significant social, cultural or political relationship with an Indian community.” *In re Santos Y.*, 92 Cal. App. 4th 1274, 1306 (Cal. Ct. App. 2001) (internal quotation marks omitted) (citation omitted). Scholars have expressed concern about the effects of allowing courts to evaluate whether an individual is Indian “enough” to warrant federal protection, especially when their conclusions are often “influenced by stereotypes about Indians.” Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 24, 31 (2008); see Cohen’s Handbook, *supra* note 4, § 11.06, at 865.

²⁷ Letter from Nat’l Council for Adoption, to Sec’y of Interior & Assistant Sec’y of Bureau of Indian Affairs (n.d.), <https://adoptioncouncil.wufoo.com/forms/xemfpfw080284y/> [<https://perma.cc/2AQX-BVBJ>] (“The new Guidelines put the rights of a tribe over that of any individual, and most importantly over those of children”); see also Bureau of Indian Affairs, *supra* note 9, at 125 (statement of Noel Tucker) (“The best interest of the child is secondary to the preservation of tribal culture. That is the crux of the issue here.”); Press Release, Am. Acad. of Adoption Attorneys, National Adoption Association Disappointed with New Federal Indian Child Welfare Guidelines (Mar. 12, 2015), <http://www.adoptionattorneys.org/doc/ICWA-BIA%20Guidelines.pdf> [<https://perma.cc/GCZ9-UB7K>].

needs.”²⁸ The BIA’s new mandatory requirement to apply ICWA in any case where a child may be eligible for tribal membership could be especially harmful, these agencies emphasize, when children and their biological parents “do not have . . . any connection whatsoever to any tribe other than biology” or only “through extreme distant ancestry.”²⁹

Within a few months, the BIA faced a multifront war in federal court.³⁰ These cases assert that the BIA exceeded its congressionally delegated authority under ICWA and that several provisions of ICWA itself are unconstitutional. In Virginia, the National Council for Adoption sued on behalf of a Native American child.³¹ They argued, among other things, that the new guidelines and ICWA require state courts and agencies to violate the due process and equal protection rights of Indian children and their birth parents. The rules, they contend, both interfere with the parents’ ability to direct the upbringing of their children and deny their children the same “best interests” determination given to non-Indian children in foster and adoption placement proceedings.³²

A few months later, the Goldwater Institute filed a class action lawsuit on behalf of “all off-reservation Arizona-resident children with Indian ancestry [in child custody proceedings] and . . . [the] foster, pre-adoptive, and prospective adoptive parents [of these children].”³³ The plaintiffs allege similar complaints, arguing that ICWA subjects Indian children to unequal treatment in the child welfare system because of their race in violation of their due process and equal protection rights, that ICWA violates the Tenth Amendment by encroaching on a matter traditionally reserved to the states, and that the guidelines exceed the BIA’s delegated authority under ICWA.³⁴

²⁸ Letter from Nat’l Council for Adoption, to Sec’y of Interior & Assistant Sec’y of Bureau of Indian Affairs, *supra* note 27.

²⁹ Press Release, Am. Acad. of Adoption Attorneys, *supra* note 27.

³⁰ Memorandum from the ICWA Def. Project (July 29, 2015), <https://turtletalk.files.wordpress.com/2015/08/2015-08-18-icwa-defense-project-memo-final-with-logos.pdf> [<https://perma.cc/7X7U-9AX3>].

³¹ Nat’l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL, 2015 WL 9854389 (E.D. Va. Oct. 20, 2015).

³² Complaint & Prayer for Injunctive & Declaratory Relief at 4, *Jewell*, 2015 WL 9854389 (No. 1:15-cv-00675-GBL).

³³ Complaint at 2–3, *Carter v. Washburn*, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015).

³⁴ *Id.* at 21–26; see also *Doe v. Jesson*, No. 15-2639 (JRT/SER), 2015 WL 4067170, at *5 (D. Minn. July 2, 2015) (denying a preliminary injunction but not yet ruling on substantive issues in a challenge to provisions under Minnesota’s Indian Family Preservation Act that has provisions mimicking ICWA).

C. These Challenges Revive Historical Equality-Based Attacks but Highlight a New Vulnerability in Indian Law

These attacks are nothing new. Federal law has singled out Native Americans for special benefits, preferences, and rights for centuries.³⁵ At first, equal protection challenges paired with antipaternalism to focus on laws that allegedly disadvantaged Native Americans and placed them on unequal footing with white citizens.³⁶ In the wake of affirmative action, equal protection rhetoric has shifted from government “paternalism” to avoiding “preferences” based on race.³⁷ Instead of being motivated by a desire “to reach tribal resources or to eliminate tribal competition,” these modern attacks focus on “overthrowing government-sponsored racial and ethnic preferences.”³⁸ Although the purpose has shifted, these cases continue to match non-Indians against those tribal members singled out for preferential treatment.³⁹

At one time, the Supreme Court explicitly affirmed Congress’s ability to regulate Native Americans based on race.⁴⁰ After the modern rise of

³⁵ Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 *UCLA L. Rev.* 943, 944–45 (2002); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 *Wash. L. Rev.* 1041, 1056 (2012). Classification as an Indian or non-Indian is also a central question to which sovereign jurisdiction an individual falls under since federal, state, and tribal authority is determined by an individual’s status. See, e.g., 18 U.S.C. § 1152 (2000) (establishing federal criminal jurisdiction over interracial crimes, but not crimes by an Indian against another Indian, or crimes by an Indian in “Indian country who has been punished by the local law of the tribe” or treaty stipulations); Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 *S.D. L. Rev.* 1, 2 (2006).

³⁶ Robert N. Clinton et al., *American Indian Law: Cases and Materials* 105 (3d ed. 1991); Goldberg, *supra* note 35, at 945–47; Bruce E. Johansen, *The New Terminators: The Anti-Indian Movement Resurfaces*, 17 *Native Am.*, Sept. 2000, at 42, 48.

³⁷ Goldberg, *supra* note 35, at 948; Johansen, *supra* note 36, at 49.

³⁸ Goldberg, *supra* note 35, at 948–49.

³⁹ See *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (challenging a Hawaiian statute that only allowed descendants of indigenous Hawaiians to vote for the trustees of the state’s Office of Hawaiian Affairs); *Morton v. Mancari*, 417 U.S. 535, 537, 553 n.24 (1974) (challenging a provision of the 1934 Indian Reorganization Act that gave Indians of one-quarter blood or more an advantage in seeking employment with the BIA).

⁴⁰ *Hallowell v. United States*, 221 U.S. 317, 320, 324 (1911) (holding that an Indian who had been active in county and state government as judge, county attorney, and director of a public school district was still subject to federal liquor laws as an Indian because “the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people”); *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (rejecting the argument that adopted Caucasians are Indians because the term is “confined to those who by the usages and customs of the Indians are regarded as belonging to their race” and “does not speak of members of a tribe, but of the race generally”); *Mosier v. United States*, 198 F. 54, 57, 60 (8th Cir. 1912)

equal protection challenges to affirmative action, the Court faced the question of whether to reiterate its precedent affirming congressional power to legislate on the basis of race, or to overturn that doctrine in light of modern theories of equal protection. In *Morton v. Mancari*, the Supreme Court responded to a due process challenge against the Indian Reorganization Act of 1934 that gave Native Americans an advantage when applying to work for the BIA.⁴¹ The Court held that the Indian hiring preference “does not constitute ‘racial discrimination’” nor is it “even a ‘racial’ preference.”⁴² Instead, the preference is “an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.”⁴³ To explain how a statute directed towards “Indians”⁴⁴ was not race-based, the Court clarified that the preference is “not directed towards a ‘racial’ group consisting of ‘Indians’” since it “applies only to members of ‘federally recognized’ tribes.”⁴⁵ Because this would “exclude many individuals who are racially to be classified as ‘Indians’” the preference is “political rather than racial in nature.”⁴⁶ The Court has repeatedly defended challenges to Indian law under this political-not-racial dichotomy, twice in the context of ICWA itself.⁴⁷

The BIA’s recent rulemaking, however, highlights a previously unexplored facet of the intersection between equal protection law and Indian law—can Congress regulate individuals who are racially Indian and eligible for tribal membership but who do not associate with their tribe? Challenges are typically brought by non-Indians or non-member Indi-

(holding that citizenship did not remove an Indian from coverage of liquor laws applicable to Indians because “[t]he word ‘Indian’ [in the statute] describes a person of Indian blood” and “[t]he word ‘citizen’ describes a political status”); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 228 (1984) (“[I]ndividual Indians were subjected to liquor laws, whether or not they had severed tribal relations and whether or not they were on a reservation.”).

⁴¹ 417 U.S. 535.

⁴² *Id.* at 553.

⁴³ *Id.* at 554.

⁴⁴ 25 U.S.C. § 472 (1934).

⁴⁵ *Mancari*, 417 U.S. at 553 n.24.

⁴⁶ *Id.*

⁴⁷ Brief for the Petitioners at 44–47, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (No. 12-399); Appellee’s Brief at 22–23, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 39 (1989) (No. 87-980); see also L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 717 (2001) (“For Congress and tribes, *Mancari* is a refuge for race-conscious legislation in an *Adarand* world of race neutrality.”).

ans⁴⁸ who wish to tear down a barrier erected by federal law that limits who can claim a particular preference, or to eliminate a preference entirely.⁴⁹ But the BIA's new rule flips this traditional campaign on its head. Instead of limiting who can claim a preference, the BIA's rule traps people inside, sweeping those who do not wish to be recognized as "Indian" into the BIA's sphere of regulation. The proposed rule requires all children who are "eligible for membership in an Indian tribe" and who are "the biological child of a member of an Indian tribe" to be mandatorily subject to ICWA's provisions.⁵⁰ ICWA no longer expresses a preference for where such children should be placed, subject to the parent's choice or the child's best interests. Instead, the BIA's new interpretation forces state courts and adoption agencies to immediately contact the relevant tribe and place the child with an associated family.

This shift in focus, from outsider to insider,⁵¹ reveals a potential weakness in Indian law's defense against equal protection challenges. *Mancari's* classification of Indian preferences as "political" as opposed to "racial" makes sense when tribal status is treated like any other restricted membership in an organization. Indian tribes are sovereigns that can determine who is entitled to be a citizen or a tribal member.⁵² But

⁴⁸ Nonmember Indians are those who are ethnically Indian but are not members of a federally recognized tribe.

⁴⁹ Goldberg, *supra* note 35, at 944.

⁵⁰ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,151 (Feb. 25, 2015).

⁵¹ Professor Matthew Fletcher characterizes this problem in a different way, arguing that the determination of "who is an Indian" cannot depend on race because race is both over- and underinclusive. Race is overinclusive because "many thousands of Indian people are not members of Indian tribes because they do not meet tribal membership criteria" that often rely on blood quantum. And race is underinclusive because "many non-Indian people are members of Indian tribes while many others qualify for tribal, federal, and state government Indian programs despite their lack of Indian racial characteristics such as blood quantum." Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 181 (2008).

⁵² Carole Goldberg, *Descent into Race*, 49 UCLA L. Rev. 1373, 1374, 1389 (2002) (explaining that "'race' was a European invention" and that Indians identify themselves "on the basis of tribal affiliation rather than race"); Robert B. Porter, *The Demise of the *Ongwehoweh* and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 Harv. BlackLetter L.J. 107, 156 (1999) ("The problem, then, with fixating on 'race' . . . is that Indigenous people are thus only perceived by American society in terms of race. This is true notwithstanding the fact that many of these discussions about 'race' actually focus on concerns about Indigenous sovereignty and self-government."); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. Rev. 958, 965 n.34 (2011) ("Federal Indian law scholars tend to avoid discussion of Indian racialization, casting race as a constructed and imposed

like all sovereigns, Indian tribes are not entitled to reach outside their borders and claim those who would disavow them.⁵³ And when the government restricts an individual's freedom based on their *eligibility* for membership, often based on an individual's blood quantum,⁵⁴ it touches a core liberty interest in self-determination. That is especially true when tribal eligibility only requires a genealogical link to a member of the tribe. Race is an immutable characteristic and individuals do not have a choice to be ethnically Indian. But they do have a choice to identify as Indian, and to apply for the special privileges and regulations attached to that status. If Congress has the power to regulate individuals as if they belonged to a tribe because of their racial background, Native American tribes would become the only organization that Indians could never leave—because of their race.

Striking down the BIA's new mandatory application of ICWA, however, risks eradicating broad areas of Indian law. This concern explicitly underlies the Court's creation of the "political" classification in *Mancari*. The Court noted that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single[s] out for special treatment a constituency of tribal Indians."⁵⁵ If these laws that were "explicitly designed to help only Indians[] were deemed invidious racial discrimination," then the Court warned the "entire Title of the United States Code (25 U.S.C.) would be effectively erased."⁵⁶ Subsequent courts have relied on *Mancari* for the assertion that Indian laws do not constitute "racial" legislation, and thus do not trigger strict scrutiny under the Fifth and Fourteenth Amend-

identity and emphasizing tribal affiliation and sovereignty as the most significant aspects of Indianness.").

⁵³ Rolnick, *supra* note 52, at 967 ("Tribal membership is . . . understood as an exercise of political consent and voluntary civic participation. As such, it is nearly indistinguishable from political participation in a local or state government.").

⁵⁴ Cohen's Handbook, *supra* note 4, § 14.03, at 953 ("[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 Kirsty Gover, Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States, 33 *Am. Indian L. Rev.* 243, 250 (2008–2009); Margo S. Brownell, Note, Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 *U. Mich. J.L. Reform* 275, 279–80, 288–98, 308–12 (2000–2001) (discussing blood quantum in survey of modern federal definitions of "Indian").

⁵⁵ *Mancari*, 417 U.S. at 552.

⁵⁶ *Id.*

ments.⁵⁷ But the BIA's new interpretation that ICWA created a mandatory preference for child placement and tribal involvement in foster and adoptive proceedings endangers this delicate compromise.

II. CURRENT RESPONSES TO EQUALITY-BASED ATTACKS ON INDIAN LAW FAIL TO ADDRESS CONGRESSIONAL REGULATION OF INDIVIDUALS

Current scholarship offers several possible responses to equal protection attacks on Indian law, differentiating Indian law from general affirmative action. These authors argue that special features of the relationship between the federal government and Indian tribes prevent a wholesale repudiation of Indian law. Because these theories respond to assaults against exclusive policies granting preferences to individuals, as opposed to inclusive policies that seek to categorize individuals and impose limitations on their conduct, they fail to respond to the core issue presented by the BIA's mandatory interpretation of ICWA.

A. Preferences for Native Americans Can Survive Strict Scrutiny Analysis

The first response argues that preferences created for Native Americans can survive the Supreme Court's strict scrutiny test for race-based statutes. After *Adarand Constructors, Inc. v. Peña*, the Supreme Court subjects federal classifications on the basis of race to strict scrutiny, even statutes that purport to benefit the racially subordinated group.⁵⁸ Strict scrutiny requires that the government advance a compelling interest through narrowly tailored means, reaching no more conduct than necessary to advance the government's compelling ends.⁵⁹

⁵⁷ Fletcher, *supra* note 51, at 159; see also *Williams v. Babbitt*, 115 F.3d 657, 663–66 (9th Cir. 1997) (noting that the challenger's argument that strict scrutiny applied to a law granting a preference to Native Americans raised "grave" questions that "implicate an entire title of the United States Code"); Carole Goldberg-Ambrose, Not "Strictly" Racial: A Response to "Indians as Peoples," 39 UCLA L. Rev. 169, 170 (1991) ("To accept this conclusion is to invite the complete demolition of federal Indian law as we know it today.").

⁵⁸ 515 U.S. 200, 218–19 (1995).

⁵⁹ Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 794, 798–800 (2006). The test is often described as "'strict' in theory and fatal in fact" since the application of heightened review appeared for many years to be outcome determinative. Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

This response originated with the federal courts as they struggled to respond to equal protection attacks to Native American preferences. Judge Alex Kozinski rejected the proposition that strict scrutiny “would effectively gut Title 25 of the U.S. Code.”⁶⁰ Strict scrutiny analysis did not warrant such “dire prediction[s],” he argued, because there is “little doubt that the government has compelling interests when it comes to dealing with Indians.”⁶¹ He concluded in a manner that likely did little to settle the concerns of those seeking to preserve Indian law, noting that if the government did have such an interest, “Title 25 [would] only be stripped of those laws that are not narrowly tailored.”⁶²

For Indian law to “survive strict scrutiny,” the courts would need to accept that Title 25’s extensive preferences for Native Americans are narrowly tailored to further the government’s trust obligation with the Indian tribes.⁶³ A few federal cases have applied strict scrutiny to allow federal preferences to stand. In *American Federation of Government Employees v. United States*, the U.S. District Court for the District of Columbia denied a preliminary injunction brought to enjoin the federal government from granting preferences to Native-American-owned civil engineering firms when awarding contracts with the Air Force.⁶⁴ The court accepted the federal government’s proffered interest “in fulfilling its trust obligations to the Alaska Native-American tribes—an interest and obligation which arises from the unique guardian-ward relationship which exists between the government and the tribes.”⁶⁵ Holding that the preference is “likely to pass strict scrutiny,” the court argued that the preference was narrowly tailored because the “preference has never been used to benefit an enterprise which is owned by someone who is of the

⁶⁰ *Williams*, 115 F.3d at 665 n.8 (citation omitted).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Professor David Williams provides several alternative compelling state interests, including the federal government’s “Fiduciary Obligation” to the Indian tribes, the “Ethnic of Promise-Keeping” after years of establishing treaties and agreements with tribes, “Cultural Pluralism,” and “Reparations for Historical Dispossession.” David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 *UCLA L. Rev.* 759, 813–23 (1991). There is no indication, however, that any of these additional interests affect the ultimate outcome of the strict scrutiny analysis. The trust-obligation formulation derives from *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

⁶⁴ 104 F. Supp. 2d 58, 61 (D.D.C. 2000).

⁶⁵ *Id.* at 75.

Native-American race but does not hold tribal membership or affiliation.”⁶⁶

But this is not obviously correct. In a 1989 letter to Senator Daniel Inouye of the Senate Select Committee on Indian Affairs, the Justice Department warned that government preferences “that do not depend solely upon [Indian] *membership* in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under [*Morton v. Mancari*].”⁶⁷ Thus, the U.S. Department of Education’s hiring preference for Native Americans was not “narrowly tailored” because it “did not remedy past discrimination” and instead “trammel[ed] the rights of innocent third parties.”⁶⁸ Professor Carole Goldberg argues that the narrowly tailored component of the test is one of two main difficulties with the strict scrutiny response. Courts often “substitute[] their own judgments about the importance of particular government objectives and the best means to achieve them for the judgments of the legislatures and other public agencies.”⁶⁹ This trend renders the strict scrutiny survival response “unmanageable and unpredictable.”⁷⁰ More fundamentally, she argues that this theory treats Native Americans as a racial group as opposed to citizens of separate sovereigns, a construct which would better fit the “lens through which Indian people understand themselves.”⁷¹

This theory would also be inadequate to address the BIA’s new rule-making. Congress specifically addressed its concerns when enacting ICWA, noting the alarmingly high percentage of Indian families that were broken up by social workers and how tribes faced a depleting future membership because Indian children were being fostered or adopted outside of a tribe’s culture.⁷² But even if courts are convinced that the government’s interest in a mandatorily imposed ICWA is compelling, there is no reason to think the BIA’s interpretation is narrowly tailored. The rule is both over- and underinclusive. It includes individuals who

⁶⁶ *Id.*

⁶⁷ Letter from Thomas M. Boyd, Assistant Attorney Gen., to Sen. Daniel K. Inouye, Chairman of the Select Comm. on Indian Affairs (Jan. 30, 1989), *reprinted in* S. Rep. No. 100-601, at 13–15.

⁶⁸ Goldberg, *supra* note 35, at 956 n. 84 (citation omitted).

⁶⁹ *Id.* at 956.

⁷⁰ *Id.* at 957.

⁷¹ *Id.* (citing Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (1988)).

⁷² See *supra* Section I.A.

are ethnically Indian but have no cultural relations to their ancestral tribe, but ignores individuals who may not be racially Indian but have strong political, cultural, and social connections to a tribe. The BIA justifies this change by arguing that courts previously flouted ICWA's preference for Indian children to remain with their tribe by taking advantage of its flexible requirements and "best interest" exception.⁷³ But it has offered little evidence that a mandatory ICWA is a narrowly tailored solution to this obstacle.

Moreover, if courts are willing to uphold Native American preferences as narrowly tailored because they have "never been used to benefit . . . someone who is of the Native-American race but does not hold tribal membership or affiliation," there is no reason to think this extends to the BIA's new rulemaking.⁷⁴ This new rule specifically targets children who are eligible for tribal membership because of their race, including those whose parents reject tribal affiliation. If this factor plays the role in strict scrutiny analysis that the D.C. District Court suggests, the BIA's rule would not withstand strict scrutiny.

B. Regulation of Native Americans Is Based on Their Status as Tribal Citizens Rather Than Race So Indian Law Is Not Subject to Strict Scrutiny

The second response to equal protection challenges argues that Indian classifications on the basis of tribal citizenship are permissible since they do not depend on Indian ethnic ancestry. This theory was first proposed by Professor Eugene Volokh, who drew an analogy between tribal citizenship and foreign citizenship to argue that laws classifying on this basis should receive the same relaxed scrutiny standard.⁷⁵ The federal government can distinguish among individuals based on whether they are U.S. citizens or foreigners, or if they are a citizen of one state versus another. This is true even if that sovereign's citizenship requirements are based on race.⁷⁶ Tribes are simply another type of citizenship that one

⁷³ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,149 (Feb. 25, 2015).

⁷⁴ *Am. Fed'n of Gov't Emps.*, 104 F. Supp. 2d at 75.

⁷⁵ Eugene Volokh, *The California Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1358–59 (1997).

⁷⁶ Thomas W. Pogge, *Group Rights and Ethnicity*, in *Ethnicity and Group Rights* 187, 193 (Ian Shapiro & Will Kymlicka eds., 1997) (noting that while "rare[]" countries do have bans on certain ethnicities becoming citizens; for example "ethnic Germans from Russia who

can adopt, and that can be regulated. Under this theory, discriminatory laws that focus on Native Americans as a racial group can be targeted and removed without unraveling the rest of the structure.

Professor Goldberg responds that there are several difficulties with this theory. First, it can be difficult to determine who is a tribal citizen, since many tribes are not federally recognized or do not have written documents.⁷⁷ Second, it may not fit with judicial precedent since *Manca-ri* does not apply rational basis review, as foreign citizenship rules require, but a standard that looks for Indian laws to be “tied rationally to the unique obligation” of the federal government towards Indian tribes.⁷⁸ Third, “the federal government has long resisted limiting its trust responsibility to enrolled tribal members” because “the very concept of enrollment and maintenance of citizenship lists is largely an artifact of the allotment era” where the federal government devastated Indian sovereignty by dividing tribal lands into parcels that were allotted out to members.⁷⁹ Many programs specifically reach out to individuals who are not citizens of a federally recognized tribe, and such statutes could not survive a citizenship-based response to equal protection challenges.⁸⁰

The citizenship-based response also fails to engage the core tension highlighted by the BIA’s recent rulemaking. Citizenship is not an immutable characteristic like race. Individuals who do not want to bear the benefits and burdens of citizenship can renounce or relinquish it. But the BIA’s new rule attempts to regulate an individual regardless of tribal citizenship. Children who are the subject of a foster care or adoption proceeding and are eligible for membership with an Indian tribe are regulated regardless of whether they themselves are enrolled in a tribe. And parents cannot remove themselves from the reach of the BIA’s adoption requirements by renouncing their tribal citizenship. Thus, while the citizenship test has the benefit of removing the racial element from the analysis, and allowing Native American preferences to be subject to rational basis instead of strict scrutiny, it does not address the core issue at

speaking no German are eligible to become citizens of Germany while ethnic Turks who have lived there all their lives are not.”).

⁷⁷ Goldberg, *supra* note 35, at 959.

⁷⁸ *Id.*

⁷⁹ *Id.* at 964.

⁸⁰ *Id.* at 964–65, 964 & n.126 (discussing programs such as the Indian Arts and Crafts Act that “protect[s] Indian artists against sale of handicrafts that are misrepresented as Indian goods,” or that give “federal funding to support training for health care professionals,” or funding for BIA schools).

the heart of the BIA's rulemaking. Because individuals cannot renounce their Indian affiliation to escape the strictures of the BIA's adoption mandate, the law looks far more like a regulation based on race than on citizenship.

C. The Indian Commerce Clause Is Specific, While the Equal Protection Clause Is General, So Indian Law Is Not Subject to Strict Scrutiny Analysis

The final response to equal protection claims relies on the text of the Indian Commerce Clause. This theory draws on the statutory interpretation principle that specific provisions should control over more general provisions.⁸¹ The Equal Protection Clause is a general provision dictating equal treatment, while the Indian Commerce Clause is a specific provision authorizing the federal government to exercise power over Indian tribes.⁸² Therefore, “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.”⁸³

Professor Goldberg recognizes that “the most serious question concerning the Indian Commerce Clause response is whether it supports existing federal classifications directed at individual Indians rather than tribes.”⁸⁴ She agrees that there must be “some limits on Congress’s power to declare an individual or group ‘Indian’ and to justify special legislation, including preferences or detriments, on this basis.”⁸⁵ Professor Goldberg proposes a two-part solution. The first part is based on the Indian Arts and Crafts Act of 1990, which limits eligible individuals to those who are “a member of an Indian tribe” or are “certified as an Indian artisan by an Indian tribe.”⁸⁶ Professor Goldberg argues that using a definition like this to limit Congress’s power over individual Indians will preserve coverage of those Indians who “may still have sufficient

⁸¹ Also known as “*generalia specialibus non derogant*” or “general things do not derogate from specific things.” *Generalia specialibus non derogant*, Black’s Law Dictionary (10th ed. 2014). See generally Caleb Nelson, *Statutory Interpretation* 538–52 (2011) (reviewing the principle as applied by courts).

⁸² Goldberg-Ambrose, *supra* note 57, at 174–75.

⁸³ Goldberg, *supra* note 35, at 967.

⁸⁴ *Id.* at 968.

⁸⁵ *Id.* at 970–71.

⁸⁶ 18 U.S.C. § 1159(c)(1) (2012).

connections with the tribe to constitute tribal affiliation” as long as the tribe is willing to certify them as a member.⁸⁷ The second prong of her test requires “a nexus between benefitting individual Indians and benefitting a tribe.”⁸⁸ This test would vary depending on the “tribal interest served by the statute,” requiring courts to keep “tribal governments, cultures, and economies in mind.”⁸⁹ In other words, when Congress passed legislation that appeared to benefit Indians, then courts would give “considerable judicial deference to congressional choices about the class of individuals subject to Indian legislation,” but apply a more skeptical review if the law appeared to be detrimental.⁹⁰

But this reading of the Indian Commerce Clause faces two fatal difficulties. First, Professor Goldberg fails to provide a textual hook to support the “nexus” she proposes to limit government legislation over tribes and individual Indians. There is nothing in the Indian Commerce Clause, granting Congress power to “regulate Commerce . . . with the Indian Tribes,” that suggests that this legislation must be for the benefit of Native Americans. And given the long history of Congress passing harmful legislation that broke up tribes and tribal land,⁹¹ it is not clear that there is a historical basis for her proposed approach.

Moreover, Professor Goldberg posits that this limitation is inherent in the Indian Commerce Clause, but she then goes on to argue that this test somehow incorporates or tracks the statutory test for determining “Indianness” in the Indian Arts and Crafts Act.⁹² It may be good policy, but there is no clear connection between this test and the constitutional limits on Congress’s power to legislate on Indian affairs. It is also not clear why courts would apply varying levels of scrutiny based on the potential benefits or detriments of the legislation, or even how they would differentiate between the two.

The BIA’s new guidelines underscore why this type of analysis would be so difficult to apply. Native American tribes argue that the mandated-adoption protocols are necessary for sustaining tribal culture and preserving future membership. But individual Native American parents who wish to place their child outside the tribe view this regulation as a

⁸⁷ Goldberg, *supra* note 35, at 972.

⁸⁸ *Id.* at 971.

⁸⁹ *Id.* at 972.

⁹⁰ *Id.*

⁹¹ See *infra* Section III.B.

⁹² See Goldberg, *supra* note 35, at 971.

severe burden on their individual autonomy to decide what is in their child's best interest. Professor Goldberg's interpretation of the Indian Commerce Clause fails to address how Indian law can survive equal protection challenges when tribal interests and individual interests diverge.

III. A NEW THEORY: INDIAN COMMERCE CLAUSE LIMITS CONGRESSIONAL POWER TO LEGISLATE "INDIANS" BASED ON THEIR POLITICAL, CULTURAL, AND SOCIAL CONNECTIONS

Current scholarship does not provide an answer to the question highlighted by the BIA's new rulemaking: Does Congress's power over Indian affairs under the Indian Commerce Clause include the ability to regulate individuals who are racially Indian but who do not affiliate with a federally recognized tribe?⁹³ This Part argues that it does not.

The answer turns on the ambiguity in the word "Indian" as used in the Clause.⁹⁴ The word "Indian" as used in the Indian Commerce Clause contains two plausible interpretations. It could refer to Indians in their racial capacity, encompassing everyone of Native American descent. Or it could be limited to only those individuals with a political, social, or cultural connection to a Native American tribe. This political definition provides the best interpretation.

⁹³ Congressional power over Indian tribes may not rest solely in the Indian Commerce Clause, but also in the Treaty Clause. *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."); Cohen's Handbook, *supra* note 4, § 5.01, at 384 (finding the Indian Commerce Clause and the Treaty Clause are the "most often cited" sources of authority for legislation, and "coupled with the supremacy of federal law" the two Clauses "provide[] ample support for the federal regulation of Indian affairs"). The Treaty Clause, U.S. Const. art. II, § 2, cl. 2, vests the federal government "with additional authority over the signatory tribe" by granting Congress "the power to enact legislation to fulfill obligations incurred in treaties." Cohen's Handbook, *supra* note 4, § 5.01, at 386–87. The Indian Commerce Clause is, however, "the only explicit [grant of] constitutional authority to deal with Indian tribes." Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 137 (2006).

⁹⁴ Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 Duke L.J. 1213, 1217 n.10 (2015) (explaining that text is ambiguous when it "could mean more than one specific thing.").

The resolution of an ambiguous constitutional provision depends on the practice used to interpret constitutional provisions.⁹⁵ An immediate challenge to a new interpretation of a constitutional provision, or the resolution of a latent ambiguity, is determining if that interpretation withstands scrutiny under different methods of constitutional analysis. To substantiate the conclusion that the ambiguity in the word “Indian” should be resolved in favor of its political definition, this Section responds to the potential challenges posed by different constitutional methodologies by reviewing the framers’ intent, historical practice, judicial precedent, and intratextual doctrine.

Only the political definition of “Indian” comports with all of these methods of constitutional interpretation. The framers failed to provide any guidance about the meaning of the word “Indian” within the Clause. But federal treatment of Indians after the Constitution’s enactment, although applied inconsistently depending on the purpose of the federal action, shows an overwhelming support for a political definition of “Indian” in the Constitution. This definition is also consistent with the judiciary’s evolving interpretation of federal Indian law and congressional power. Finally, the political definition is further validated by comparing the possible alternative resolutions of this ambiguity with other provisions of the Constitution. In particular, only the political definition of “Indian” comports with the First Amendment’s right to freedom of association.

A. The Framers Did Not Provide Guidance on How to Interpret the Word “Indian”

We know very little about what the Framers thought the Indian Commerce Clause meant. The Clause’s antecedent was Article IX of the Articles of Confederation, which granted the Continental Congress the “sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians.”⁹⁶ This was broad language, but the provision included two restrictions: Congress could only regulate Indians who were “not members of any of the states” and only as long as

⁹⁵ Id. at 1238; see also Philip Bobbitt, *Constitutional Interpretation* 11–22 (1991) (identifying six types of constitutional interpretation: textual, historical, structural, ethos (based on national identity), prudential, and precedential).

⁹⁶ Articles of Confederation of 1781, art. IX, para. 4.

Congress did not “infringe[] or violate[]” the “legislative right of any state within its own limits.”⁹⁷

When the delegates gathered at the Constitutional Convention in June 1787, many expressed concern about the increasing state encroachment on Congress’s power to control trade and official relations with the Indian tribes.⁹⁸ But the first recorded consideration of Native Americans did not appear until August, during the Committee of Detail, when John Rutledge of South Carolina made a margin note of “Indian Affairs” next to Edmund Randolph’s sketch of the constitutional power “[t]o provide tribunals and punishment for mere offences against the law of nations.”⁹⁹ Later that month, James Madison proposed an additional power during a debate on the powers of the legislative branch, calling for a power “[t]o regulate affairs with the Indians as well within as without the limits of the U. States.”¹⁰⁰ The Committee of Detail instead chose to incorporate Madison’s proposal into a previously drafted provision granting Congress the power to “regulate commerce with foreign nations, and among the several States.”¹⁰¹ The addition would read “and with Indians, within the Limits of any State, not subject to the laws thereof.”¹⁰²

The question of Congress’s power over Native Americans did not appear again until the Convention neared its end. The Committee on

⁹⁷ Id. Even this was the result of a compromise with the states. The first draft asserted far more power, including banning the colonies from “engag[ing] in offensive war against Natives without congressional consent,” granting the Continental Congress the power to “enter into an alliance with the Six Nations,” and “the right of preemption of all Native land while guaranteeing Indian title to unpurchased territory.” Gregory Ablavsky, *The Savage Constitution*, 63 *Duke L.J.* 999, 1012 (2014). The Congress lost most of these provisions in later drafts, and even “[t]he most contentious” provision granting the Congress the “sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians” was restricted by the final version. *Id.* at 1012–13 (second quotation’s internal quotation marks omitted).

⁹⁸ 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., 1911) (June 19, 1787) (statement of James Madison, Virginia); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *Yale L.J.* 1012, 1022 (2015); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 *Am. Indian L. Rev.* 57, 79 (1991) (noting that “in spite of Article IX, states had regulated and confiscated Native American lands, had warred with Native American tribes, and had engaged in commerce with the Native American tribes” all in tension with the Continental Congress’s own attempts to regulate interactions with the tribes).

⁹⁹ 2 *The Records of the Federal Convention of 1787*, *supra* note 98, at 143.

¹⁰⁰ *Id.* at 324.

¹⁰¹ *Id.* at 181.

¹⁰² *Id.* at 367. This change from Madison’s language preserved the limitations placed on Congress’s power in Article IX of the Articles of Confederation.

Postponed Parts suggested eliminating the clause's restrictions, instead adding "and with the Indian tribes" to the end of the Commerce Clause.¹⁰³ The rest of the Constitutional Convention, without comment, incorporated those changes so that the final language reads as it does today, granting Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁰⁴

The most significant change from Congress's power under the Articles of Confederation and the Constitution was the Convention's choice to eliminate the restrictions on which Indians could be regulated. James Madison praised this change as resolving disputes about which sovereign, federal or state, had authority over Indian affairs.¹⁰⁵ In Federalist No. 42 he also commented that the original language had left open ambiguities about which Indians would fall under federal power and which would fall under state power.¹⁰⁶ "What description of Indians are to be deemed members of a State, is not yet settled," he wrote, "and has been a question of frequent perplexity and contention in the federal councils."¹⁰⁷ That commentary in *The Federalist* would be the last mention¹⁰⁸ of Congress's power over Indian affairs until the U.S. Congress passed the Trade and Intercourse Act of 1790.¹⁰⁹

The only clear takeaway from these records is that there is very little to take away. Scholars have attempted to draw inferences from the shift from "Indians" to "Indian tribes"¹¹⁰ and from "affairs" to "commerce"¹¹¹ to interpret the breadth and scale of Congress's powers under the Indian

¹⁰³ *Id.* at 493, 497, 503.

¹⁰⁴ *Id.* at 497, 655.

¹⁰⁵ *The Federalist* No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory.").

¹⁰⁶ *Id.* at 268–69.

¹⁰⁷ *Id.* at 269.

¹⁰⁸ Anti-Federalist Abraham Yates, Jr. also mentioned the Indian Commerce Clause during his attacks on the rest of the document, arguing that the federal government had usurped improper supremacy over Indian affairs. See Sydney, *To the Citizens of the State of New York*, N.Y.J., June 13–14, 1788, *reprinted in* 20 *The Documentary History of the Ratification of the Constitution* 1153, 1156–58 (John P. Kaminski et al. eds., 2004).

¹⁰⁹ Act of July 22, 1790, ch. 33, 1 Stat. 137.

¹¹⁰ See Fletcher, *supra* note 51, at 165–70.

¹¹¹ See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)) (discussing academic literature interpreting the Indian Commerce Clause through its history); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 *Denv. U. L. Rev.* 201, 241–44, 250 (2007).

Commerce Clause. But without more, this “traditional source[] of original constitutional understanding give[s] modern scholars very little clear evidence”¹¹² to justify one particular interpretation of the Constitution over another. Records from the Constitution’s drafting and debates reveal little about whether the framers interpreted “Indian” to refer to those of a particular racial descent or to those who identified with and participated in Indian tribes.

B. Historical Practice After the Constitution’s Enactment Comports with a Political Definition of “Indian”

The Indian Commerce Clause’s meaning becomes more apparent by looking at how the federal government differentiated Indians from non-Indians during and after the time of the Constitution’s ratification. Although federal officials often used the language of blood quantum to describe mixed-race individuals, the terms rarely had legal weight. Furthermore, Congress failed to adopt a uniform definition of “Indian,” instead implicitly choosing to allow administrative officials to determine the meaning based on the circumstances they faced. The effect of this unstated policy is that from the country’s founding to the passage of the Indian Reorganization Act of 1934,¹¹³ the law relied on an almost exclusively political definition of “Indian” that turned on tribal membership as opposed to race.¹¹⁴

Blood quantum laws did have an early start in the American colonies.¹¹⁵ These laws derived from an English common law rule that distinguished between “whole blood” and “half blood” relatives for in-

¹¹² Ablavsky, *supra* note 97, at 1023; see *id.* at 1038 (“Because the Clause’s unenlightening text was shaped, unrecorded, behind committee doors, clarity is elusive.”).

¹¹³ Act of June 18, 1934, ch. 576, § 19, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 479 (2012)). The Indian Reorganization Act was a major turning point in Indian law, when the federal government chose to define tribal membership according to definitions in constitutions adopted by federally recognized tribes. Melissa L. Meyer, *American Indian Blood Quantum Requirements: Blood Is Thicker than Family*, in *Over the Edge: Remapping the American West* 231, 233 (Valerie J. Matsumoto & Blake Allmendinger eds., 1999).

¹¹⁴ Spruhan, *supra* note 35, at 4 (“The shift from the almost exclusive use of political definitions to the selective use of biological ones tracks the changing perception of the federal government’s relationship to Indian tribes.”).

¹¹⁵ *Id.* at 47. “Blood quantum” is a metaphor for ancestry. A person is described in fractional terms, such as “one-quarter” or “one-half” based on the status of that person’s lineal ancestry. *Id.* at 46–47.

heritance.¹¹⁶ The early British colonies adapted this rule “to define the legal status of mixed-race people for various purposes.”¹¹⁷ This “language of blood” was also often used by courts when adjudicating slave cases to determine if an individual was a “free white or Indian person” or a slave.¹¹⁸

In the time after the Constitution’s enactment, Congress failed to provide a definition of “Indian” until the late nineteenth century.¹¹⁹ The Trade and Intercourse Act, first passed in 1790,¹²⁰ was Congress’s first use of the Indian Commerce Clause, but the Act regulated relations between non-Indians and Indian tribes. The Act prohibited any person from “carry[ing] on any trade or intercourse with the Indian tribes” without defining the outer boundary limits of who constituted a member of the Indian tribes, or whether individuals who were ethnically Indian were included in the Clause’s provisions. Subsequent versions of the Trade Act continued to regulate trade with Indian tribes, ban state and private land purchases from Indians, and extend federal criminal jurisdiction over any “citizen or inhabitant of the United States” who performed a criminal act on “territory belonging to any nation or tribe of Indians.”¹²¹

¹¹⁶ 2 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 301–05 (2d ed. 1959).

¹¹⁷ Spruhan, *supra* note 35, at 4. For example, a Virginia statute passed in 1705 barred “mulattos” from holding public office. A “mulatto” was “the child of an Indian and child, grandchild or great grandchild of a negro.” *Id.* at 5 (quoting 1705 Va. Acts, ch. IV, 3 Statutes at Large 250, 252 (William Waller Hening ed., 1823)).

¹¹⁸ *Id.* at 6.

¹¹⁹ This period is often referred to as the “Allotment era.” Congress passed a series of acts regulating Native Americans based on race. For example, Congress criminalized distributing liquor to Indians “including mixed-bloods.” Act of Jan. 30, 1897, ch. 109, 29 Stat. 506, 506. Often, however, these laws would regulate Indians based on a hybrid political-racial definition. For example, Congress included “half-breed[s] who live[] and associate[] with Indians” in an 1899 law that prohibited anyone to sell firearms to Indians. Act of Mar. 3, 1899, ch. 429, § 142, 30 Stat. 1253, 1274.

¹²⁰ Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137. The Act was subsequently reauthorized for three-year increments until the 1834 Act made the general policy permanent. Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

¹²¹ Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

The executive branch attempted to fill this void, operating primarily through the treaty power.¹²² Beginning in 1817, treaties included provisions for individual Indians based on blood quantum, but these treaties often required a person of less-than-full Indian blood to be residing on tribal land to be eligible for benefits, indicating that individuals needed to show a political rather than merely racial affiliation with the tribe.¹²³

In 1856, Attorney General Caleb Cushing offered a definition in an administrative decision about the status of Chippewa multiracial individuals.¹²⁴ The case involved an individual of mixed Indian and white descent who attempted to claim both “half-breed scrip” under a federal treaty with the Chippewa nation and public land “preemption” benefits that were available to U.S. citizens under the General Preemption Act of 1841.¹²⁵ Cushing considered and rejected a rule based on blood quantum in favor of a rule that “distinguished Indians from [U.S.] citizens by their political allegiance.”¹²⁶ Instead, Indians of mixed descent needed to reject their tribal membership before becoming eligible for American citizenship.¹²⁷

Congress reentered the field of Indian affairs after the Civil War, first touching on the question of Indian status during the debates on the Civil Rights Act of 1866 and the Fourteenth Amendment. Indians are only mentioned explicitly in the text of the Fourteenth Amendment once, “excluding Indians not taxed,” from representative apportionment in

¹²² Congress still plays a role in the treaties negotiated by the President, as according to the Constitution all treaties must be ratified by a two-thirds vote in the Senate. U.S. Const. art. II, § 2.

¹²³ Spruhan, *supra* note 35, at 10–12. For example, the Chippewa treaty provides that “half or mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians.” Treaty with the Chippewa art. 4, Aug. 2, 1847, 9 Stat. 904, 905; see also Treaty with the Poncas art. 3, Mar. 12, 1858, 12 Stat. 997, 999 (requiring that the “half-breeds[s]” who chose to stay with the tribe “enjoy all the rights and privileges of members of the tribe”).

¹²⁴ Spruhan, *supra* note 35, at 17 (citing *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746 (1856)).

¹²⁵ General Preemption Act of 1841, 27 Cong. Ch. 16, 5 Stat. 453.

¹²⁶ Spruhan, *supra* note 35, at 17.

¹²⁷ *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. at 752–53 (“Let him cease, then, to continue by his own volition and election an Indian. If, by some act of recognized legality, he has manifested his desire to be considered a citizen, then it will have to be considered whether such act is effective . . . whether, in a word, if of admitted capacity to become a citizen of the United States, he has in fact become such, by throwing off the *status* of Indian.”).

Section Two.¹²⁸ The debates surrounding the adoption of the text emphasized the collective nature of Indians as a political entity, defining “Indians” as “tribal Indians [who] are not taxable as long as they remain subject to the jurisdiction of their tribe in any degree and hold tribal allegiance in any degree.”¹²⁹ Indians were excluded from citizenship not because of their race, but because “they had no *personal* political relationship with the United States or the several states.”¹³⁰

A few years later, Congress abolished treaty making with Indian tribes,¹³¹ allowing agreements approved by a majority of each house to serve the same function.¹³² During this period, Congress and the BIA asserted increasing federal authority over tribal life by distributing annuity payments, establishing tribal police forces and courts, and creating schools.¹³³

Increased federal benefits for Native Americans renewed questions about who was qualified to collect those benefits. Congress passed a number of laws to limit particular statutory provisions to Indians of full blood, but otherwise left the question to the BIA and the federal court system.¹³⁴ The BIA alternated between specifically including mixed-bloods in their lists of tribal members, and foregoing identifying those of

¹²⁸ U.S. Const. amend. XIV, § 2. This language originally referred to those Indians who had severed their tribal relations and individually joined non-Indian communities. Cohen’s Handbook, *supra* note 4, § 8.01, at 677.

¹²⁹ George Beck, The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,” 28 Am. Indian Culture & Res. J. 37, 37 (2004).

¹³⁰ Fletcher, *supra* note 51, at 177.

¹³¹ Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2012)) (declaring that no future tribe would be considered an “independent nation, tribe, or power with whom the United States may contract by treaty”). This move was of “dubious constitutionality.” Fletcher, *supra* note 51, at 172; see also George William Rice, Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?, 5 Am. Indian L. Rev. 239, 247 (1977) (“When Congress condemned the use of treaties, it did not prevent the practice of dealing with Indian nations by means of ‘constitutions,’ ‘agreements,’ ‘charters,’ and ‘conventions,’ nor impair the validity of any existing treaty, nor impair the political status of Indian governments.” (footnotes omitted)).

¹³² 1 Vine Deloria, Jr. & Raymond J. DeMallie, Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979, at 249–50 (1999).

¹³³ Another example includes Congress’s expansion of federal criminal jurisdiction over major crimes committed between Indians. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2012)).

¹³⁴ Spruhan, *supra* note 35, at 20. Members of Congress did attempt to “create an all-purpose definition for Indian that would have included mixed-bloods as long as they maintained relations with their tribe[.]” *id.* at 32, but concerns about impeding assimilation prevented its passage. 27 Cong. Rec. 2610, 2612–14 (1895).

mixed-race and identifying only those who “wore citizen’s dress.”¹³⁵ When federal agents asked the Commissioner of Indian Affairs to clarify whether a “white person with one-thirty-second part Indian blood, or even less, [could be] entitled to recognition and rights within the tribe equal to those of full-bloods[,]” the administration failed to clarify.¹³⁶ The BIA’s regulations simply stated that federal agents should distribute benefits to “individual members of the tribe” and not to “citizens or persons not Indians, who have not been adopted by the tribal authorities.”¹³⁷

In 1887, the relationship between the federal government and Indian tribes entered a new era of regulation. In the 1887 General Allotment Act, Congress divided tribal land into individual “allotted” parcels, with surplus land ceded back to the federal government for non-Indian settlement.¹³⁸ The BIA then faced the question of whether persons of mixed race were eligible for allotments. The agency largely applied the rule of tribal membership, allowing an individual’s status within the tribe to determine whether they were “Indian” within the meaning of the federal statute.¹³⁹ The Acting Commissioner specifically instructed BIA agents to grant white men who were “legally incorporated” with the tribe allotments,¹⁴⁰ though federal agents occasionally refused to grant allotments to individuals of white descent separately from their Indian wives or mixed-race children.¹⁴¹ Responding to a high-profile case in which a mixed-race individual was refused allotment, the Attorney General reiterated the tribal membership rule, asserting that the “definition of Indian for purposes of allotment eligibility depended on the particular rules and customs of the tribes.”¹⁴²

Congress officially shifted from this political definition to one based on race at the beginning of the twentieth century. Native Americans had

¹³⁵ Spruhan, *supra* note 35, at 21 n.160 (citing Annual Report of the Commissioner of Indian Affairs 328–54 (1885)).

¹³⁶ Spruhan, *supra* note 35, at 21 (quoting Annual Report of the Commissioner of Indian Affairs 90–95 (1877)).

¹³⁷ Bureau of Indian Affairs, Regulations of the Indian Department, §§ 158, 162 (Washington, D.C., Government Printing Office 1884).

¹³⁸ General Allotment Act, ch. 119; 24 Stat. 388, 388–91 (1887) (codified as amended at 25 U.S.C. §§ 331–58 (2012) (§§ 331–33 repealed 2000)).

¹³⁹ Spruhan, *supra* note 35, at 24 n.198, 25 n.199.

¹⁴⁰ Letter from A.C. Tonner, Acting Comm’r of Indian Affairs to Special Allotting Agent Charles H. Bates (Aug. 8, 1904).

¹⁴¹ Dep’t of the Interior, U.S. Indian Serv., Report of Pine Ridge Council 2–3 (1908).

¹⁴² Spruhan, *supra* note 35, at 29 (citing Sioux Mixed Blood, 20 Op. Att’y Gen. 711, 711–12 (1894)).

an initial twenty-five-year ban on selling their allotments. But under the Burke Act,¹⁴³ Congress amended the ban for Indians who were “deemed competent to handle their affairs.”¹⁴⁴ Once an Indian was considered “competent,” they could sell their land and, crucially, be taxed. To hasten the process, Congress “applied blood quantum as a proxy for competency to release whole groups of Indians from their allotment restrictions.”¹⁴⁵ Congress established the Dawes Commission to create official rolls that identified Indians by blood quantum, releasing whites and one-half blood Indians from land restrictions and retaining restrictions for those of three-quarters blood or more.¹⁴⁶ Allotment was a disastrous policy for Native Americans that left Indians “landless and impoverished, deprived of their sovereignty, identity, and community.”¹⁴⁷ The Dawes Commission rolls, although highly inaccurate, became the basis for determining Indian membership and asserting Indian ancestry.¹⁴⁸

In 1934 Congress passed the Indian Reorganization Act (“IRA”)¹⁴⁹ and shifted public policy once again. The Act encouraged Indian tribes to organize constitutional governments like corporations.¹⁵⁰ BIA representatives encouraged tribal leaders to codify enrollment requirements, often explicitly encouraging blood quantum requirements to limit mem-

¹⁴³ Act of May 8, 1906, ch. 2348, § 6, 34 Stat. 182, 183 (codified as amended at 25 U.S.C. § 340 (2012)).

¹⁴⁴ Spruhan, *supra* note 35, at 40; see also Janet A. McDonnell, *The Dispossession of the American Indian 1887–1934*, at 87–102 (1991) (discussing how the Burke Act’s requirement of competency was narrowly applied to include only Indians who were capable of managing their own affairs—and thus eligible to sell their lands before the twenty-five-year trust period ended).

¹⁴⁵ Spruhan, *supra* note 35, at 40.

¹⁴⁶ Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645. This release happened over time. Congress granted the Commissioner of Indian Affairs the power to release all allotted Indians of less than one-half Indian blood in 1917, and in 1919 to release everyone equal to one-half blood. 1917 Comm’r Indian Affairs. Ann. Rep. 3, 3–5. See generally Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 15–30 (1999) (providing a detailed account of enrollment and allotment in American history).

¹⁴⁷ Goldberg, *supra* note 35, at 946–47; Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1, 6 (1995).

¹⁴⁸ Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 *Geo. Pub. Pol’y Rev.* 129, 132 (1999).

¹⁴⁹ Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified at 25 U.S.C. § 465 (2012)).

¹⁵⁰ Meyer, *supra* note 113, at 233.

bership and the division of federal benefits.¹⁵¹ The IRA itself created a mish-mash of historical requirements, adopting three categories of who could be determined “Indian.” Under Section 19, the IRA provides three alternative criteria for eligibility: (1) tribal membership, (2) ancestral descent, or (3) blood quantum.¹⁵² Today, Indian law reflects this same confusion, containing over thirty different definitions of “Indian.”¹⁵³

This history reveals substantial shifts in the federal government’s relation to Native American individuals. Blood quantum has been part of the federal government’s lexicon since its founding, but terms such as “half-breed” rarely had legal significance. Congress chose not to adopt a definition for “Indian” until the nineteenth century, granting the executive department implicit authority to determine the federal government’s relations with mixed-blood individuals. Often, a person’s affiliation with a tribe would determine his or her “Indian” status instead of a given percentage of ethnic blood. The effect of this policy was that, until Congress became more involved in tribal relations after the Civil War, the federal government applied a largely political definition of “Indian.”

C. Judicial Precedent Supports a Political Definition of “Indian”

The Supreme Court’s understanding of Congress’s power to legislate on the basis of race dramatically transformed in the twentieth century. The Court did not hear a case drawing on the federal government’s powers over Indian affairs for decades after the Constitution’s enactment, and it relied on the political question doctrine to reflexively affirm explicitly racial legislation. But as the Supreme Court’s doctrine on equal protection and civil rights shifted in the latter half of the twentieth century, it silently disavowed this precedent and asserted a purely political definition of “Indian” under constitutional law.

Early in the country’s history, when addressing a case involving a Native American, state courts often drew a stark line between slave and

¹⁵¹ John Collier, U.S. Dep’t of the Interior, Office of Indian Affairs, Membership in Indian Tribes, Circular No. 3123 (1935).

¹⁵² Margo S. Brownell, Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 285 (2000–2001) (discussing 25 U.S.C. § 479 (1994)).

¹⁵³ Sharon O’Brien, Tribes and Indians: With Whom Does the United States Maintain a Relationship?, 66 Notre Dame L. Rev. 1461, 1481 (1991) (describing current government methods for determining Indian status for benefit programs).

non-slave cases.¹⁵⁴ In slave cases, a person of mixed Native American blood was determined a freeman or not based on their matrilineal descent. If a mother was a free white or Indian person, the child was as well.¹⁵⁵ In non-slave cases, however, courts applied a “straight political or social test to define Indian.”¹⁵⁶ For instance, in a Massachusetts case, the court determined that an individual’s parentage was “immaterial” because “she associated with the tribe, making one of their number.”¹⁵⁷ Likewise, the Alabama Supreme Court determined that “the word ‘Indians,’ includes not only those who have no admixture of blood with the white or negro races, but those descendants of Indians who have become thus mixed, yet retain their distinctive character as members of the tribe from which they trace their descent.”¹⁵⁸ Other courts applied “hybrid biological-political rule[s]” to define state statutory requirements applied to “Indians” by looking at whether the person was of Indian descent and whether the person was a recognized member of any tribe.¹⁵⁹

The U.S. Supreme Court did not address this development in the state courts, and did not question the federal government’s assertion of power over Indian affairs¹⁶⁰ until 1831. In three seminal cases,¹⁶¹ the Court defined the federal government’s relationship with the Indian tribes as a trust-like relationship where the federal government acted as a guardian over its ward, and tribes were “domestic dependent nations.”¹⁶²

For the rest of the nineteenth century and the beginning of the twentieth, the Supreme Court adopted a “rigorous policy of applying the political question doctrine to cases involving Indian tribes and Indian people.”¹⁶³ For example, in *United States v. Holliday*, the Supreme Court declared that it “is the rule of this court to follow the action of the execu-

¹⁵⁴ Spruhan, *supra* note 35, at 6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 7.

¹⁵⁷ *Id.* (quoting *Inhabitants of Andover v. Inhabitants of Canton*, 13 Mass. (12 Tyng) 547, 553 (1816)).

¹⁵⁸ *Id.* at 7–8 (quoting *Wall v. Williams*, 11 Ala. 826, 836 (1847)).

¹⁵⁹ *Id.* at 8 (citing *Doe v. Avaline*, 8 Ind. 6, 14–15 (1856)).

¹⁶⁰ The Supreme Court briefly mentioned the Indian Commerce Clause in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 60 (1824).

¹⁶¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 596 (1823).

¹⁶² *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

¹⁶³ *Fletcher*, *supra* note 51, at 178; see also *id.* at 178 n.131 (citing a list of forty-four cases in which the Supreme Court asserted the political question doctrine to “sidestep” questions of Indian law).

tive and other political departments of the government, whose more special duty it is to determine such affairs” and refused to question the federal government’s decision whether to recognize an Indian tribe.¹⁶⁴ The Court also refused to question the government’s determination that an individual was a citizen of an Indian tribe, noting in *Wallace v. Adams* that the “power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges.”¹⁶⁵

During this period, the Supreme Court explicitly affirmed Congress’s ability to regulate Native Americans based on race. In *United States v. Rogers*, the Court rejected that an “adopted” white man could be considered Indian because the term was “confined to those who by the usages and customs of the Indians are regarded as belonging to their race” and “does not speak of members of a tribe, but of the race generally.”¹⁶⁶ In *Hallowell v. United States*, the Supreme Court held that an Indian who had been active in county and state government as a judge, county attorney, and director of a public school district was still subject to federal liquor laws as an Indian because “the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people.”¹⁶⁷

As the twentieth century rolled on, the Supreme Court shifted from a racial definition of “Indian” to a political one. In *Halbert v. United States*, the Supreme Court determined that mixed-blood individuals were eligible for allotment if they were members of the Indian tribe that previously owned the property.¹⁶⁸ An Indian woman who married a white man but remained with the tribe and continued to be a tribal member could claim to be an “Indian” because it “was the woman’s physical separation from the tribe, and not mere marriage to a white man that severed tribal membership.”¹⁶⁹

The Court heard a direct equal protection attack on the federal government’s ability to legislate for Indians in *Morton v. Mancari*.¹⁷⁰ The

¹⁶⁴ 70 U.S. (3 Wall.) 407, 419 (1865).

¹⁶⁵ 204 U.S. 415, 423 (1907); see also *Montana v. United States*, 450 U.S. 544, 564 (1981) (asserting that the Court has no power over tribal membership rules).

¹⁶⁶ 45 U.S. (4 How.) 567, 573 (1846).

¹⁶⁷ 221 U.S. 317, 324 (1911).

¹⁶⁸ 283 U.S. 753, 762–63 (1931) (also determining that tribal membership defined eligibility to tribal property).

¹⁶⁹ Spruhan, *supra* note 35, at 35–36.

¹⁷⁰ 417 U.S. 535, 551 (1974).

challengers argued that the employment preferences given to qualified Indians under the Indian Reorganization Act of 1934 violated the Fifth Amendment's Due Process Clause. Instead of reiterating its precedent affirming congressional power to legislate on the basis of Indian race, or overturning the doctrine in light of modern conceptions of equal protection, the Court held that the Indian hiring preference "does not constitute 'racial discrimination'" nor is it "even a 'racial' preference."¹⁷¹ Instead, the preference is "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."¹⁷² To explain how a statute directed towards "Indians," was not race-based, the Court clarified that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'" but noted that the statute "applies only to members of 'federally recognized' tribes."¹⁷³ Because this would "exclude many individuals who are racially to be classified as 'Indians,'" the preference is "political rather than racial in nature."¹⁷⁴ Therefore, the Court held, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."¹⁷⁵

¹⁷¹ Id. at 553.

¹⁷² Id. at 554.

¹⁷³ Id. at 553 n.24 (discussing 25 U.S.C. § 472 (1934)).

¹⁷⁴ Id.

¹⁷⁵ Id. at 555. The Supreme Court reaffirmed this rational standard of review for Indian law in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). *Weeks* concerned a challenge from the Kansas Delawares, a group of descendants from the Delaware Nation (a federally recognized tribe) who signed an 1866 treaty agreeing to "dissolve their relations with their tribe" and become citizens of the United States to avoid being moved to Oklahoma. Id. at 78. In 1970 the Delawares won a multimillion-dollar award against Congress for violating a separate treaty. Id. at 79. Congress appropriated the funds to "the Cherokee and Absentee Delawares." Id. at 80. The Kansas Delawares were not included and sued, arguing that their exclusion violated their rights to equal protection and due process under the law. Id. at 75. Reviewing the statute to determine whether "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians," the Court held that Congress's decision to "distribute funds only to individuals who were members of, or clearly identified with" the Cherokee and Delaware National tribe was rationally related to fulfilling its obligation towards the Indians because it "avoid[ed] undue delay, administrative difficulty, and potentially unmeritorious claims." Id. at 85, 89 (first quotation quoting *Mancari*, 417 U.S. at 555 (internal quotation marks omitted)); see also *United States v. Antelope*, 430 U.S. 641, 646 (1977) (rejecting a challenge to the Major Crimes Act, which subjects Indian defendants to federal prosecution for crimes occurring on tribal lands, often resulting in harsher convictions and sentences than would be imposed in state courts, on the basis that such regulation "is not based upon impermissible classifications" of a "'racial'

The political definition of “Indian” in the Indian Commerce Clause denoting individuals who have a political, cultural, or social connection with a tribe is the only definition that accords with *Mancari*’s interpretation of the term in statutory law. A definition that regulates Indians solely based on race, without regard to whether the individual asserts any connection with a federally recognized tribe, would not “exclude many individuals who are racially to be classified as ‘Indians.’” This is true even if the law is rationally connected to fulfilling Congress’s unique obligation to the Indians.

D. Freedom of Association Doctrine Provides Intratextual Support for a Political Definition of “Indian”

Finally, the ambiguity in the word “Indian” in the Indian Commerce Clause can also be resolved by comparing the term’s possible meanings to other provisions of the Constitution. This intratextual analysis is similar to the statutory interpretation principle that when one reading of a provision would conflict with the clear intent of another provision, the conflicting interpretation is disfavored. The “freedom of association” protected by the First Amendment suggests that the political definition of “Indian” is the preferred interpretation.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”¹⁷⁶ The Supreme Court recognizes that the “freedom of association” is an “intrinsic element of personal liberty” and that the Bill of Rights affords “the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”¹⁷⁷ The freedom of association “plainly presupposes a freedom not to associate”¹⁷⁸ and “forced membership” would “impinge on . . . associational rights.”¹⁷⁹ In

group consisting of ‘Indians’” but is “rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” (quoting *Mancari*, 417 U.S. at 553 n.24).

¹⁷⁶ U.S. Const. amend. I.

¹⁷⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 620 (1984).

¹⁷⁸ *Id.* at 623.

¹⁷⁹ *Harris v. Quinn*, 134 S. Ct. 2618, 2631 (2014); see also *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 258 (1977) (Powell, J., concurring) (“Disassociation . . . lie[s] at the core of those activities protected by the First Amendment.” (citations omitted)); David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995, 995 (1982) (“[T]he first amendment’s commitment to freedom of belief

the context of the Indian Commerce Clause, an interpretation of Congress's power to regulate Indians that depends solely on their ethnic heritage would mean that Indians would never be able to disassociate themselves from their tribes. Because this racial definition would violate the freedom of association, the political definition of "Indian" better comports with the rights guaranteed by the Constitution.

1. The Freedom of Association Limits Congress's Otherwise Plenary Power Under the Indian Commerce Clause

There are two ways of understanding how this right to "disassociation" could affect the proper interpretation of the Indian Commerce Clause. First, this right could limit Congress's enumerated powers. The Indian Commerce Clause could grant Congress the power to regulate individuals based on *both* their Indian ethnicity and their political connections to an Indian tribe. The Bill of Rights would then limit the scope of this power to protect the individual right to association as "long as it is not outweighed by a countervailing government interest."¹⁸⁰ An ethnically Native American individual who wished to disassociate themselves from an Indian tribe, but who continued to be regulated by the federal government as a member of that tribe, could challenge Congress's exercise of its power under the Indian Commerce Clause. The Supreme Court would then weigh the government's interest in regulating ethnic Indians with the individual's interest in withdrawing association from the tribe.

The Court has yet to establish a clear standard to guide this balancing and, in particular, has yet to present a clear understanding of the "interest" asserted by successful freedom of association claims. In *West Virginia State Board of Education v. Barnette*, the Court's first case protecting the negative First Amendment right, the Court struck down a requirement that students and teachers recite the pledge of allegiance.¹⁸¹ Justice Jackson's majority opinion described "a right of self-determination in matters that touch individual opinion and personal attitude" and the "constitutional liberty of the individual," but did not provide further clarification.¹⁸² In *Harris v. Quinn*, the Court found it

and expression has led to protection not only of the right to speak or to associate freely, but also to protection of a corollary right not to speak or associate at all . . .").

¹⁸⁰ Gaebler, *supra* note 179, at 996 n.3.

¹⁸¹ 319 U.S. 624, 626, 642 (1943).

¹⁸² *Id.* at 631, 635.

unnecessary to “discuss this analysis at length” because it found the compelled agency-fee provisions at issue to “unquestionably impose a heavy burden on the First Amendment interests of [the] objecting employees.”¹⁸³ Gaebler described the interest more concretely as “the loss of control over the projection of one’s public identity” or “interfer[ing] with the individual’s projection of a public identity.”¹⁸⁴

It is also unclear what government interest will outweigh an individual’s negative First Amendment interest. As one commentator surmised, it may be that “as the degree of infringement of individual interests decreases, the Court’s deference to competing government interests increases.”¹⁸⁵ On the one hand, several Supreme Court cases indicate a strong individual interest. In *Barnette*, the Court dismissed the government’s interest in promoting “national unity” and thus “national security.”¹⁸⁶ Striking down the pledge of allegiance requirement, the Court noted the “[u]ltimate futility of such attempts” and the “inva[sion on] the sphere of intellect and spirit which . . . is the purpose of the First Amendment.”¹⁸⁷ Similarly, in *Wooley v. Maynard*, the Court found New Hampshire’s requirement that all vehicle license plates display the motto “Live Free or Die” to be an unconstitutional infringement on the plaintiff’s First Amendment right “to avoid becoming the courier for such message.”¹⁸⁸ The government’s interests in “facilitat[ing] the identification of passenger vehicles” and “promot[ing] appreciation of history, individualism, and state pride” were insufficient because there were “less drastic means for achieving the same basic purpose.”¹⁸⁹ But on the other hand, in *PruneYard Shopping Center v. Robins*, the Court rejected a shopping center owner’s claim that a California law requiring him to provide access to people exercising their First Amendment right of free speech violated his own First Amendment right to be disassociated with the speech of others.¹⁹⁰ The Court found the state’s “asserted interest in promoting more expansive rights of free speech and petition,”¹⁹¹ to outweigh the owner’s association interest, particularly because property

¹⁸³ 134 S. Ct. at 2643.

¹⁸⁴ Gaebler, *supra* note 179, at 1007, 1019.

¹⁸⁵ *Id.* at 1015.

¹⁸⁶ 319 U.S. at 640.

¹⁸⁷ *Id.* at 641–42.

¹⁸⁸ 430 U.S. 705, 717 (1977).

¹⁸⁹ *Id.* at 716–17.

¹⁹⁰ 447 U.S. 74, 87 (1980).

¹⁹¹ *Id.* at 85.

owners are not “being compelled to affirm their belief in any governmentally prescribed position or view” and are “free to publicly disassociate themselves from the views of the speakers or hand-billers.”¹⁹²

Native Americans and the federal government could assert strong interests on both sides. Native Americans have a strong autonomy interest in choosing if and when to associate with an Indian tribe, particularly when tribal membership comes with subjecting oneself to regulation. In the context of ICWA, under the BIA’s current interpretation, tribal membership can mean that a parent gives up their right to direct their child’s future according to their own interests or the best interests of their child. But the Court has also recognized the government’s interest in protecting “the continued existence and integrity of Indian tribes” by preventing Indian children from being “placed in non-Indian foster and adoptive homes and institutions.”¹⁹³ Given the Supreme Court’s historical deference to Congress to exercise plenary power over Indian affairs, the Court may find that Congress’s interests outweigh Native American rights to dissociate themselves from their tribes.¹⁹⁴

2. The Freedom of Association Doctrine Justifies Reading “Indian” According to a More Narrow Political Definition

The stronger argument is that the First Amendment provides context to determine the meaning of an ambiguous word in the Constitution. When the words in the Constitution are ambiguous, the Supreme Court is responsible for determining what the text means. The Court looks to semantic clues, such as surrounding terms and the Constitution’s overall structure, and to “extra-constitutional” sources.¹⁹⁵ These sources include early documents like the Articles of Confederation or the Declaration of Independence, early judicial opinions, the “ethos of the Framing era,” or

¹⁹² Id. at 88.

¹⁹³ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35 (1989) (quoting 25 U.S.C. § 1901 (1988)).

¹⁹⁴ See, e.g., *Duro v. Reina*, 495 U.S. 676, 692 (1990) (asserting that “Indians like other citizens are embraced within our Nation’s ‘great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty’” but that “Indians are citizens does not alter the Federal Government’s broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits” (first quotation quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (alterations in original))).

¹⁹⁵ Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. Ill. L. Rev. 1935, 1936–38.

the “historical practices of the institutions of government and the American people.”¹⁹⁶

In *NLRB v. Noel Canning*, for example, the Court interpreted the Recess Appointments Clause for “the first time in more than 200 years.”¹⁹⁷ The plaintiffs asked the Court to decide whether the words “the recess” in Article II, Section Two, Clause Three cover strictly inter-session recesses or also intra-session recesses. The Court first looked to founding-era dictionaries and the Federalist Papers, and compared the structure of the Recess Appointments Clause to other sections of the Constitution.¹⁹⁸ But the majority ultimately concluded that the text contained multiple possible meanings and was “thus ambiguous.”¹⁹⁹ The Court then “relied heavily on customary practice” in addition to “its view of the purpose of the Recess Appointments Clause” to conclude that “the recess” included intra-session recesses of substantial length, but not the three-day periods between pro forma Senate sessions.²⁰⁰

Just as the Court in *Noel Canning* looked to modern practice to interpret the meaning of the Recess Appointments Clause, so too the Court may rely on the modern reading of the First Amendment to interpret the Indian Commerce Clause. The word “Indian” is ambiguous. It can be limited to only those individuals with a political, social, or cultural connection to a Native American tribe, or it can encompass everyone of Native American descent. But under the Court’s interpretation of the First Amendment, individuals have the right to choose whether to associate with a tribe. If the Indian Commerce Clause gave Congress plenary authority to regulate anyone with Native American blood, ethnic Indians would be unable to escape what they may perceive to be newfound disadvantages of their Indian heritage. Native Americans would no longer be U.S. citizens who have chosen to celebrate their Indian ancestry by maintaining a connection to their familial tribe, voluntarily assuming that membership’s burdens and benefits. They would be quasi-citizens, individuals who have all the panoply of rights granted to U.S. citizens except for the special rules and restrictions triggered by the content of their blood.

¹⁹⁶ Id. at 1936.

¹⁹⁷ 134 S. Ct. 2550, 2560 (2014).

¹⁹⁸ Id. at 2561.

¹⁹⁹ Id.

²⁰⁰ Id. at 1264.

CONCLUSION

For over two centuries, Congress's power over Indian affairs appeared to extend without limit. Then, in 2013, Justice Thomas's concurrence in *Adoptive Couple v. Baby Girl* questioned if Congress's reach had exceeded its grasp.²⁰¹ But the Bureau of Indian Affairs ("BIA") stretched still further, issuing a rule that purports to regulate individuals based on their eligibility for tribal membership rather than their association with a federally recognized tribe.

This rulemaking created a new opportunity to subject Indian law to the strict scrutiny analysis reserved for race-based legislation. Although judicial precedent currently shields Indian law from this exacting review by differentiating it as a "political" rather than "racial" classification, the BIA's rulemaking exposes it to a renewed onslaught of equal protection challenges. These challenges have the potential to overturn more than the BIA's most recent regulation. If successful, these equal protection challenges could be the start of the wholesale eradication of preferences for Native Americans under federal law.

This Note provides an interpretation of the Indian Commerce Clause that focuses on the definition of "Indian" to conclude that Congress only has the power to regulate individuals based on their political, cultural, and social connections with federally recognized tribes, not their race. This interpretation accords with the historical practice of regulating Indians based on their affiliation with the tribe rather than their blood quantum, judicial precedent categorizing Indian law as a political rather than racial classification, and an intratextual analysis that shows how a political definition is the only interpretation that comports with a First Amendment that recognizes a freedom of association.

Under this interpretation of the Indian Commerce Clause, Congress continues to have broad powers to regulate tribal affairs. But it reaffirms that our Constitution leaves the ultimate choice of affiliation to the eligible individual. Equal protection thus remains as a safeguard for those who wish to reject the benefits and burdens of tribal membership without threatening the structure of Indian law as a whole.

²⁰¹ 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring).