

# FEDERAL INDIAN LAW AS METHOD

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## INTRODUCTION

*Morton v. Mancari*<sup>1</sup> is well-known in Indian law circles as a foundation for the tribal self-determination era, which is

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generally understood to have begun in the late 1960s and early 1970s.<sup>2</sup> The case involved an Act of Congress that required the federal “Indian Office” (now called the Bureau of Indian Affairs) to grant preference in employment to “Indians.”<sup>3</sup> The case is typically understood as the basis for analyzing how federal statutes that apply exclusively to Indian people do not implicate the anti-discrimination principles of the United States Constitution.<sup>4</sup> This understanding of the case, while correct, is too narrow.

*Mancari*, instead, should be understood as articulating the definitive method for analyzing the constitutionality of Acts of Congress establishing favorable or unfavorable treatment toward Indian people. This method is stated plainly in the text of Justice Harry Blackmun’s majority opinion: “As long as the special treatment can be tied rationally to the fulfillment of Congress’[s] unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>5</sup>

This Essay is written in the shadow of a series of noxious attacks on core principles of federal Indian law, most notoriously *Haaland v. Brackeen*,<sup>6</sup> a challenge to the constitutionality of the Indian Child Welfare Act (ICWA).<sup>7</sup> The Supreme Court did not reach the merits of the equal protection challenges,<sup>8</sup> but during oral argument, several justices expressed skepticism that congressional Indian affairs enactments that grant privileges or preferences to Indian people could survive scrutiny under an equal protection analysis.<sup>9</sup> Justice Brett Kavanaugh, one of the justices most interested in the equal protection claims, wrote separately to highlight these issues, asserting that “the equal protection issue is serious.”<sup>10</sup> The parties siding with ICWA’s constitutionality argued to the Court that *Mancari* is a guide,

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Malveaux, Wenona Singel, and the organizers of the 31st Annual Ira B. Rothgerber Conference.

1. *Morton v. Mancari*, 417 U.S. 535 (1974).
2. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 1.3, at 13–14 (2016).
3. Indian Reorganization Act § 12, 25 U.S.C. § 5117.
4. RESTATEMENT OF THE L. OF AM. INDIANS § 9 (AM. L. INST. 2021).
5. *Mancari*, 417 U.S. at 555.
6. *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023).
7. 25 U.S.C. § 1901.
8. *Brackeen*, 143 S. Ct. at 1638–41.
9. See Amy Howe, *Closely divided court scrutinizes various provisions of Indian Child Welfare Act*, SCOTUSBLOG (Nov. 9, 2022, 6:02 PM), <https://www.scotusblog.com/2022/11/closely-divided-court-scrutinizes-various-provisions-of-indian-child-welfare-act> [https://perma.cc/UK8E-DEXT].
10. *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

whereas the opponents to ICWA's constitutionality wanted the Court to ignore the case altogether.

This Essay is a full-throated defense of *Mancari* as a method of constitutional interpretation. Not only is the *Mancari* method correct, but it is also the only justifiable method. This Essay begins in Part I with a short background on federal Indian law and its default interpretative rules. In Part II, the Essay surveys the application of and challenges to the *Mancari* method. In Part III, the Essay continues with a comparison of the methods proposed to replace or displace the *Mancari* method. In Part IV, the Essay shows how the method should be applied to placement preferences, a controversial component of ICWA.

## I. FEDERAL INDIAN LAW'S DEFAULT INTERPRETATIVE RULES

If the judiciary stays faithful to foundational precedents, federal Indian law is easy. Whenever observers complain of the complexity, difficulty, or unfairness of federal Indian law questions, they are often likely to be in hostile opposition to the results that follow from precedent.<sup>11</sup> This Part surveys the core principles of federal Indian law and the default interpretative rules that follow from those principles.

### A. *The Canons of Construction and the Clear Expression Rules*

The foundational principles of federal Indian law follow from the Marshall Trilogy, three Supreme Court decisions primarily authored by Chief Justice John Marshall in the 1820s and 1830s.<sup>12</sup> The principles drawn from those cases are: (1) federal law in Indian affairs is plenary and exclusive, (2) state law has no force in Indian country absent congressional authorization, and (3) Indian tribes are domestic nations with all the powers of any nation subject to congressional restriction.<sup>13</sup> An important concomitant principle is that the

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11. Cf. Ian Millhiser, *The Supreme Court is doing something out of character: Obeying precedents*, VOX, (June 15, 2023, 1:50 PM), <https://www.vox.com/politics/2023/6/15/23762139/supreme-court-indian-child-welfare-haaland-brackeen-amy-coney-barrett> [https://perma.cc/DY5L-EPD9] (arguing that *Brackeen* is a celebration of precedent).

12. *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

13. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, at ch. 1.

United States has agreed to undertake a duty of protection to individual Indians and Indian tribes, often referred to as the “trust responsibility” or “trust relationship.”<sup>14</sup> These principles formed the constitutional basis for Indian affairs enactments going back to the First Congress, beginning with the Trade and Intercourse Act of 1790<sup>15</sup> and continuing with modern day self-determination acts.<sup>16</sup>

From those original principles, we can derive two sets of default interpretative rules that derive in part from the duty of protection. The first set of rules are the canons of construction of Indian treaties and Indian affairs statutes.<sup>17</sup> To simplify, the judiciary is to interpret Indian treaties and Indian affairs statutes for the benefit of Indians and tribes. The canons of construction of interpreting Indian treaties date back to language in the Marshall Trilogy.<sup>18</sup> The canon of construing Indian affairs statutes is more than a hundred years old.<sup>19</sup> The next set of rules are clear expression rules that protect tribal sovereignty in five areas: (1) inherent authority,<sup>20</sup> (2) tribal sovereign immunity,<sup>21</sup> (3) treaty rights,<sup>22</sup> (4) reservation boundaries,<sup>23</sup> and (5) taxation.<sup>24</sup> In short, only Congress can abrogate or modify tribal prerogatives and only if courts find a clear expression of the intent of Congress to do so. The clear expression rules originated as early as 1883.<sup>25</sup>

### *B. The Mancari Principle*

In the 1970s, during the earliest years of the tribal self-determination era, the Supreme Court recognized another core principle relating to congressional powers: Indian affairs enactments rationally related to the fulfillment of the duty of

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14. *Id.* § 4(a).

15. *See* Act of July 22, 1790, ch. 23, 1 Stat. 137 (regulating trade and intercourse with the Indian tribes).

16. FLETCHER, *supra* note 2, §§ 3.12–3.16, at 103–15.

17. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, §§ 6, 8.

18. Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 5–6 (2013).

19. *Id.* at 20–23.

20. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, § 15 cmts. a, b, c.

21. *Id.* § 25 cmt. b.

22. *Id.* § 5 cmt. e.

23. *Id.* § 3 cmt. k.

24. *Id.* § 32 cmt. b.

25. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

protection are constitutionally valid.<sup>26</sup> That the Court did not explicitly articulate this principle until 1974 is due to the Court's deferential Indian law jurisprudence. The Court has been so intensely deferential to Congress that it has struck down an Indian affairs statute only a few times in its entire history.<sup>27</sup> The Court has never struck down an Indian affairs statute for establishing a racial preference within the statute.

The *Mancari* case originated from a constitutional challenge to an Indian preference in an employment statute and its implementing regulations.<sup>28</sup> The Indian Reorganization Act contained a provision allowing preference for "Indians" in Bureau of Indian Affairs ("BIA") positions.<sup>29</sup> Under the implementing regulations in operation at the time of *Mancari*, the Bureau of Indian Affairs narrowed the definition to include only persons with one-quarter Indian blood quantum and who were members of federally recognized tribes.<sup>30</sup>

The Court concluded, in an opinion from Justice Blackmun, that the Indian preference laws were constitutional and rejected the equal protection claim.<sup>31</sup> In language quoted by tribal advocates for decades, the Court noted the "unique legal status of Indian tribes,"<sup>32</sup> describing the duty of protection as a "special relationship" between tribes and the United States<sup>33</sup> that is best described as "political, rather than racial in nature."<sup>34</sup> Justice Blackmun's majority opinion noted that many federal Indian affairs statutes rely on Indian status classifications, warning that the consequences of applying the standard equal protection

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26. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, § 9.

27. *E.g.*, *Babbitt v. Youpee*, 519 U.S. 237, 237 (1997) (striking down § 207 of the Indian Land Consolidation Act as a taking of private property without just compensation).

28. *Mancari v. Morton*, 359 F. Supp. 585, 587 (D.N.M. 1973), *rev'd*, 417 U.S. 535 (1974).

29. *Morton v. Mancari*, 417 U.S. 535, 537–38 (1974) (quoting Indian Reorganization Act § 12, 48 Stat. 986 (1934) (codified as amended at 25 U.S.C. § 5117(a))).

30. *Id.* at 553 n.24 (quoting 44 BUREAU OF INDIAN AFFS. MANUAL 335, 3.1).

31. *Id.* at 551–55.

32. *Id.* at 551.

33. *Id.* at 552.

34. *Id.* at 553 n.24.

analysis even once would threaten to undermine the entire structure of Indian law:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.<sup>35</sup>

Ultimately, the Court announced a test to apply in the event that a federal Indian affairs statute is challenged as unconstitutional: “As long as the special treatment can be tied rationally to the fulfillment of Congress’[s] unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>36</sup> There is a lot to unpack in that statement of law: (1) “special treatment,” which could favor or disfavor Indians or tribes, (2) “tied rationally” and “legislative judgment,” which squarely recognizes Congress’s plenary and exclusive power to manage Indian affairs, (3) “Congress’[s] unique obligation to the Indians,” which is the duty of protection and a source of significant federal power, and (4) “will not be disturbed,” meaning that once the court finds a rational relationship, the inquiry ends. The test placed an almost insurmountable burden on a challenger, requiring a showing that the federal enactment had no rational relationship to the fulfillment of the trust responsibility. While the burden is high, the test is sufficient to eradicate truly irrational federal enactments.

The burden imposed by the *Mancari* method on challengers to Indian affairs laws is not strange or unusual in federal Indian law. The Court’s deference to federal actions in Indian affairs was akin to its deference to the federal government in international relations; this makes sense since there is significant overlap with Indian and foreign affairs. Until the advent of the self-determination era, most congressional enactments decidedly disfavored tribal interests. Indian affairs

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35. *Id.* at 552.

36. *Id.* at 555.

enactments almost always passed constitutional scrutiny.<sup>37</sup> For example, the Supreme Court affirmed the confiscation of tribal communal property over the objections of the tribal nation<sup>38</sup> and declared that the taking of original Indian title was not compensable under the Fifth Amendment.<sup>39</sup>

In the years following *Mancari*, the Supreme Court issued a flurry of decisions rejecting challenges to federal and state laws that established or relied upon Indian status classifications. The Court rejected equal protection challenges made by Indian criminal defendants to the Major Crimes Act,<sup>40</sup> challenges made by non-Indians to state laws enacted respecting tribal treaty fishing rights,<sup>41</sup> challenges to jurisdictional checkerboarding arising from congressional authorization of state jurisdiction in Indian country,<sup>42</sup> and challenges by Indians to the doctrine of exclusive tribal jurisdiction over Indian child welfare.<sup>43</sup>

Until recent years, given the clarity of the Supreme Court's *Mancari* method, there have been no significant equal protection challenges to congressional Indian affairs enactments.

## II. *MANCARI'S* CRITICS

Now that the Roberts Court has punted on the equal protection issues in *Brackeen* (and correctly so), the hunt will be on for a vehicle to bring the issue back to the Court. *Mancari* has never sat well with some conservative judges and commentators looking for ways to undermine civil rights statutes, including many Indian affairs laws like ICWA. This section addresses the doctrinal challenges to the *Mancari* method.

Justice John Paul Stevens, who in his later years on the Court tended to be supportive of tribal interests,<sup>44</sup> was the first

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37. I am aware of one pre-self-determination era statute that was struck down by the Supreme Court. The statute, passed by Congress, allowed Indians to challenge the constitutionality of an Indian affairs statute. See *Muskrat v. United States*, 219 U.S. 346 (1911).

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

39. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289 (1955).

40. *United States v. Antelope*, 430 U.S. 641, 649–50 (1977).

41. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 673 n.20 (1979).

42. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499–502 (1979).

43. *Fisher v. District Court*, 424 U.S. 382, 390 (1976).

44. See generally Matthew L.M. Fletcher, *The Indian Law Legacy of Justice Stevens*, TURTLE TALK BLOG (Apr. 9, 2010), <https://turtletalk.blog/2010/04/09/the-indian-law-legacy-of-justice-stevens> [<https://perma.cc/XHS4-7F8R>].

to tie the *Mancari* decision to the Supreme Court’s anti-discrimination cases in *Adarand Constructors, Inc. v. Peña*.<sup>45</sup> That case held that laws creating classifications based on race in order to remedy discrimination were subject to strict scrutiny just the same as laws designed to discriminate against people of color.<sup>46</sup> In his dissent, Justice Stevens noted that Indian affairs statutes also create what appear to be race-based classifications.<sup>47</sup> He reasoned that the *Adarand* outcome might threaten those laws.<sup>48</sup>

Justice Stevens did tribal interests no favors by grouping Indian affairs statutes with laws designed to remedy historical race discrimination. For one thing, no party in *Adarand* and none of the amici mentioned *Mancari* or Indian affairs at all. More saliently, Indian affairs statutes are not in the same category as laws designed to remedy historical racial discrimination—after all, many Indian affairs laws did not benefit Indians or tribes.<sup>49</sup> The Constitution only mentions one ethnicity explicitly: “Indians”<sup>50</sup> and “Indian tribes.”<sup>51</sup> The word “Indians” even appears in the source of the equal protection anti-discrimination principle, the Fourteenth Amendment, which thankfully scrubbed the Constitution clean of one of its original sins of labeling enslaved persons as “three fifths of all other Persons”!<sup>52</sup> In other words, the Constitution itself includes a racial classification—to say that a statute that applies to “Indians” is racially discriminatory, requiring strict scrutiny, is to say that the Constitution itself is racially discriminatory. Madness!

Conservative commentators and judges quickly seized on the language in *Adarand* to call for a reconsideration of *Mancari*, or at least demand that the judiciary limit the case to its facts.

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45. *Adarand Constructors v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).

46. *Id.* at 229.

47. *Id.* at 244 n.3 (citing *Morton v. Mancari*, 417 U.S. 535, 541 (1974)).

48. *Id.*

49. Most scholarship on Indian affairs is harshly critical of Congress’s exercise of its Indian affairs powers. *E.g.*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986) (launching a devastating critique of Congress and the Supreme Court).

50. U.S. CONST. amend. XIV, § 2.

51. U.S. CONST. art. I, § 8, cl. 3.

52. U.S. CONST. art. I, § 2, cl. 3.



Former federal judge Alex Kozinski<sup>53</sup> led the charge in an opinion striking down a federal regulation granting preferences to Alaska Natives in reindeer harvesting, musing in dicta that “*Mancari*’s days are numbered.”<sup>54</sup> Later, Kozinski would argue that federal criminal jurisdiction over “Indians” was unconstitutional as well because that classification was not “political.”<sup>55</sup> Similarly, scholar Eugene Volokh asserted, without much analysis, that a classification based on tribal membership in a federally recognized tribe was valid, whereas a classification based on simple Indian status was not.<sup>56</sup> One commentator pointed to Native Hawaiians, an Indigenous group in the United States not federally recognized as an Indian tribe, as a group to which the federal government could not claim a special relationship. They stated that to do so would create an impermissible racial classification.<sup>57</sup> Another scholarly commentator simply claimed that “race is what *Mancari*, the decision that eschews race, is fundamentally about.”<sup>58</sup>

Not much came of these stray missives against *Mancari* until conservative lawyers were retained by powerful special interests in the 2010s to broadly attack the foundations of federal Indian law.<sup>59</sup> The first, a challenge to a gaming compact with an Indian tribe in Massachusetts spearheaded by Paul Clement, never quite got off the ground, though the court found the state’s *Mancari*-based argument to be “doubtful.”<sup>60</sup> Next, Clement’s effort to collaterally attack the constitutionality of ICWA also failed to attract the majority’s attention, though the Court noted that it was ruling with an eye toward the canon of

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53. See Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 502–03, n.39 (2020).

54. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

55. *United States v. Zepeda*, 792 F.3d 1103, 1117–18 (9th Cir. 2015) (en banc) (Kozinski, J., concurring).

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

57. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 538–40 (1996).

58. L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 717 (2001).

59. See Rebecca Clarren, *A Right-Wing Think Tank Is Trying to Bring Down the Indian Child Welfare Act. Why?*, THE NATION (Apr. 6, 2017), <https://www.thenation.com/article/archive/a-right-wing-think-tank-is-trying-to-bring-down-the-indian-child-welfare-act-why> [https://perma.cc/FV8N-MSPY].

60. *KG Urb. Enters., LLC v. Patrick*, 693 F.3d 1, 20 (1st Cir. 2012).

constitutional avoidance in order to avoid the lurking equal protection issue.<sup>61</sup>

Keep in mind that *none* of these courts and commentators doubting *Mancari* and Indian status classifications have actually engaged with the text of the Constitution. The text of the Constitution not only allows, but *requires*, Congress to make decisions about which federal Indian affairs statutes apply to which “Indians” and “Indian tribes.”<sup>62</sup> In the absence of direct engagement with the text of the Constitution, Kozinski, Clement, and the others continue to play a high-stakes game of gaslighting the Supreme Court and Indian country.

And then there was *Haaland v. Brackeen*.<sup>63</sup> For the first time in American history, a federal appellate court struck down federal laws creating an Indian status classification as violative of the Fifth and Fourteenth Amendments, specifically the placement preferences that privileged “other Indian families.”<sup>64</sup> The federal district court analogized ICWA to the state preferences created by the State of Hawaii granting voting rights privileges to Native Hawaiians, a group that has not established governing entities comparable to federally recognized Indian tribes.<sup>65</sup> In *Rice v. Cayetano*, the Supreme Court struck down those voting rights preferences under the Fifteenth Amendment.<sup>66</sup> The district court in *Brackeen* relied on *Rice* and held that ICWA’s placement preferences were similarly unconstitutional.<sup>67</sup> The district court limited *Mancari* to the fact of membership in a federally recognized Indian tribe; in other words, the court held that *Mancari* allowed Congress to establish preferences to tribal members but not to Indians who

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61. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013); *see also* Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 53–56, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399); *Adoptive Couple*, 570 U.S. at 689–90 (Sotomayor, J., dissenting) (reiterating and rejecting the majority’s “suggestion” that ICWA’s application in that case would violate equal protection).

62. *Fletcher*, *supra* note 53, at 520–32.

63. *Complaint, Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018) (No. 4:17-cv-00868).

64. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 530–36 (N.D. Tex. 2018), *aff’d by an equally divided court, Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (en banc) (per curiam) (striking 25 U.S.C. §§ 1915(a)(3) and 1915(b)(iii)), *vacated*, 143 S. Ct. 1609 (2023).

65. *Brackeen*, 338 F. Supp. 3d at 533.

66. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000).

67. *Brackeen*, 338 F. Supp. 3d at 533–34.

were not tribal members.<sup>68</sup> The Fifth Circuit, sitting en banc, affirmed without precedential opinion, splitting 8-8 on the question.<sup>69</sup>

The Supreme Court vacated the judgments of both lower courts, finding no party had standing to bring an equal protection challenge.<sup>70</sup> Justice Kavanaugh concurred fully but asserted that the equal protection challenge to ICWA's placement preferences was "serious."<sup>71</sup>

### III. WHY *MANCARI'S* METHOD REMAINS SUPERIOR

*Morton v. Mancari* and its progeny establish a method of how Acts of Congress that create Indian status classifications should be analyzed in light of an equal protection challenge under the Constitution. This Part is intended to describe the *Mancari* method and compare it to other ways to analyze Indian status classifications. It will become apparent that the *Mancari* method is the only acceptable method.

#### A. *The Mancari Method*

This Section proceeds by explaining how the *Mancari* decision is not only an example of faithful adherence to the principles of federal Indian law, but also an interpretative method for addressing challenges to Indian affairs laws under the Constitution's equal protection principle. The second Section offers a theoretical defense of that interpretative method.

#### 1. The *Mancari* Method Defined

The *Mancari* method in operation is fairly simple—federal laws creating Indian status classifications rationally related to the fulfillment of the trust responsibility are constitutionally valid.

Imagine a federal Indian affairs enactment stating that it applies to "Indians" but offers no definition of which persons are "Indians." The Major Crimes Act of 1885 is a good example.<sup>72</sup>

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68. *Id.* at 533.

69. *Haaland*, 994 F.3d at 268.

70. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1638–41 (2023).

71. *Id.* at 1661 (Kavanaugh, J., concurring).

72. 18 U.S.C. § 1153.

The Act states that “[a]ny Indian” who commits one of the enumerated crimes in the statute is guilty of a federal offense.<sup>73</sup> In response to an equal protection challenge brought by a person who is “Indian” but not a member of a federally recognized Indian tribe, the court would apply the *Mancari* method.

The court would inquire as to the relationship between “Indians,” the enumerated crimes, and the duty of protection. The legislative history of the Major Crimes Act is well documented.<sup>74</sup> In 1883, the Supreme Court held that the federal government did not have jurisdiction over crimes committed by Indians against other Indians in Indian country.<sup>75</sup> The federal government complained to Congress in 1884 that Indians were committing crimes in Indian country that were going unpunished as a result of the 1883 decision.<sup>76</sup> In 1885, members of Congress supported a bill that would become the Major Crimes Act, alleging that a revenge killing resulted directly from the 1883 case.<sup>77</sup> In short, whether one agrees with the policy choices advanced by Congress or not, the legislative history recognizes that there is crime in Indian country and that such crime is related to the lack of federal criminal law enforcement. Finally, one of the key features of the duty of protection is protection from crime.<sup>78</sup> The connection between crimes committed by Indians and the duty of protection should easily pass the rational relationship test.

One wrinkle in defining “Indians” is that the Indians discussed in the 1880s by the federal government may or may not have been tribal citizens. Those particular Indians probably were, but the Major Crimes Act covers all Indians, whether enrolled or not, so long as the crime occurred in Indian country. In the current era, the rule of thumb is that less than one-half of “Indians” covered by the Act are not tribal members.<sup>79</sup> There are

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73. *Id.* § 1153(a).

74. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 7.4, at 320–21 (2016).

75. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

76. S. EXEC. DOC. NO. 105, at 11, 48th Cong., 1st Sess. (1884) (referencing a case where a Creek Indian murdered an Arapaho Indian at Fort Sill).

77. 16 CONG. REC. 934 (1885).

78. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, § 4, cmt. d; *see also id.* § 70, cmt. a & Reporters’ Notes.

79. In 2010, the last year in which adequate statistics were available, there were about 1.9 million members of federally recognized tribes. U.S. DEPT. OF THE INTERIOR, 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 10 (2014). In 2010, the Census reported about 5.2 million American Indians and

lots of reasons why an Indian covered by the Act is not enrolled: they could have chosen never to enroll or relinquish their tribal membership for political or other reasons; they might be Indians with an ancestral connection to several tribes, but not enough blood quantum in any given tribe to qualify for enrollment; or their tribe might have closed enrollment for whatever reason. Where Congress passes a law that applies to “Indians” who might or might not be tribal members, the question for the court is whether Congress had reasons rationally related to the duty of protection to include unenrolled “Indians.” In this context, where unenrolled Indians have committed crimes in Indian country, any given tribe’s interest in law and order coupled with the federal government’s duty of protection is sufficient to include unenrolled Indians. After all, non-Indians are also subject to federal criminal jurisdiction for crimes committed in Indian country.<sup>80</sup>

Note that the *Mancari* method sometimes requires a dive into the legislative history of a congressional enactment in order to determine whether Congress acted in a way rationally related to the duty of protection. But not always. In the self-determination era, Congress regularly explained in detail in the statute itself why the enactment meets the test of rational relatedness.

Consider ICWA.<sup>81</sup> The legislative history of that law is rich, given the three full congressional hearings over several years with a multitude of reports and witness statements.<sup>82</sup> But a judge doesn’t need to assess that history at all. Congress’s findings are very specific: (1) “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe,”<sup>83</sup> (2) “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-

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Alaskan Natives in the U.S. population. TINA NORRIS ET AL., *THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010* (2012).

80. 18 U.S.C. § 1152.

81. 25 U.S.C. § 1901.

82. FLETCHER, *supra* note 74, § 8.8, at 421–27 (surveying the legislative history).

83. 25 U.S.C. § 1901(3).

Indian foster and adoptive homes and institutions,”<sup>84</sup> and (3) “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”<sup>85</sup> It should go without saying that legislative history backs this up. One would be hard-pressed to plausibly claim that ICWA is not rationally related to the duty of protection.

Given the deference *Mancari* requires of the judiciary to Congress, one might wonder what limiting principles, if any, there are on the powers of Congress in creating an Indian status classification. The first principle is the rational relationship test implied in the language of *Mancari*: (1) there must be a legitimate government purpose, (2) the statute does not need to fulfill the purpose, but simply must be a reasonable way to do so, (3) the purpose does not need to be the actual goal of the statute, and (4) the challenger of law has the burden of proof to show that (a) the statute’s purpose is not a legitimate governmental goal, or (b) the statute is not a reasonable way to reach that purpose.<sup>86</sup>

*Mancari* offered extensive evidence about the governmental purposes of Indian preference in employment in federal agencies charged with administering Indian affairs statutes and programs.<sup>87</sup> First, the Court noted that the Constitution charges Congress with administering the federal–tribal relationship,<sup>88</sup> surely a governmental purpose given that the Constitution empowers Congress to deal in Indian affairs. Second, the Court noted that Congress chose to require Indian preference in employment with the Indian affairs bureaucracy because non-Indians have sometimes caused great harm to Indian people in the administration of the Indian affairs power.<sup>89</sup> In the absence of countervailing evidence, of which there was none in *Mancari*, these two factors should be sufficient on their own. The Court added additional justifications: the enhancement of tribal self-government through the employment of Indians by the Bureau

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84. *Id.* § 1901(4).

85. *Id.* § 1901(5).

86. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J. L. & PUB. POL’Y 401, 402 (2016) (footnotes omitted).

87. *Morton v. Mancari*, 417 U.S. 535, 542–45 (1974).

88. *Id.* at 541–42.

89. *Id.* at 542 n.11.

of Indian Affairs to better serve Indian country,<sup>90</sup> and the employment of Indian people in federal Indian affairs offices that would provide Indian people with experience and expertise in administering Indian affairs programs directly for tribes once they leave federal service.<sup>91</sup>

Easy enough.

The Supreme Court, long before *Mancari* and the rise of the modern equal protection analysis, had already articulated and applied the method in a case involving liquor sales in Indian country. The case, *United States v. Sandoval*,<sup>92</sup> involved a criminal suit against a person who brought liquor into the Santa Clara Pueblo in New Mexico in violation of federal law.<sup>93</sup> The defendant claimed that Congress did not have the power to regulate liquor in any of the New Mexico pueblos because the Court had previously determined that Pueblo people were not “Indians” under federal law.<sup>94</sup> The Court noted that Congress had expressly determined in the New Mexico Enabling Act that the Pueblos remained under federal jurisdiction.<sup>95</sup> The Court deferred to Congress on that judgment.<sup>96</sup> However, the Court noted there are limits to the power of Congress to recognize Indian tribes as sovereign: “Congress may [not] bring a community or body of people within the range of this power by *arbitrarily* calling them an Indian tribe . . . .”<sup>97</sup> In other words, Congress could not recognize a Boy Scout troop or any other entity as an Indian tribe in the complete absence of some congressional determination that the group possessed Indigenous characteristics. There are at least some limiting

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90. *Id.* at 542–43, 542 n.12.

91. *Id.* at 543–44.

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

93. *Id.* at 36.

94. *See id.* at 38, 47–48; *see also* *United States v. Joseph*, 94 U.S. 614, 617–18 (1876) (holding that Pueblo people were not “Indians” that Congress could regulate).

95. *Sandoval*, 231 U.S. at 38.

96. *Id.* at 48.

97. *Id.* at 46 (emphasis added).

principles to congressional judgment that would apply to a *Mancari*-type analysis.

## 2. Theoretical Justification for the *Mancari* Method

The text and structure of the Constitution, as well as the unique federal–tribal relationship, provide ample theoretical justification for the *Mancari* method. Justice Neil Gorsuch’s concurring opinion in *Brackeen* established the bulk of historical and theoretical background supporting *Mancari*,<sup>98</sup> which may be the first time a Supreme Court justice has fully laid down the history of Indian law in a comprehensive and intellectually honest way.

The core of federal Indian law is the duty of protection. The duty of protection is a creature of customary international law that governs relationships between larger and smaller sovereigns.<sup>99</sup> In the case of the tribal sovereigns in the United States, the duty of protection is enshrined in the text and structure of the Constitution. The Framers saw fit to grant Congress broad powers to regulate commerce with Indian tribes.<sup>100</sup> The First Congress used those powers in conjunction with the Supremacy Clause<sup>101</sup> to preempt the entire field of Indian affairs by forcing states and private parties to seek federal consent before entering Indian country or otherwise engaging in any intercourse with tribes and Indians.<sup>102</sup> The Constitution also granted the treaty power to the federal government,<sup>103</sup> used by the United States to negotiate and define further the duty of protection owed to tribal nations. Agreements between the United States and tribal nations continue to refine the scope of the duty of protection to this day, usually through the self-determination contracting process.<sup>104</sup> In short, Indian affairs are completely federalized.

The duty of protection must be read in light of the original positions of the contracting parties: the United States and tribal nations. It is axiomatic that the entirety of the lands and

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98. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1647–61 (2023) (Gorsuch, J., concurring).

99. RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, § 4 cmt. a.

100. U.S. CONST. art. I, § 8, cl. 3.

101. U.S. CONST. art. VI, cl. 2.

102. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

103. U.S. CONST. art. II, § 2.

104. 25 U.S.C. § 5301 (2016).



resources that make the United States wealthy and powerful originally belonged to tribal nations and Indigenous peoples. The treaties and other federal–tribal agreements are contracts that involved exchanges of material wealth from the tribes to the United States in exchange for the ongoing duty of protection.<sup>105</sup> Some of the duties owed by the United States, but not all, are expressed in the treaties themselves. For example, surely the Anishinaabe nations of northern Michigan did not sell their land base—one-third of the land in the State of Michigan, likely worth trillions of dollars or more—in exchange for a few thousand dollars in cash, some fish barrels and schoolbooks, and mechanics’ tools.<sup>106</sup> No. The duty of protection is far more valuable than the mere terms of the treaty language. The immense monetary value acquired by the United States in exchange for the duty of protection places a heavy thumb on the scales of the federal–tribal relationship.

Early on, the Supreme Court recognized that the role of the judiciary in Indian affairs was severely limited by the structure of the Constitution.<sup>107</sup> The utilization of treaties to deal with tribal nations firmly placed Indian affairs in a governmental arena similar to that of foreign affairs. The Court recognized that state law, for example, had no force in Indian country absent federal authorization.<sup>108</sup>

On top of all this, the anti-discrimination principles reflected in the text of the Constitution also reflect and recognize the federal government’s duty of protection to Indians and Indian tribes. The Fourteenth Amendment introduced the anti-discrimination principle of equal protection in relation to state laws,<sup>109</sup> followed much later by the Supreme Court’s application of the equal protection principle to the federal government in the

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105. The Supreme Court recently referred to the treaties as an exchange of property rights. *See Arizona v. Navajo Nation*, 143 S. Ct. 1804 (2023).

106. Treaty of Washington, art. I, IV, 7 Stat. 491 (1836).

107. *Cf. Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 683–709 (2016) (arguing that the scope of inherent tribal sovereignty is akin to a political question).

108. *E.g., Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (“The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which *the laws of Georgia can have no force*, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the Government of the United States.”) (emphasis added).

109. U.S. CONST. amend. XIV, § 1.

Fifth Amendment's Due Process Clause.<sup>110</sup> Importantly, the Fourteenth Amendment mentions one racial category—"Indians not taxed"—to whom the Amendment does not apply.<sup>111</sup> We now understand "Indians not taxed" to be individuals who are "Indian" and who are not citizens of the United States,<sup>112</sup> which means that now Indian people are protected by the Equal Protection Clause. But at the time of Reconstruction, Congress made clear that Indian people were to be treated differently.<sup>113</sup> As the Court wrote in 1865, "The general duty of the agent [the United States] is to manage and superintend the intercourse with the Indians. This assumes their separate and social condition."<sup>114</sup>

The Indian Commerce Clause, the "Indians not taxed" Clause, the structure of the Constitution, and the duty of protection establish important contours for the judiciary when considering challenges to the power of Congress to enact Indian affairs statutes. Congress possesses plenary and exclusive (as to states) power in Indian affairs. The United States owes a duty of protection to Indians and tribes that is both immensely valuable and largely undefined. *Haaland v. Brackeen* is merely one in a long line of precedents acknowledging the expansive powers of Congress in Indian affairs.<sup>115</sup> None of this is particularly controversial; Justice Clarence Thomas appears to be the only justice on the current Court that would revisit those precedents.<sup>116</sup>

Given that Indians are the only race or ethnicity mentioned explicitly in the Constitution, the impact of the equal protection principle is different. Any time Congress enacts a law that applies to "Indians," Congress is taking action to implement its Indian affairs powers. Since the Constitution does not define "Indians," presumably it is up to Congress to determine who is an Indian in the first instance for purposes of federal law. We

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110. U.S. CONST. amend. V; *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

111. U.S. CONST. amend. XIV, § 2.

112. Indian Citizenship Act of 1924, 43 Stat. 253 (extending citizenship to American Indian people).

113. 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(4) AM. INDIAN CULTURE AND RES. J. 37, 37–38 (2004).

114. *United States v. Holliday*, 70 U.S. 407, 412 (1865) (brackets and emphasis added).

115. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–29 (collecting cases).

116. No one joined Justice Thomas's dissent. *Brackeen*, 143 S. Ct. at 1662 (Thomas, J., dissenting).

know Congress cannot arbitrarily label people Indians, but the Constitution grants broad discretion to Congress to decide which Indian affairs laws apply to certain classes of Indians. Sometimes Congress has stated that a law applies to “Indians,” or “tribal members,” or Indian people with a minimum blood quantum.<sup>117</sup> By stating that a law applies to Indians, Congress is impliedly saying that a given Indian affairs law does not apply to non-Indians. Until recent decades, when Congress finally started enacting tribal self-determination laws that benefit Indian people, these classifications have not been controversial.

That last part bears repeating—Indian status classifications were not contested by non-Indians until Congress embraced tribal self-determination.

Given all this, it should be no surprise that the Supreme Court has never struck down an Indian affairs law on the basis of an equal protection violation. Even so, there are competing modes of analysis, though to describe these other efforts as analysis or methods is a stretch. They are discussed next.

### *B. The Competitors to the Mancari Method*

The analytic methods that compete with *Mancari* range from absolute deference to Congress through the invocation of a political question justiciability-type analysis, to zero deference to Congress through invocation of judicial policymaking. This Section will survey and critique these competing “methods” ranging from extreme deference to Congress to extreme judicial supremacy.

#### 1. (Near) Absolute Deference to Congress

For much of the history of the United States, the Supreme Court often treated Indian affairs as the exclusive province of Congress and the Executive branch akin to a non-justiciable political question. In *Baker v. Carr*,<sup>118</sup> the Supreme Court listed

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117. *E.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2013) (“Indians”); Indian Reorganization Act, 25 U.S.C. § 5129 (1934) (“members of any federally recognized Indian tribe,” and “all other persons of one-half or more Indian blood”).

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

“[t]he status of Indian tribes” as an example of a political question, though the Court noted “there is no blanket rule.”<sup>119</sup>

The apex of this view was likely *Lone Wolf v. Hitchcock*.<sup>120</sup> There, the Supreme Court held that Congress possessed the power to unilaterally abrogate Indian treaties, even if the abrogation could implicate the Fifth Amendment’s Takings Clause.<sup>121</sup> The Court concluded that “as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, . . . relief must be sought by an appeal to that body for redress, and not to the courts.”<sup>122</sup> The Fifth Amendment aspect of *Lone Wolf* is no longer good law.<sup>123</sup>

Near absolute deference to Congress would obviate the established limiting principles of congressional Indian affairs powers, most notably the Fifth Amendment’s Takings Clause, the First Amendment’s Free Exercise Clause, the equal protection component of the Fifth Amendment’s Due Process Clause, and the Thirteenth Amendment’s bar on slavery. No one would have Article III standing to challenge an Indian affairs enactment under any theory.

The consequences of the near-absolute deference to Congress by the judiciary are apparent from the long, terrible history of federal Indian affairs policy. This extensive deference enabled mandatory boarding schools and other child removals,<sup>124</sup> confiscation of tribal and Indian property interests without due process or just compensation,<sup>125</sup> unilateral termination of the duty of protection,<sup>126</sup> and vicious bureaucratic paternalism rooted in ethnocentrism and

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119. *Id.* at 215 (citing *Holliday*, 70 U.S. 407, 419 (1865) and *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831)).

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

121. *Id.* at 564–65.

122. *Id.* at 568.

123. *E.g.*, *United States v. Sioux Nation*, 448 U.S. 371, 414–15 (1980) (“*Lone Wolf*’s presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here.”).

124. *See generally* BRYAN NEWLAND, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022) (surveying the history of Indian boarding schools).

125. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005) (surveying Indian land dispossession).

126. *See generally* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Era*, 5 AM. INDIAN L. REV. 139, 140 (1977) (surveying the termination era of Indian affairs where Congress terminated the federal duty of protection to hundreds of tribes).

misogyny.<sup>127</sup> For centuries, federal Indian law and policy treated Indian people as subhuman over which the government served as a “guardian” to Indian “wards.”<sup>128</sup>

As a matter of the Constitution, near-absolute deference to Congress is not defensible. American Indian people are American citizens with individual rights; they are not wards of the federal government (if they ever were). Property owned by tribal nations and the inherent sovereignty of tribal nations are judicially protectable interests. What constitutes Indian commerce or tribal sovereignty is judicially cognizable.

Most importantly, tribal nations are coequal partners in the federal–tribal relationship. The duty of protection is a dynamic, shifting, and ongoing arrangement between sovereigns. Congress cannot unilaterally modify that arrangement without running afoul of the Takings Clause or the Contracts Clause, to offer two examples of constitutional protections of property rights. The rare instances of federal Indian affairs statutes struck down by the Supreme Court involved the escheatment of individual Indian property interests in reservation land.<sup>129</sup> Even if the judiciary’s role is limited to securing the outer boundaries of congressional power, there is still a role.

## 2. Roberts Court-Style Textualism

In recent decades, the Supreme Court has turned to textualism as the dominant theory of judging. Chief Justice John Roberts articulated the goals of this textualism when he stated at his confirmation hearing, “Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”<sup>130</sup> Most observers do not really believe this and can show examples of when the Roberts Court deviates from its fidelity to

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127. *E.g.*, Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348 (1953) (describing federal bureaucratic abuses in the 1950s).

128. *E.g.*, Nancy Carol Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887-1924*, 4 *AM. INDIAN L. REV.* 197 (1976) (surveying the history of abusive federal guardianship over Indian people and property during the assimilative era).

129. *See* *Youpee v. Babbitt*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 784 (1987).

130. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).

textualism,<sup>131</sup> but here we take them at their word for purposes of argument.

There are two important aspects of textualism in the Roberts Court. First, the Roberts Court interprets statutes according to their ordinary meaning, divorcing congressional policies and intent from the analysis. For example, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*,<sup>132</sup> the Court interpreted the phrase “other foreign and domestic government” in the Bankruptcy Act to include Indian tribes without discussing the legislative history of that language or other evidence of congressional intent to include tribes.<sup>133</sup> Justice Ketanji Brown Jackson’s majority opinion compared the phrase to common uses of the language, such as “rain or shine,” “near and far,” and “foreign and domestic” (in relation to America’s enemies) to show how the Bankruptcy Act includes tribal nations without specifically mentioning them.<sup>134</sup> In his dissent, Justice Gorsuch similarly focused on the words in the statute instead of the public policies or legislative history, using the phrase “small or a dog” to show that tribal nations might be “medium sized aardvark[s]” and therefore excluded from the catchall statutory phrase.<sup>135</sup>

Second, the Roberts Court interprets the Constitution in view of the original public understanding of the constitutional text. The scope of congressional powers in Indian affairs is a good example. In *Brackeen*, where the majority largely relied on centuries of precedents to conclude that Congress has broad power, the dueling opinions of Justice Gorsuch in concurrence and Justice Thomas in dissent show how the Roberts Court analyzes Constitutional text in the light of original public understanding. Justice Gorsuch quoted Henry Knox and Thomas Jefferson to show that the nascent American state understood Indian tribes to be nations in possession of full sovereignty.<sup>136</sup> Justice Thomas responded by quoting Presidents

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131. *E.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (critiquing the Roberts Court’s fidelity to textualism).

132. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023).

133. *Id.* at 1696 (quoting 11 U.S.C. § 101(27)).

134. *Id.* at 1696–97.

135. *Id.* at 1706–07 (Gorsuch, J., dissenting).

136. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1648–49 (quoting Letter to G. Washington (July 7, 1789), in 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134–41 (D. Twohig ed. 1989), and Notes on Cabinet Opinions (Feb. 26, 1793), in 25 PAPERS OF THOMAS JEFFERSON 271–72 (J. Catanzariti ed. 1992)).

Washington and Jefferson and Secretary of War Henry Knox in an effort to emphasize the limited character of federal powers over Indian affairs.<sup>137</sup>

Leaving aside the abundant normative critiques and defenses of these methods,<sup>138</sup> what is critical here is that both effectively mandate the Roberts Court ignore federal Indian affairs policy and, to a large extent, Congress's interpretation of its own powers. In its quest to serve as truly impartial interpreters of statutory and constitutional text, the Roberts Court's textualism divorces the judiciary from contemporary reality. At times, the Court's decisions approach absurdity. Consider the *LDF* decision, which denied sovereign immunity to a tribal business acting as a creditor in a bankruptcy action.<sup>139</sup> As a matter of bankruptcy policy, it might make sense to require tribal businesses to comply with federal bankruptcy law, but it makes little sense to allow lenders and business partners of tribes to force tribal businesses into bankruptcy. Bankruptcy judges, for example, possess enormous discretion and power to issue orders to effectuate the purposes of the bankruptcy,<sup>140</sup> begging the question of how far a bankruptcy judge could go. Congress is the better branch of federal government for assessing the complex policy questions that might arise in bankruptcy matters involving tribal businesses.

*LDF* is just the most recent case. Consider *Carcieri v. Salazar*,<sup>141</sup> a case involving the power of the federal government to acquire land in trust for tribes "now under federal jurisdiction."<sup>142</sup> In that case, the Supreme Court again ignored the default interpretative rules of Indian law to hold that "now" meant the time of the statute instead of at the time of the trust

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137. *Id.* at 1672 (quoting Washington Statement to the Senate (Aug. 4, 1790), reprinted in 4 AMERICAN STATE PAPERS 80; KNOX REPORT (July 6, 1789), reprinted in 4 AMERICAN STATE PAPERS 15; Jefferson Statement to Congress (Jan. 18, 1803), reprinted in 4 AMERICAN STATE PAPERS 684).

138. Perhaps the most obvious critique is the inconsistency of textualism in relation to statutes, where legislative history is all but forbidden evidence, and to the constitutional text, where legislative history is the acceptable evidence.

139. *Haaland*, 143 S. Ct. at 1694.

140. 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.").

141. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

142. 25 U.S.C. § 5108.

land acquisition, despite decades of contrary administrative practice by the Department of the Interior.<sup>143</sup> The decision excluded a tribe that the government improperly denied services in 1934.<sup>144</sup>

At times, the Roberts Court's textualism reaches outcomes supportive of tribal interests, most notably in *McGirt v. Oklahoma*,<sup>145</sup> where the Court faithfully applied the default interpretative rules disfavoring the termination of the Creek reservation boundaries in the absence of congressional action.<sup>146</sup> Even there, the leading advocates of textualism dissented, going far beyond the text of the relevant statutes and instead invoking history and policy for finding the Creek reservation disestablished.<sup>147</sup>

The Roberts Court's textualism seemingly generates random outcomes without an eye toward Indian affairs policy.

### 3. "Mainstreaming" Indian Law

Former Dean David Getches of the University of Colorado Law School labeled the key method of the Rehnquist Court, which preceded the Roberts Court, as "mainstream[ing]" Indian law.<sup>148</sup> Getches argued that the Rehnquist Court "was more concerned with correcting the perceived injustices of applying Indian law principles . . . ."<sup>149</sup> He was writing mostly about the rights of non-Indians under the jurisdiction of tribal governments, but the Rehnquist Court's overall agenda of strengthening states' rights and forcing a color-blind interpretation of the Constitution led to decisions such as *Duro v. Reina*.<sup>150</sup> There, the Court held forth on history and policy to conclude that tribal nations had no power to prosecute nonmember Indians for crimes.<sup>151</sup> Such a decision advanced the

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143. *Carcieri*, 555 U.S. at 391–93.

144. *Id.* at 395–96.

145. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

146. *Id.* at 2463–69.

147. *Id.* at 2482 (Roberts, C.J., dissenting).

148. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

149. *Id.* at 297.

150. *Duro v. Reina*, 495 U.S. 676 (1990).

151. *Id.* at 686–89.



Court's federalism interests by weakening tribal nations, which the Court at the time seemed to view as racial cabals.

The mainstreaming of federal Indian law to favor states' rights and colorblindness has taken a back seat to textualism in the Roberts Court, but a recent key Roberts Court decision, *Oklahoma v. Castro-Huerta*,<sup>152</sup> harkened back to that era. That opinion featured a lengthy, cherry-picked review of Indian affairs history to determine that states have the power to prosecute non-Indian on Indian crime in Indian country, even in the absence of congressional authorization.<sup>153</sup> The analysis also leaves much to be desired.

One key problem with mainstreaming Indian law is that the text and structure of the Constitution directly push back on elevating states' rights and constitutional colorblindness. After all, states have little to no authority in Indian affairs unless Congress authorizes their action. Also, Indians are the only race or ethnicity explicitly mentioned in the Constitution. In the handpicked historical evidence gathered in cases like *Castro-Huerta*, the Court cannot name a year when Indian affairs policy changed to allow states to prosecute crime in Indian country.

Another key problem is that mainstreaming Indian law seems to cause catastrophic injury. The Court's decision in *Oliphant v. Suquamish Indian Tribe*,<sup>154</sup> for example, is now well understood to have effectively immunized non-Indians from prosecution for crimes in Indian country, leading to horrific violent crime rates.<sup>155</sup> Artificially elevating states' rights and colorblindness, both conservative judicial cornerstones,<sup>156</sup> too often fails in the domain of Indian affairs.

Even so, the Roberts Court's obsession with colorblindness is salient. Perhaps at the risk of caricaturing its race-discrimination doctrines, I consider the Roberts Court's colorblindness to be best encapsulated by the Chief Justice's statement, "The way to stop discrimination on the basis of race

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152. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

153. *Id.* at 2493–94.

154. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

155. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 28–30 (2007).

156. *See, e.g.*, CEDRIC MERLIN POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY (2022) (on colorblindness); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2010) (on federalism).

is to stop discriminating on the basis of race.”<sup>157</sup> Historical evidence of racial discrimination by White persons against people of color is irrelevant to this analysis.<sup>158</sup> The Chief Justice’s statement came in the context of an educational affirmative action decision by a municipality outside of the federal–tribal relationship, but if applied in the Indian affairs context, it could be monumentally disruptive. If, for example, the Court held that an Act of Congress that applied to “Indians” actually created a racial classification to which strict scrutiny would apply, then many federal Indian affairs laws could be subject to strict scrutiny. In Justice Blackmun’s words:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.<sup>159</sup>

The first batch of federal Indian affairs statutes to go would be those establishing Indian country criminal jurisdiction. From the First Congress through to the present day, the jurisdictional hook for Indian country criminal jurisdiction has been the word “Indian.”<sup>160</sup> Federal criminal defendants regularly bring equal

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157. *Parents Involved in Public Schools v. City of Seattle*, 551 U.S. 701, 748 (2007).

158. *Cf. Students for Fair Admission v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2202 (2023) (Thomas, J., concurring) (“[A]ny statistical gaps between the average wealth of black and white Americans [produced by historic discrimination] is constitutionally irrelevant.”).

159. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

160. *Compare* Trade and Intercourse Act of 1790, § 5 (“That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly *Indian or Indians*, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or

protection challenges to the federal Indian country jurisdictional regime.<sup>161</sup> It would just be a matter of time before a court struck down the Major Crimes Act or related laws.

#### 4. Judicial Supremacy

Even beyond elevating federalism and colorblindness, the Supreme Court has, at times, simply acted as the final arbiter of federal Indian affairs policy. Consider the tax case of *City of Sherrill v. Oneida Indian Nation*,<sup>162</sup> an early Roberts Court decision. There, a tribe claimed a county property tax immunity after it repurchased lands within its reservation that had been lost to illegal sales more than two centuries before.<sup>163</sup> The Court invoked a theory that no party briefed or invoked, a theory dependent on evidence not in the record, that the disruption to non-Indian governmental interests outweighed the tribe's interest.<sup>164</sup> The Court apparently presumed that the hypothetical evidence existed to support its theory—and that such evidence was sufficient.

Judicial supremacy is an extraordinary method that is wholly illegitimate given the separation of powers contained within the Constitution. Enough said.

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This next section will examine the ICWA placement preferences provisions highlighted by Justice Kavanaugh as

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district to which he or they may belong, against a citizen or white inhabitant thereof.”) (emphasis added), *with* Major Crimes Act, 18 U.S.C. § 1153(a) (“Any *Indian* who commits against the person or property of another *Indian* or other person . . .”) (emphasis added).

161. *E.g.*, *United States v. Jojola*, 608 F.Supp.3d 1050, 1053–54 (D.N.M. 2022) (rejecting equal protection challenge to Major Crimes Act).

162. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

163. *Id.* at 202.

164. *Id.* at 219–21.

potentially suspect through the lenses of the previously mentioned methods.

#### IV. APPLYING AND COMPARING THE COMPETING METHODS TO ICWA'S PLACEMENT PREFERENCES

Of the methods of interpretation described in this paper, the *Mancari* method is the only legitimate method to assess whether ICWA runs afoul of the Constitution's equal protection requirement.

ICWA's placement preferences apply in two circumstances: adoptive placements<sup>165</sup> and foster care or pre-adoptive placements.<sup>166</sup> The preference for adoptive placements "shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) *other Indian families*."<sup>167</sup> The preference for the third foster care placements is virtually the same.<sup>168</sup>

The italicized language, often referred to as the third placement preference, grants a preference to "Indian families" regardless of tribal membership or affiliation with the Indian child's tribal nation. As ICWA does not define "Indian families," presumably it means that both tribal members and nonmember Indians are preferred. In this case, nonmember Indians can mean both (1) members of federally recognized Indian tribes who are not enrolled with the child's tribe or (2) persons who are not enrolled in a federally recognized Indian tribe but who can be considered Indian through some other evidence of governmental recognition akin to how courts assess Indian status for purposes of criminal jurisdiction.<sup>169</sup>

As a practical matter, state courts rarely invoke the third preference to place a child with an Indian foster home over the objections or petition of a non-Indian foster home. Moreover, the state court must still make a determination that the placement is in the best interests of the child.<sup>170</sup> None of the cases decided

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165. 25 U.S.C. § 1915(a).

166. *Id.* U.S.C. § 1915(b).

167. *Id.* § 1915(a) (emphasis added).

168. *Id.* § 1915(b).

169. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc).

170. The "best interests" of the child standard is a state-by-state, tribe-by-tribe list of factors courts must apply in placement decisions. David Simmons, *Federal Law Is Still in The Best Interests of Indian Children*, THE IMPRINT (Mar. 13, 2019),

in *Brackeen* involved the third preference. The equal protection challenge in *Brackeen* failed on Article III standing grounds;<sup>171</sup> other potential challengers to follow would have to show that a state court chose to place an Indian child with an Indian family after a best-interests finding. Let's assume that a vehicle for such a challenge appears and assess the challenge based on the various methods discussed above.

#### A. *The Mancari Method*

The *Mancari* method requires the court to assess whether the application of the third placement preference, for example, is rationally related to the fulfillment of the trust responsibility. Courts should have no problem finding that the preferences are rationally related to the fulfillment of the trust responsibility.

The first step could be to assess whether there is a rational relationship between the placement preferences and the trust relationship. The statute itself points out that state agencies placed Indian children primarily with non-Indian families,<sup>172</sup> alluding to state governments' failures to understand Indian cultures.<sup>173</sup> The legislative history backs these assertions. At the time ICWA was enacted, state agencies placed 85-90 percent of Indian children removed from their homes into non-Indian homes.<sup>174</sup> Congress learned state agencies discriminated against American Indians who wished to be licensed by the state as foster parents.<sup>175</sup> At the time ICWA was enacted, state

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<https://imprintnews.org/child-welfare-2/federal-law-is-still-in-the-best-interests-of-indian-children/34205> [<https://perma.cc/WQU5-2M6G>].

171. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1638–40 (2023).

172. 25 U.S.C. § 1901(4).

173. *Id.* § 1901(5).

174. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93rd Cong., at 5 (1974) [hereinafter *Indian Child Welfare Hearings*] (statement of William Byler, Executive Director, Association on American Indian Affairs); Terry A. Cross et al., *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAMS. IN SOC'Y: THE J. OF CONTEMP. SOC. SERVS. 49, 51 (2000) (“In 16 states in 1969, 85 percent of the Indian children were placed in non-Indian families.”).

175. *E.g.*, *Indian Child Welfare Hearings*, *supra* note 174 (describing discriminatory state foster care licensing and practices); *see also id.* at 129–30 (statement of Dr. Robert Bergman); *id.* at 152 (statement of Mary Anne Lawrence, Director, Indian Family Defense Project).

agencies placed 85–90 percent of Indian children removed from their homes into non-Indian homes.<sup>176</sup>

In the 21st century, Indian families remain targets of severe and intrusive government intervention often based on lack of personal resources. The Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence found that Indian families are subjected to break-up by government agencies that do not provide active efforts to assist those families.<sup>177</sup> State agencies still routinely misunderstand Indian cultural practices and emphasize values that are harmful to Indian children in contravention of the policies announced by Congress.<sup>178</sup> Indian parents are placed in a dilemma when dealing with state agencies: “either renounce their culture or lose their children.”<sup>179</sup> A 2023 study concluded that disproportionate removal of American Indian children by state agencies is an “ongoing” issue.<sup>180</sup> Therefore, a court could easily find that ICWA’s placement preferences advance the interest of keeping Indian children with Indian families, which Congress has found is directly tied to the future of tribal nations.<sup>181</sup>

Whether the United States’ trust responsibility extends to both types of nonmember Indians is similarly easy but requires a deeper dive into the realities of American Indian life. Begin with Indian people who are not members of federally recognized Indian tribes. At the time ICWA was passed, Congress had

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176. Indian Child Welfare Hearings, *supra* note 174, at (statement of William Byler) (estimating 90 percent); Cross et al., *supra* note 174, at 51

177. U.S. DEP’T OF JUST., ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 72 (2014) (“Native children are often removed from their mother for ‘failure to protect’ or because the mother lacks resources to support the child. Rather than working with the mother to resolve the problems, children are removed too frequently, and few services are provided to help the mother regain custody of her children.”).

178. Marian Bussey & Nancy M. Lucero, *Re-examining Child Welfare’s Response to ICWA: Collaborating with Community Based Agencies to Reduce Disparities for American Indian/Alaska Native Children*, 35 CHILD. AND YOUTH SERVS. REV. 394, 396 (2013) (“Long-used approaches in child welfare stressing individualism, independence, confidentiality, and authority through formal education often are in direct conflict with traditional Native values.”).

179. *Id.* (“Misunderstandings of cultural practices, as well as tribal values often at odds with values of the dominant culture, can leave Native families in a no win situation—either renounce their culture or lose their children.”).

180. Frank Edwards et al., *American Indian and Alaska Native Overexposure to Foster Care and Family Surveillance in the US: A Quantitative Overview of Contemporary System Contact*, 149 CHILD. & YOUTH SERVS. REV. 1, 11 (2023).

181. 25 U.S.C. § 1901(3).

terminated the federal–tribal relationship with hundreds of tribal nations;<sup>182</sup> the Department of the Interior had administratively terminated dozens of others;<sup>183</sup> and the United States had not yet acknowledged many others as tribal sovereigns at all.<sup>184</sup> Even without the United States formally acknowledging these tribes, the federal government stole the children of these non-recognized tribal nations or similarly allowed these children to be taken by private secular and religious child welfare organizations.<sup>185</sup>

Many Indian people are not enrolled either because they do not meet the membership requirements of federally recognized Indian tribes or because they choose not to enroll.<sup>186</sup> Federal courts have a well-established doctrine of common law that requires the judiciary to determine whether an unenrolled Indian is an Indian for purposes of federal criminal jurisdiction: first the court looks to racial ancestry, then the court looks for indicia of governmental recognition of that person as an Indian.<sup>187</sup>

Next consider Indian families who are not members of the child’s tribe. Congress again knew that states discriminated against potential Indian foster and adoptive parents, specifically by sending Indian children off-reservation to White families.<sup>188</sup> Congress also knew that many tribal nations were split apart. There are numerous Anishinaabe (Ojibwe, Odawa, and Bodewadmi) tribal nations, twelve in Michigan alone, spread out over a half dozen states. Anishinaabe nations, even those as far apart as Michigan and Oklahoma, share common languages, cultures, and child rearing practices. For a state court to place a Pokagon Band Potawatomi child from northern Indiana with a loving Citizen Band Potawatomi family in Oklahoma fulfills many of the goals of ICWA. Consider Lakota, Pueblo, Tlingit, Salish, Paiute, Cherokee, and Pomo tribal nations, all of which are tribal nations that are similarly separated but still culturally

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182. AM. INDIAN POL’Y REV. COMM’N, FINAL REPORT 425–56 (1977).

183. MATTHEW L.M. FLETCHER, SYSTEMIC RACISM AND THE DISPOSSESSION OF INDIGENOUS WEALTH IN THE UNITED STATES 11 (2021).

184. AM. INDIAN POL’Y REV. COMM’N, *supra* note 182, at 457–82.

185. *E.g.*, NEWLAND, *supra* note 124, at 64–79 (describing how citizens of Alaska Native and Native Hawaiian nations, many of which were not federally acknowledged at the time, were forced into federal Indian boarding schools).

186. Fletcher, *supra* note 53, at 545.

187. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc).

188. 25 U.S.C. § 1901(4)–(5).

related and count numerous federally recognized tribal nations among them. Even tribal nations that seem to have little in common share a common history; after all, the federal government forced Indian children to boarding schools far from their homes and mixed Indian children together from far-ranging geographies and cultures in schools like Carlisle and Haskell.<sup>189</sup> Regardless of the connection between Indian foster and adoptive parents and Indian children, a state court may find good cause to deviate from the placement preferences if the placement is not in the child’s best interests.<sup>190</sup>

In short, there are plenty of reasons for Congress to grant a preference to “other Indian families” that are rationally related to the fulfillment of the trust responsibility. Under the *Mancari* method, this ends the analysis.<sup>191</sup>

The next sections detail the competing methods in reverse order of their likelihood of being taken seriously by the Supreme Court.

### *B. Near-Absolute Deference to Congress*

The first competing method is absolute deference to Congress. This method would effectively treat challenges to ICWA as non-justiciable political questions. The judiciary would take Congress at its word, presume “good faith” as in the *Lone Wolf v. Hitchcock* decision,<sup>192</sup> and summarily reject equal protection challenges to the third placement preferences. As noted above, the Constitution does grant considerable power to Congress and requires Article III courts to defer to Congress’s policy judgments in Indian affairs, but other Constitutional provisions, such as the First Amendment and the Fifth Amendment’s Takings Clause (to name just two), serve as

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189. NEWLAND, *supra* note 124, at 40 (describing how the Haskell Institute “intentionally mixed” children from 31 tribes).

190. *E.g., in re Alexandria P.*, 1 Cal. App. 5th, 331, 349–50 (2016); *see also* 25 C.F.R. § 23.132 (2016) (explaining when state courts have good cause to deviate from the placement preferences).

191. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”).

192. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (“[I]t was never doubted that the power . . . existed in Congress, and that, in a contingency, such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.”).



justiciable limiting principles on Congress's Indian affairs powers.

This method is the least likely to be used.<sup>193</sup>

### C. *Judicial Supremacy*

The next least likely method is judicial supremacy. Here, the Supreme Court would simply act as a super legislature and decide on policy grounds what would be the best course of action. In every Supreme Court case, there are a plethora of policy briefs akin to expert testimony in congressional hearings for the Court to assess. In *Brackeen*, there were amicus briefs from the American Psychological Association,<sup>194</sup> the National Indigenous Women's Resource Center,<sup>195</sup> and Casey Family Programs<sup>196</sup> expounding on the policy benefits of ICWA. Perhaps tellingly, there were few policy briefs in opposition to ICWA, and those relied on cherry-picked anecdotes rather than peer-reviewed studies.<sup>197</sup>

Of course, the Supreme Court is not a policymaking branch of government. The Court has no institutional capacity for making Indian affairs policy choices.<sup>198</sup> That does not mean the Court never steps into the policymaking realm in Indian affairs, as cases such as *Oliphant* and *Sherrill* demonstrate, but there are few cases in which the Court intervenes in this way. This

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193. *E.g.*, *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 72, 83–84 (1977) (agreeing with the government that the plenary power of Congress does not mean that all federal legislation concerning Indians is immune from judicial scrutiny).

194. Amicus Brief of the Am. Psych. Ass'n et al., *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (No. 21-376), 2022 WL 3682219.

195. Brief for National Indigenous Women's Resource Center et al. as Amici Curiae Supporting Petitioners, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (No. 21-376), 2022 WL 3648352.

196. Brief for Casey Family Programs et al. as Amici Curiae Supporting Petitioners, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (No. 21-376), 2022 WL 3648364.

197. *E.g.*, Brief for Christian Alliance for Indian Child Welfare et al. as Amici Curiae Supporting Respondents at 10–23, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (No. 21-376), 2022 WL 2020368 (relying on anecdotes to challenge ICWA on equal protection grounds).

198. Steele, *supra* note 107, at 683–709.

fact suggests that the Court's appetite for rendering decisions in this way is limited.

#### *D. Roberts Court Textualism*

The next method is the Roberts Court's textualism. That textualism is hardly a model of clarity, but it naturally is a likely "method" to be used in the event the issue of the third placement preference reaches the Supreme Court.

Presumably the first step would be to ascertain the original public understanding of the Fourteenth Amendment on Indian affairs. The scholarship on this question generally concludes that the Fourteenth Amendment is inapplicable in Indian affairs unless Congress enacts legislation to change that. For example, in *Elk v. Wilkins*,<sup>199</sup> the Court held that the Amendment did not extend citizenship to Indian people.<sup>200</sup> Congress did extend citizenship to some American Indians haphazardly over the half-century after the Amendment's ratification,<sup>201</sup> finally extending citizenship to all Indians in 1924.<sup>202</sup> The original public understanding of the Fourteenth Amendment outside of the Indian citizenship context has not been adjudicated in a meaningful or comprehensive manner, but the reasoning appears to be similar. Unless Congress acts to extend the protections of the Amendment to Indian people, they don't apply.<sup>203</sup>

But the real action on the third placement preferences is not in the Equal Protection Clause, but instead the equal protection *component* of the Fifth Amendment's Due Process Clause since ICWA is a federal statute. The original public understanding of the equal protection component is likely never to be ascertained, as the Founding Generation likely would not have been able to guess that their Fifth Amendment contained any kind of "equal protection" component. As is well known, the Supreme Court implied an equal protection component into the Fifth Amendment in cases such as *Korematsu v. United States*<sup>204</sup> and

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199. *Elk v. Wilkins*, 112 U.S. 94 (1884).

200. *Id.* at 99–100.

201. *E.g., id.* at 104 (describing act extending option to obtain citizenship to Winnebago Indians in the State of Minnesota).

202. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).

203. *Elk*, 112 U.S. at 99–100.

204. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

*Bolling v. Sharpe*.<sup>205</sup> Even if the Framers of the Fourteenth Amendment understood the amendment to incorporate an equal protection requirement on the federal government, we have already determined that the Framers did not understand the Amendment to change much of anything in Indian affairs.

This confusing and indeterminate playing field would leave the Roberts Court in a tough spot in its quest for the original public understanding of the Fourteenth Amendment as applied to Indian affairs laws. This indeterminacy could elevate the final method explained below.

### *E. Mainstreaming Indian Law: Colorblindness*

The final possibility is that the Supreme Court will use a method that elevates states' rights and/or colorblindness over congressional enactments. The Roberts Court has already rejected broad states' rights challenges to ICWA in *Brackeen*,<sup>206</sup> so it seems unlikely that the Court will pluck the third placement preferences out for special federalism treatment. Given the Court's focus on its notion of colorblindness, most recently weaponized in the Harvard and North Carolina affirmative action cases,<sup>207</sup> this method would also be a possibility.

In general, the Court's colorblindness theories are a serious threat to Indian affairs statutes. As noted above, the Court could treat potentially every Indian status classification—"Indian," blood quantum, and perhaps even tribal membership—as a racial classification. If that were the case, Justice Blackmun's concern that vast swaths of Title 25 would go down would likely come to pass.<sup>208</sup>

How this might work in the context of the third placement preferences is that the Court might begin with the phrase "other Indian families."<sup>209</sup> Since ICWA does not define that classification to exclude non-tribal members, as it did elsewhere in the statute,<sup>210</sup> the Court might conclude that "other Indian

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

206. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629–38 (2023).

207. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

208. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

209. 25 U.S.C. § 1915(a)(3), (b)(iii).

210. *E.g.*, 25 U.S.C. § 1903(3) ("Indian' means any person who is a member of an Indian tribe . . ."); *see also id.* § 1903(4) ("Indian child' means any unmarried

families” is a naked racial classification. Under the Roberts Court’s colorblindness framing, a naked racial classification is constitutionally suspect. That the classification arises from an Indian affairs statute might not matter in the least.

Justice Kavanaugh’s attempted framing of the constitutional challenge to the third placement preferences reveals much about this vision of Indian law:

Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child’s race—even if the placement is otherwise determined to be in the child’s best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent’s race.<sup>211</sup>

Under that framing, Indian children or non-Indian foster or adoptive parents might be subject to race discrimination because of the application of the placement preferences; Justice Kavanaugh does not expressly limit his framing to third preferences. This prototypical colorblindness analysis ignores the long history of race discrimination against Indian children, Indian families, and Indian adoptive and foster parents. The framing notably ignores the special federal–tribal relationship that Justice Gorsuch carefully and extensively described in his *Brackeen* concurrence.<sup>212</sup> More importantly, colorblindness willfully ignores the ongoing race discrimination raging against

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person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”).

211. *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

212. *Brackeen*, 143 S. Ct. at 1661 (Gorsuch, J., concurring) (“Thankfully, Indian children are not (these days) units of commerce. Cf. *Fletcher & Singel* 897–898 (describing an early practice of enslaving Indian children). But at its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians. And, as we have seen, that falls in the heartland of Congress’s constitutional authority. Recall that the very first Congresses punished non-Indians who ‘commit[ted] any crime upon [any] friendly Indian.’ Act of July 22, 1790, ch. 33, § 5, 1 Stat. 138. ICWA operates in much the same way. The mass removal of Indian children by States and private parties, no less than a pattern of criminal trespasses by States and private parties, directly interferes with tribal intercourse.”).

Indian people and tribes in child welfare proceedings throughout the United States in the 21st century.<sup>213</sup>

Colorblindness is a deeply cynical and vicious theoretical framework intended to gut civil rights efforts, all the while touting neutrality.<sup>214</sup> Would eradicating ICWA of its Indian status classifications stop race discrimination in Indian child welfare matters by state courts and agencies? Social science research and common sense indicate that the answer is no; racism remains endemic in the child welfare system.<sup>215</sup>

Perhaps the saving grace for Indian status classifications is the reality that the broad application of equal protection principles to Indian affairs laws would so intensely disrupt Indian country criminal jurisdiction that the Court would be too unnerved by consequences of its own colorblindness to go down that road. But that's a sad statement of American Indian law.

#### CONCLUSION

In sum, the *Mancari* method requires significant deference to Congress's authority in Indian affairs, while the other methods place the onus on the Judiciary's interpretations and policy choices. The choice between these options should be easy. Choosing deference to Congress is largely mandated by the Constitution, which already places considerable power in Congress.<sup>216</sup> The choice to defer to Congress is already the law, in that the default interpretative rules of federal Indian law require considerable deference to Congress (and to tribal interpretations).<sup>217</sup> The choice to defer to Congress is also good policy, in that Congress, with the assistance of expertise from tribal nations and the Department of the Interior, can assess the

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213. See, e.g., Edwards, *supra* note 180 (study showing ongoing race discrimination in Indian child welfare proceedings in state courts).

214. See generally MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003).

215. E.g., DOROTHY B. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (advocating radical reform of the child welfare system to eradicate racism in its application); Robert B. Hill, *Institutional Racism in Child Welfare*, 7 *Race & Soc.* 17 (2004) (studying persistent overrepresentation of black children in the child welfare system).

216. See generally RESTATEMENT OF THE L. OF AM. INDIANS, *supra* note 4, § 4.

217. See generally *supra* Part I.

implications of making changes to Indian affairs law and policy.<sup>218</sup>

Applying strict scrutiny to Indian affairs legislation that is rationally related to the fulfillment of the trust responsibility says one thing very clearly: the majority of the Court does not prefer the outcome of the *Mancari* method and will instead impose its own policy preferences. Not only is the *Mancari* method correct, but it is also the only justifiable method.

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218. See generally Steele, *supra* note 107, at 683–709 (on institutional capacity).