1991

Sometimes Suspect: A Response to Professor Goldberg-Ambrose

David C. Williams
Indiana University Maurer School of Law, dacwilli@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Constitutional Law Commons, and the Indian and Aboriginal Law Commons

Recommended Citation

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
I appreciate the care and thoroughness with which Professor Goldberg-Ambrose has approached *Indians as Peoples* and the opportunity to respond to her many acute comments. First let me emphasize our common ground, because I think that it is substantial. We share the same basic goals: we each believe ourselves to be “committed to racial justice and profoundly troubled by America’s treatment of Indian peoples,”1 and we each seek to “create a legal regime that promotes self-determination for Indian groups without compromising the equal protection guarantees of the Constitution.”2 Yet we also believe that Indian law rests on racial classifications, or “race-plus” a political element.3 So we agree that the Supreme Court’s analysis of Indian law—that it does not involve race—is in error.4

But if Indian law does involve racial classifications, how can we protect both Indians’ special status and the antidiscrimination norms of the Constitution? It is on this strategic-analytical question

---

2. Id.
3. See id. at 172–73.
4. I should note that *Indians as Peoples* does not portray Indian law as “indefensible under basic American principles of racial equality.” Id. at 169. It does argue that if the Court applied the same standards to Title 25 as it does to other race-based legislation, it would strike down that part of the title that could not be justified as affirmative action and, arguably, most of the title would so fall. See Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 764–67 (1991). But I also observe that one could read the equal protection component of the Fifth Amendment in ways that would allow broad protection for all minority groups, see id. at 824–26; and *Indians as Peoples* itself argues that most of Indian law is consistent with “basic American principles of racial equality,” because those principles, rightly understood, do not prohibit protection for peoplehood. See id. at 841–50.
that we differ. I agree with Professor Goldberg-Ambrose that “anyone engaged in that struggle should place history and context ahead of abstract reasoning and inventive formulations”\textsuperscript{5}—but I think that history and context would lead us away from her proposed analysis, which promises only more of the present regime. She has, however, convinced me that there is not one perfect path through this thicket—only better and worse ones. My response therefore is necessarily comparative. I cannot pretend that my approach is without its problems, but I still believe that it is preferable to the most familiar alternatives.

In particular, Professor Goldberg-Ambrose proposes a “direct” route to deal with the equal protection problem raised by Indian legislation. She would recognize that the Constitution itself singles out Indians in the Indian Commerce Clause as a special area of congressional power—and thereby implicitly legitimates the practice of Indian-specific legislation.\textsuperscript{6} Standing alone, however, that path would free Congress to help or hurt tribes, free of any restriction from the equal protection norm. So Professor Goldberg-Ambrose adds a standard of review to the article I approach: Congress may single out Indians only in a manner consistent with its fiduciary obligation to them.\textsuperscript{7} As she notes, I find this approach unpersuasive on textual, historical, and policy grounds. Her defense sets out powerful and cogent arguments, but I do not believe that it adequately shores up the flawed foundations of her approach.

*Indians as Peoples* offers a different strategy: the Fourteenth Amendment, as incorporated by the Fifth Amendment to apply to Congress, does bar Indian-specific legislation as a general rule. The Amendment, however, also contains an important exception to this rule: it recognizes that to some extent tribes are separate peoples and thus fall outside the domestic norms of the Constitution. Congress may therefore single Indians out in support of their peoplehood but *only* in support of their peoplehood. This approach, in my view, proceeds more naturally from the language and history of the Constitution and offers more meaningful protection for tribal self-determination than the article I approach.

\textsuperscript{5} See Goldberg-Ambrose, *supra* note 1, at 190.
\textsuperscript{6} See id. at 174.
\textsuperscript{7} See id. at 176–77.
I. TEXT OF THE CONSTITUTION

As regards the text of the Constitution, *Indians as Peoples* suggests that the Equal Protection Clause,8 with its principle against racial classification, may have superseded the Indian Commerce Clause, with its recognition of Congress' power to single out tribes, because it is “later in time and is no less specific.”9 Professor Goldberg-Ambrose concedes that the Fourteenth Amendment was enacted later than article I, but questions whether it is equally specific.10 Even under her analysis, then, the relative preeminence of the two provisions is problematic, with age and specificity pointing in different directions. Text alone seems an unreliable guide, and we therefore must look to different sources of constitutional norms—policy and history—as Professor Goldberg-Ambrose eventually does. This conclusion was the point of my argument about the Indian Commerce Clause: the bare text just does not help us very much; one cannot invoke article I and declare the matter settled.11 That is why my proposal—while beginning with the text—really revolves around the twin poles of history and policy.12 Indeed, I assume that Professor Goldberg-Ambrose agrees with me that text should not be the central factor in this equation, because as I will argue, she offers a standard of review—consistency with the trust responsibility—that has no rootage in text.

Professor Goldberg-Ambrose seems, however, to be making a stronger argument: the text is so specific that it leads one to the article I approach regardless of policy and the teachings of history.

8. This clause does not apply to the federal government, but its substance has for the most part been reverse incorporated against it through the Due Process Clause of the Fifth Amendment. Professor Goldberg-Ambrose does not affirmatively argue against reverse incorporation, so I assume that such an argument is not the basis of her response. She does observe: “It is odd in the first place for Professor Williams to read the Fourteenth Amendment, applicable only to the states, as potentially nullifying a federal article I power.” *Id.* at 175. But it is no odder than reading the Amendment to restrict Congress' ability to discriminate under any of its other powers. She also points out that the Equal Protection Clause has not been reverse incorporated against Congress' treatment of aliens, *see id.* at 174 n.26, but I argue in *Indians as Peoples* that aliens and Indians are in different circumstances regarding reverse incorporation. *See Williams,* supra note 4, at 811–13. Professor Goldberg-Ambrose does not respond to this argument. Perhaps she simply means here to repeat her specificity argument: the Amendment should not be reverse incorporated in this context, because the Indian Commerce Clause is more specific than the Equal Protection Clause. I address that argument in the text.

10. *See id.*
11. *See Williams,* supra note 4, at 784–86.
Here we must part company. Article I does specifically legitimate Indian-specific legislation; but read in historical context, the Equal Protection Clause commands equality between the races. Professor Goldberg-Ambrose denies that the Equal Protection Clause "expressly address[es] racial classifications," and in a literal sense, she is right. But that point, I think, demonstrates the inadequacy of a purely textual approach to this issue, because it denies the whole context of the provision. It is certainly true that the language—"nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"—does not expressly mention race. In context, however, the Fourteenth Amendment is all about race; the idea that the Amendment is not about race because the language does not mention race ignores the greatest watershed event in nineteenth century American history.

One of Professor Goldberg-Ambrose's examples illustrates this point: she suggests that the equal protection norm would not apply "with full force" to a federal law requiring Indians to ride in the back of interstate buses. Perhaps she believes that her trust responsibility standard of review would block such a law, but that analysis misses the point: this law seems unconstitutional not only, and perhaps not primarily, because Congress has neglected its trust responsibility. In the context of the history of this country, this law is unconstitutional because it is racist legislation, plain and simple. Moreover, if one is looking only at the specific language of the Constitution, the trust responsibility standard is in serious difficulty, because, as I will argue, it has no basis in the language of the document.

Professor Goldberg-Ambrose offers one last argument about specificity: as Robert Clinton noted some years ago, the Fourteenth Amendment itself specifically mentions Indians by its exclu-

14. Id.
15. U.S. CONST. amend. XIV.
16. Alternatively, Professor Goldberg-Ambrose may mean that the Amendment does address race but not racial classifications; in other words, it creates an ideal of substantive equality among racial groups—an ideal that may sometimes require formal racial classifications. As I note in Indians as Peoples, I applaud that reading. I chose not to make that argument only because others have done so and I think that one can defend the special status of Indians without recourse to such a broad and controversial argument. See Williams, supra note 4, at 823–26.
17. Goldberg-Ambrose, supra note 1, at 174–75.
sion of “Indians not taxed” from the apportionment. I find this language very relevant—indeed I build my proposal around it—but not for the reasons Professor Goldberg-Ambrose offers. She argues that the language of the “Indians not taxed” clause simply affirms the relationship between the federal government and the tribes in article I. Again, however, this strictly textual argument is unsatisfying. By its terms, the Amendment excludes only Indians not taxed, but all Indians are taxed today. Indeed, the Department of Interior’s current interpretation of this clause is that all Indians are included in the apportionment because the federal government taxes them all. If one paid attention only to language, then, one would conclude that the “Indians not taxed” clause cannot ground a special relationship between Congress and any Indians, because it now applies to no Indians at all.

I rush to admit that this focus on language is wooden and rigid. “Indians not taxed” really means “tribal Indians,” but the only way that we can know that is to look at the history of the Fourteenth Amendment. When we do so, however, we discover the reason the drafters of the Amendment excluded Indians from apportionment: the tribes were different peoples, not part of the constitutional fabric of the nation, not subject to constitutional norms in the same way as others.

II. History

So arguments about the textual preeminence of article I or the Equal Protection Clause seem to be a wash for the article I approach and are generally unilluminating. We must then turn to history and policy. In the historical debates surrounding the Fourteenth Amendment, I found the basis for the Indians-as-peoples approach. I rehearse those debates at length in my original article, so I will not repeat that discussion here. By contrast, I find no suggestion that article I imposes on Congress a fiduciary duty or that the “Indians not taxed” language does anything other than exclude tribes from the constitutional regime for citizens.

19. Goldberg-Ambrose, supra note 1, at 175.
20. See Williams, supra note 4, at 832–33.
21. Goldberg-Ambrose, supra note 1, at 175.
24. See Williams, supra note 4, at 832–41.
25. See id.
Indeed, Professor Goldberg-Ambrose does not make a historical argument for her article I approach; instead, she offers several arguments against my historical account. In particular, she points out that my historical argument grows out of debates over the Citizenship Clause, but the Equal Protection Clause applies to "persons," not "citizens." Therefore, in her view, the citizenship debates are not relevant to the latter clause: "Indians as Peoples asks its readers to view the Fourteenth Amendment as an integrated whole, but such a general admonition cannot substitute for the close work of interpreting each clause."\(^{26}\) Despite this characterization, Indians as Peoples does interpret "each clause," but it also argues that one should interpret each clause in light of the meaning of the other clauses.

In particular, Indians as Peoples recognizes that the Equal Protection Clause extends to all "persons" and therefore grants Indian individuals some rights.\(^{27}\) The debates over the Citizenship Clause, however, should influence our interpretation of the scope of those rights. Because the debates reveal a view of the tribes as peoples outside the domestic norms of the Constitution, no part of the Fourteenth Amendment should be read as inconsistent with the Indians' peoplehood. That mode of analysis does suggest that we should read the Amendment as an integrated whole. But as a historical matter—and I am here advancing a historical argument—the framers did so view the Amendment, and I do not know of a historian who takes a different view.\(^{28}\) Moreover, if viewing the Amendment as an integrated whole is a sin, Professor Goldberg-

---

27. See Williams, supra note 4, at 839–41, 863–64; infra notes 31–33.
28. See id. at 839 & n.264. Professor Goldberg-Ambrose further argues that the debates over the Citizenship Clause are irrelevant to a historical exegesis of the Equal Protection Clause, because the latter was addressed only to state action. Under this view, the drafters might have excluded Indians from federal citizenship because of their special status, but then in the Equal Protection Clause they might have banned state laws that single out Indians in recognition of their special status. See Goldberg-Ambrose, supra note 1, at 184–86. But that hypothetical mental construct is hard to accept: the Citizenship Clause excludes Indians from state as well as federal citizenship, from state as well as federal polities. It contemplates that laws recognizing separate peoplehood are not inherently illegitimate; such statutes do not suffer from the same evils as racist legislation prohibited by the Equal Protection Clause. The framers could not, then, have intended to block state statutes that, for example, exempted tribal Indians from military conscription, in recognition of their separate status. They did, on the other hand, intend to bar state statutes that single out Indians based on their race—such as laws denying equal protection in the courts to individual Indians "sojourning" off-reservation. See Williams, supra note 4, at 839–41. The clause, then, never blocked peoplehood-protective statutes; and when reverse incorporated against the federal government, it does not block federal peoplehood-protective statutes.
Ambrose is herself guilty: she offers the “Indians not taxed” language, which is in the Apportionment Clause, as a reason to believe that the Equal Protection Clause does not change Congress’ special relationship to the Indians—and she does so without benefit of any accompanying citation to the legislative history.29

Professor Goldberg-Ambrose also makes several arguments that emphasize recent judicial expansion of the meaning of the Equal Protection Clause—suggesting, apparently, that argument based on the 1868 legislative debates is dated. First, she objects that equal protection has evolved toward greater inclusiveness, “particularly embracing aliens.”30 But again, I do not argue that the Fourteenth Amendment has ever excluded Indians—or aliens—altogether: it always extended them some rights, to the extent that they fall under non-Indian jurisdiction and therefore need those rights.31 Professor Goldberg-Ambrose criticizes this suggestion as “old-fashioned”: “Indians as Peoples takes an old-fashioned view of equal protection when it tries to section the clause like a grapefruit, applying only certain portions to Indians . . . .”32 But if “old-fashioned” means closed, rigid, or restrictive, I must differ: Indians as Peoples specifically argues that the standard is inherently evolutionary and always has been—the rights are as great as the need that evokes them. As the federal government takes more direct jurisdiction over individual Indians, displacing the tribal governments, so must the rights of those individuals against the federal government increase.33 Finally, Professor Goldberg-Ambrose argues that Indians should be included in constitutional citizenship because of “contacts or bonds with the national community.” Further, “[i]f Indians are not excluded from constitutional citizenship, it is difficult to understand why they should be excluded from equal protection.”34 But if Indian law is race-based, the tribes must be excluded from some of equal protection for a full-fledged self-determination policy to survive. Professor Goldberg-Ambrose herself recommends exclusion of Indian-specific statutes from strict scrutiny under the article I approach. Indians as Peoples, moreover, emphasizes that Indians now have statutory citizenship that constitution-

29. See Goldberg-Ambrose, supra note 1, at 175.
30. Id. at 185.
31. See Williams, supra note 4, at 839–41, 863–64.
32. See Goldberg-Ambrose, supra note 1, at 185.
33. See Williams, supra note 4, at 839–41, 863–64. For example, as the federal courts now try Indians for many on-reservation crimes, these individuals should receive the full panoply of constitutional rights extended to criminal defendants.
34. Goldberg-Ambrose, supra note 1, at 186.
ally cannot be rescinded and that brings with it all constitutional rights consistent with tribal self-determination.\textsuperscript{35}

III. Policy

Perhaps, however, policy concerns should loom largest in this discussion. Professor Goldberg-Ambrose offers critiques of three policy objections that I make to the article I approach: it would breach the "normative wall of opposition to racial classifications"; it would frustrate benign state Indian-protective legislation; and it would leave Indian peoples vulnerable to race-based federal action. I regard the third as the most important and Professor Goldberg-Ambrose's critique of it the most significant, so I take it up last for extended consideration.

First, I fear that the Court's approach in \textit{Mancari}—denying that Indian law is race-based—will encourage a fast-and-loose attitude toward the requirements of the Equal Protection Clause, because the approach is so palpably a fiction. Indians \textit{are} racial groups; to ignore that fact is to suggest that we can ignore the antidiscrimination norm when it proves inconvenient.\textsuperscript{36} Unlike the Court, Professor Goldberg-Ambrose wants to admit that Indian law is race-based; but she then argues that article I nonetheless legitimates singling out Indians. I see much less risk of devaluation of the antidiscrimination norm in this approach, and so on this score I prefer her analysis to the Court's—because it is more honest.

I do see some risk of devaluation of the norm in her approach, however, because it would essentially hold that Indians enjoy a special status under article I, alone among the country's racial minorities. And I see this exception, despite Professor Goldberg-Ambrose's arguments,\textsuperscript{37} as qualitatively different from other apparent exceptions. Aliens are radically different from Indians because they have, at least theoretically, an exit option and their status is caught up in the hard-ball of international politics.\textsuperscript{38} By comparison to Title 25, affirmative action is theoretically temporary, integrationist in its goals, and relatively minor in its effects on the minorities involved.\textsuperscript{39} Title 25 alone seems to legitimate permanent separation of American citizens into racially exclusive enclaves under different governments. Therefore, while Professor Goldberg-

\textsuperscript{35} See Williams, \textit{supra} note 4, at 857–61.
\textsuperscript{36} See \textit{id.} at 762, 774.
\textsuperscript{37} Goldberg-Ambrose, \textit{supra} note 1, at 180–81.
\textsuperscript{38} See Williams, \textit{supra} note 4, at 812–13.
\textsuperscript{39} See \textit{id.} at 764–67.
Ambrose is right to suggest that her approach would not “cause the legal barriers against racism to crumble,” it likely would have some negative effect in that direction.

I completely agree, however, with Professor Goldberg-Ambrose’s belief that some “race-plus” classifications are more innocuous than others: “This is especially the case with federal legislation regarding Indians, which acknowledges governments and groups that originally served as the basis for international negotiations and only later became associated with domestic law. [T]he fact that politics is added to race defuses the force of race . . . .” But that comment, I think, is a recapitulation of the essential thesis of Indians as Peoples: the reason that tribes are unique in the eyes of the Constitution is that they are peoples in polities that predate the Constitution. Within the territorial boundaries of the United States, Indians alone occupy this status, and so with Professor Goldberg-Ambrose I think that this approach would create relatively minimal risk of other kinds of racial legislation.

My second policy objection is that the article I approach would allow only Congress to single out Indians because only Congress has the requisite article I powers, and I find that “regrettable because it discourages or prevents state legislation supporting tribal self-determination. . . . [if] Indian legislation is justifiable without strict scrutiny when it is federal, why should it not be similarly justifiable when enacted by a state?” Professor Goldberg-Ambrose’s principal response is that there is reason to distinguish between state and federal governments: as bad as Congress has been to the Indians, the states have been worse. Moreover, the federal trust responsibility offers some promise that federal treatment will continue to be “good”: “If properly understood and invigorated, the trust responsibility can serve in lieu of strict scrutiny as a curb on legislation singling out Indians or tribes for harmful treatment.” I agree with Professor Goldberg-Ambrose that states have mistreated Indians, but that is no reason to block state legislation when on occasion it is benign; in particular, it would be regrettable to discourage grass-roots state-tribal cooperation. And I think that my standard accommodates that goal: it would block malign state—or federal—action, but allow support for self-determination. By contrast, I do

40. Goldberg-Ambrose, supra note 1, at 181.
41. Id.
42. Id. at 182.
43. Id. at 183.
not think that the trust responsibility has, will, or can prevent federal mistreatment.

This issue thus merges into the third and most important policy concern: trying to discern which legal formulation might in practice best protect the tribes. As Professor Goldberg-Ambrose observes, my chief objection to the article I option is "the vulnerability of Indians to federal power if strict scrutiny is pushed aside." But she suggests that an article I approach will not leave Indians so exposed: Congress must still live by "the doctrine the Supreme Court has most often invoked as a restraint on federal power—the trust responsibility." I agree with Professor Goldberg-Ambrose's basic view of how the Court goes about its work and how one might best try to protect the tribes. As she observes, commentators have offered many methods for stimulating judicial protection of the tribes. But

[ultimately, any means of protecting Indian resources and self-government that relies on the Supreme Court depends on the values and contextual understanding of the Justices, reverberating with prior legal doctrinal tradition. . . . What matters is whether the magic words point judges in the direction of carefully scrutinizing the consequences of decisions from the perspectives of all those affected and whether they tap into a set of norms and traditions that stimulate critical judicial thought.]

Professor Goldberg-Ambrose here draws on the recent work of those who argue that judicial decisionmaking centrally involves practical reason. These scholars are emphatically antifoundationalist: they deny that any concept, set of propositions, or factor (such as legislative intent) can offer a basis from which judges can derive outcomes. Instead, "[j]udicial interpretation is driven . . . by a complex, interactive assessment and reassessment of a multitude of factors—a 'to and fro movement' that continuously tests potential interpretations against the legal interpretive community's web of beliefs."46

44. Id. at 176.
45. Id.
46. Goldberg-Ambrose, supra note 1, at 178 (footnotes omitted).
47. Professor Goldberg-Ambrose relies directly on Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 CALIF. L. REV. 1137 (1990), but practical reason, pragmatism and contextual analysis are concepts that have affected other doctrinal areas, see, e.g., Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 24–36 (1986); and disciplines other than law, see R. Bernstein, Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis (1983); M. Nussbaum, Love's Knowledge: Essays on Philosophy and Literature (1990).
48. Frickey, supra note 47, at 1218.
Again, then, Professor Goldberg-Ambrose and I are in agreement on the task at hand: the problem is how to “tap into a set of norms and traditions” that will cause the Court to think more critically. But again, we disagree on the best way to complete that task. Professor Goldberg-Ambrose offers only one argument for the trust obligation as a likely effective limit on Congress: “From this perspective, the idea of a trust responsibility may be at least as serviceable as any other.”

This view seems to suggest that there should be one answer to the vulnerability of Indians—the trust responsibility—rather than many overlapping and mutually supportive ones. But that reductionist attitude is in tension with the ideal of practical reason that Professor Goldberg-Ambrose seems to endorse. Practical reason is inherently open-ended; it requires us to consider all of the decisional factors relevant to each complex situation.

Under this ideal, in my view, the trust responsibility and the Indians-as-peoples approach should both occupy a significant position in Indian law, serving different ends and reflecting different truths. The trust responsibility recognizes the moral duty owed to the Indians, but peoplehood recognizes another moral concern, the importance of self-determination to the tribes. In addition, as Professor Goldberg-Ambrose offers it, the trust responsibility will have its primary effect as a rule of statutory interpretation: according to the traditional canons, courts construe statutes in favor of the Indians. By contrast, peoplehood is a constitutional doctrine: under the Fourteenth Amendment, the government must either preserve tribal self-determination or extend to them strict scrutiny. In its principal function, the trust responsibility thus serves to guide the interpretation of statutes; peoplehood, on the other hand, would serve as a basis for constitutionally invalidating them. For that reason, I would see the trust responsibility and peoplehood as cumulative factors in any Indian law case, serving different functions.

I assume, however, that Professor Goldberg-Ambrose intends the trust responsibility to be a constitutional limit on Congress as an

49. Goldberg-Ambrose, supra note 1, at 179.
50. See id. at 177–78. This use of the trust responsibility may have some real effect in protecting the tribes. It is also true, however, that the Court regularly overlooks the canons when it suits its purpose to do so. See, e.g., Frickey, supra note 47, at 1175–89. It is therefore risky to look to the trust responsibility theory alone for protection of the tribes.
51. Thus, Professor Frickey explains of practical reason: “Argument tends to be cumulative rather than linear, for an argument that draws some support from several values resonating in the legal interpretive community will usually be stronger than one that follows deductively from only one value.” Frickey, supra note 47, at 1217.
alternative to the Indians-as-peoples approach, and not just a guide for interpreting statutes. If I am right in that assumption, I think that there are reasons to doubt that her approach would be "at least as serviceable as" the Indians-as-peoples approach. First, the tradition lying behind the fiduciary responsibility as a constitutional doctrine is one of deference to Congress and infantilization of the Indians. The government owes the tribes a trust obligation, but like any good guardian, Congress must use its own judgment to determine how best to treat its incompetent wards. Thus, Chief Justice Marshall described the trust obligation to Indians in American law: "[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."52 Yet Professor Goldberg-Ambrose offers this case as an example of the kind of contextual restraint that she thinks the trust responsibility might provide.53 Similarly, in the late nineteenth century, in a case that Professor Goldberg-Ambrose quotes on another point,54 the Court explained that Congress' power over Indians was plenary because the government owed them a fiduciary duty: "From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."55 And again, the Court explained that Congress could violate its treaties with the Indians because it must keep its hands free to execute its obligation, regardless of the Indians' wishes: To hold otherwise "would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians . . . if the assent of the Indians could not be obtained."56

Professor Goldberg-Ambrose might respond that these cases, while still good law for the most part, are all old. A modern fiduciary obligation, especially one recognized as of constitutional dimen-

52. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
53. See Goldberg-Ambrose, supra note 1, at 179 n.54, 184 n.78.
54. See id. at 182.
55. United States v. Kagama, 118 U.S. 375, 384 (1886). Elaborating, a later Court said of the Pueblos' relation to the federal government:
   Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism [sic], and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people. . . . [T]hey have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities.
sion, might by contrast provide some real protection. The problem with this argument is simply that its promise is disproved by reality. Professor Goldberg-Ambrose recommends in so many words that the Court do what it in fact it has done: adopt a fiduciary obligation standard of review for Indian-specific statutes. But that standard has proved to offer virtually no protection. The Court has not struck down a single statute under the standard. It has explained that the standard does not prevent Congress from disadvantaging Indian tribes or individuals relative to non-Indians. And it has begun to cite toothless economic rational basis cases to explain the fiduciary obligation standard. I can think of no more convincing contextual evidence that the "norms and traditions" of the trust obligation do not in fact stimulate the Court to "critical thinking." Even Professor Goldberg-Ambrose admits that the Court has never "pressed for Armageddon with Congress."

Finally, I think that this whole slide into quiescence could have been predicted from the beginning, because there is no plausible textual peg on which to hang the fiduciary duty as a constitutional limit. I can find no language in the description of Congress' article I powers that remotely creates a trust responsibility. If I could, and if I had any confidence that the Court would enforce it, this approach might be my preferred option too. But the Indian Commerce Clause simply gives Congress the power to "regulate Commerce . . . with the Indian tribes": it does not mention an obligation of any kind.

57. See Goldberg-Ambrose, supra note 1, at 175.
58. For example: Professor Goldberg-Ambrose argues that the result in United States v. Antelope may have been consistent with the fiduciary responsibility; for evidence, she points to the government's brief, which lists ways that the jurisdictional arrangement at issue nominally helped the Indians. See Goldberg-Ambrose, supra note 1, at 179. But significantly, the Court did not bother to point out the ways that the scheme helped the Indians; instead, it cursorily observed that under the fiduciary obligation standard, Congress may help or hurt the Indians. See Williams, supra note 4, at 788.
59. Professor Goldberg-Ambrose also maintains that I falsely assert that the Court has "formally" abandoned the trust obligation standard. In fact, Indians as Peoples does not claim that the Court has formally renounced the standard; rather, I argue that the Court has functionally done so. It has begun to cite economic rational basis cases to explain the standard, and it has stopped using the language of trust obligation. See Williams, supra note 4, at 791–92.
60. Goldberg-Ambrose, supra note 1, at 177. Frickey, on whom Professor Goldberg-Ambrose relies for her observations about practical reason, finds a sharp contrast in the Court's work in the Indian law area: the Court has been fairly ready to invoke the trust responsibility in interpreting statutes, but has observed almost complete deference at the constitutional level. See Frickey, supra note 47, at 1215.
61. In one footnote, Professor Goldberg-Ambrose briefly asserts that there is a textual basis for the trust responsibility in the Constitution and treaties. See Goldberg-
The trust obligation standard thus offers Indians virtually no protection itself, and because it is a substitute for strict scrutiny, it also deprives the Indians of protection under the equal protection norm. Under the article I approach, Indians are uniquely vulnerable among racial minorities to legislative whim. Professor Goldberg-Ambrose does offer an alternative version of the trust obligation as a “limit on federal power”—a “responsibility for mitigating the consequences [of the conquest] by preserving Indian resources and self-government.”62 I applaud that vision, but I see

---

Ambrose, supra note 1, at 179 n.54. As for a textual basis in treaties, that point is irrelevant to my argument that the Constitution does not offer a textual basis for a constitutionally required trust responsibility. As for the textual basis in the Constitution, Professor Goldberg-Ambrose argues that the phrase “Indian tribes” in the Indian Commerce Clause implicitly contains the idea that the federal government owes the tribes a trust responsibility. She derives this idea from Justice Marshall’s claim that the Commerce Clause implicitly distinguishes “Indian tribes” from “foreign nations” and “states.” See id. But Marshall concludes from this language only that the Constitution did not mean to include Indian tribes as foreign nations or states for purposes of the Court’s original jurisdiction. He never suggests that the Constitution freezes them into the particular status of “domestic dependent nations” or that it creates a binding legal obligation toward them. See Cherokee Nation v. Georgia, 30 U.S. 1, 18–19 (1831). Rather, he derives their status as “domestic dependent nations” from the language of treaties and so implicitly recognizes that Congress—through treaties—may contour the relationship with the tribes as it likes. See id. at 15–16. And that line of analysis is only common-sensical: the Constitution does distinguish the tribes from foreign nations and states but says absolutely nothing about whether the federal government owes them a trust responsibility.

When Professor Clinton first offered the article I argument, he offered a different textual analysis: he observed that the Indian Commerce Clause limited Congress’ powers to “commerce” with Indians. As a result, in Clinton’s view, the power did not extend to internal tribal decisions. But as I have argued, the Court’s dramatic expansion of the term “commerce” makes it unlikely that this formal limit will be much of a real one. See Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. PA. L. REV. 195, 237–39 (1984); Williams, supra note 4, at 770.

62. Goldberg-Ambrose, supra note 1, at 177. I should add—because Professor Goldberg-Ambrose believes that I “grossly underemphasize” this consideration—that I do not agree with her underlying claim about “what makes Indians uniquely entitled to special federal measures.” Id. at 184. She explains: “[I]f Indians do not have a protected land base and some substantial measure of self-determination, Indian culture will fade and ultimately disappear. . . . Yet unlike other American ethnic groups, Indians cannot rely on perpetuation of their tradition in a home country abroad. If Indian culture vanishes in America, it vanishes altogether.” Id. at 184. Constraints of space prevent me from developing my objections to this claim, but they are essentially two. I agree that without special protection, Indians will lose their culture, and that result would be a tragedy. But Indians are not unique in that regard, and in any event, the preservation of culture as culture does not seem to me a morally appealing basis for Indian law.

First, Indians are not unique in facing assimilation with no “home” country to preserve their culture. Ashkenazi Jews, for example, preserve in parts of America an Eastern European Yiddish culture that is threatened in their home countries and has changed beyond recognition in Israel. See T. FRIEDMAN, FROM BEIRUT TO JERUSA-
no reason to expect that the Court will adopt it as a check on Congress.

Thus, the trust responsibility offers little protection because the whole context of Indian law is one of congressional dominance. Reworking those materials seems to me to offer limited promise for the tribes. Like Nell Jessup Newton's work, Indians as Peoples therefore tries to draw on a different set of "norms and traditions"—the judicially critical attitude associated with strict scrutiny. Judges should never forget that Indian law deals with a historically oppressed racial minority; we know that "carefully scrutinizing" racially specific legislation does "reverberat[e] with prior legal doctrinal tradition."64

I therefore begin with the presumption that all Indian-specific legislation should get a very hard look by the courts, because within this legislation there could be an equal protection violation. Courts can, however, validate such legislation, but only if the legislation "is consistent with recognition of their separate peoplehood and does not reflect a view of Indians strictly as a race."65 Courts would be driven to make this assessment with care because the surrounding context is one of presumptive strict scrutiny: they must rigorously examine the legislation to ensure that it really does qualify as peoplehood-supportive. If courts ensure that Congress singles out the Indians only in a manner which is consistent with their peoplehood, then tribes may act "as a buffer between individual Indians and the hand of the federal government";66 peoplehood might thus supply

LEM 284–321, 451–90 (1989). Many Jews believe that this culture will be dead within two generations, yet I cannot believe that Goldberg-Ambrose would offer them a system like that created by Title 25. In addition, many American ethnic cultures have become distinctly American, so that they no longer mirror the "home" culture, however much they may retain connections to it. If African-American culture disappears in this country, for example, "it vanishes altogether"; it will not continue in Ghana or Kenya.

More fundamentally, Professor Goldberg-Ambrose's view seems to value preservation of a culture over the experience of persons. The great value of tribal self-determination for her seems to be the continuation of tribal cultures as cultures. But for non-Indian Americans facing loss of their own ethnic identity, the knowledge that their culture will continue in the old country may not much ameliorate their sense of loss. Similarly, under Professor Goldberg-Ambrose's reasoning, American Sioux should not be too upset at losing their culture as long as Canadian Sioux carry it on. Most disturbingly, if a given reservation should lose much of its distinctive native culture, Professor Goldberg-Ambrose offers little reason to continue to protect its self-determination.

63. Newton, supra note 61, at 286–88. I differ from Newton, however, in that I would apply strict scrutiny only to Indian-specific legislation inconsistent with tribal peoplehood.

64. Goldberg-Ambrose, supra note 1, at 178.

65. Id. at 171.

66. Williams, supra note 4, at 843.
protection in lieu of strict scrutiny.\textsuperscript{67} Again, by contrast, the context of the trust responsibility is one of presumptive legislative validity: Congress has the power do whatever it thinks best. For that reason, the Indians-as-peoples view might extend greater constitutional protection to the tribes than the article I approach.

IV. THE PRACTICALITY OF INDIANS AS PEOPLES

Professor Goldberg-Ambrose offers two basic arguments that the Indians-as-peoples approach will not reduce the vulnerability of Indians to federal action. First, if adopted, the approach could work some positive harm to nontribal Indians. But second and more likely, courts will just not adopt my proposed analysis.

As to the first, Professor Goldberg-Ambrose points out that my approach would have one distinctly negative consequence: it would require courts to look more skeptically at special benefits granted to Indians as a racial group.\textsuperscript{68} There is a core of truth in this point, and I regret it. It is important, however, to keep this point in perspective. First, some nontribal Indians may still partake of enough peoplehood, even without formal tribal ties, that special benefits would be constitutional; courts would have to proceed on a case-by-case basis. Second, Professor Goldberg-Ambrose argues in particular that Congress could not make special provisions for the special nature of Indians' religious practice.\textsuperscript{69} As Susan Williams and I have argued elsewhere, however, the better place to look for special protection of the Indians' unusual religious practice is the

\textsuperscript{67} Professor Goldberg-Ambrose opines that this suggestion "rests on a highly unrealistic view of reservation life" because "the federal government can still exercise pervasive influence over reservation life, because of tribal dependence on federal funding and federal regulation of trust property." Goldberg-Ambrose, supra note 1, at 190. But Indians as Peoples recognizes that the federal government exercises daily influence on Indian Country; it offers several protections for the tribe as a buffer. First, some federal influence is not inconsistent with tribal peoplehood: tribes can still structure much of reservation life. See Pommersheim, The Reservation as Place: A South Dakota Essay, 34 S.D.L. REV. 246, 249 (1989); Williams, supra note 4, at 843. (Similarly, in international law, "[p]eoplehood is consistent with a certain amount of internalization within a larger, protecting country." Williams, supra note 4, at 862.) Second and more importantly, under my proposed approach, each Indian-specific federal action—like funding and regulation of trust property—must be consistent with a view of Indians as peoples. See Williams, supra note 4, at 844-45.

\textsuperscript{68} See Goldberg-Ambrose, supra note 1, at 189; Williams, supra note 4, at 845 n.277.

\textsuperscript{69} See Goldberg-Ambrose, supra note 1, at 189 n.103.
Free Exercise Clause: not only should it be allowed, it should be constitutionally required. 70

Third, my approach is not unique in distinguishing Indians as a race from Indians as tribes. As Professor Goldberg-Ambrose observes, the Court makes the same distinction; 71 and despite her protestations, Professor Goldberg-Ambrose's approach does so as well. As she admits, the Indian Commerce Clause gives Congress power over Indian tribes, not individuals. She argues, however, that the "Indians not taxed" language of the Fourteenth Amendment implicitly expands Congress' power, because it refers to individuals. 72 But the drafters of the Amendment intended that language to refer to tribal Indians, not racial Indian individuals. One could ignore the history of the provision and look only at the text, but the text refers to Indians not taxed, and there are no such Indians anymore. 73 The only way to avoid that conclusion is to look at the history, but that move brings us back to reading the language as "tribal Indians."

Finally, I maintain only that Indians as a race should receive the same treatment as other minority races receive as races. But one might reinterpret the Equal Protection Clause in ways to allow expanded protection for all minority groups, and I would applaud many of those new readings. Ultimately, Professor Goldberg-Ambrose is correct that I do not think that Indians as a race should receive different treatment from other races as races. 74 I do not think that a nontribal Indian, raised off reservation with no connection to a separate people and no intention of creating one, stands in a meaningfully different position from an African-American raised under similar circumstances, simply because of the accident of genes. Both, perhaps, should receive special treatment, but I see no reason to distinguish them.

But Professor Goldberg-Ambrose plainly thinks it unlikely that any of these problems will come to pass, because she has a

70. See Williams & Williams, Volitionalism and Religious Liberty, 76 Cornell L. Rev. 769 (1991). Moreover, even if the Court does not read the Free Exercise Clause to require special protection, Congress can still make special allowance for the Indians' religious practice, as long as it does so for every other comparable religious practice. See id. at 849–50.

71. Goldberg-Ambrose, supra note 1, at 189.

72. Id. at 189–90.

73. See supra p. 205.

74. I develop this point at length at Williams, supra note 4, at 813–23. Professor Goldberg-Ambrose does offer another distinction between Indians as a race and other races—her "cultural damage" argument—but as I have argued above, see supra note 62, I do not think it a convincing or attractive way to single out Native Americans.
more fundamental objection to *Indians as Peoples*: she doubts that courts will ever adopt its suggested approach. She writes: “I doubt whether American courts will be willing to abdicate their interpretive role to the vagaries of definitions emerging from international politics. . . . Furthermore, even if American courts were willing . . . the difficulties of applying any definition of ‘peoples’ are formidable.” But if courts do not act to protect Indian self-determination, then all that *Indians as Peoples* has done is to tempt courts to “seize upon its forcefully presented equal protection critique and discard its rather contrived plan for eluding the grasp of strict scrutiny.” So the article may leave Indians in a worse state than it found them.

These comments present real problems and threats, and I do not want to minimize them. I do, however, want to compare them to the alternatives. First, assume that courts do take from *Indians as Peoples* only the equal protection critique and not my proposed reformulation. Even if that happens, the tribes would be no worse off than they are today. Under present law, tribal Indians as tribal Indians are already without protection under the antidiscrimination norm of the Fifth Amendment, as they would be under Professor Goldberg-Ambrose’s own article approach. And if courts were inclined to accept the equal protection critique without the reformulation, they might have done so before now. As Professor Goldberg-Ambrose points out, I am not the first to observe that *Mancari* is in error, nor am I now the last: Professor Goldberg-Ambrose herself joins me on this point.

Second, Professor Goldberg-Ambrose complains that my standard would be difficult to apply, and I think she is right in that contention. But again, compare the alternative: the “trust responsibility” is notoriously, perhaps definitionally, vague. It simply tells the government to do what is best for the Indians. In constructing a

75. Professor Goldberg-Ambrose offers a final objection that, I think, grows out of a misreading of *Indians as Peoples*. She observes that I maintain that “the values of equal protection can no more apply to Indian tribes than they can to a foreign government.” Goldberg-Ambrose, supra note 1, at 188. She apparently gathers from this language that I meant to argue that under current law the equal protection clause binds tribal governments. I certainly did not mean to make that argument; indeed at one point I specifically repudiate it; see Williams, supra note 4, at 805. As Professor Goldberg-Ambrose observes, the “real question is whether the federal government, in its dealings with tribes, must adhere to the standards of equal protection.” Goldberg-Ambrose, supra note 1, at 188.

76. Goldberg-Ambrose, supra note 1, at 187.

77. Id. at 172; see id. at 187-88.

78. Id. at 172.
constitutional trust obligation, the Court therefore has two options. First, it may make the obligation mean nothing (or whatever Congress wants it to mean); that option is the one that the Court has in fact adopted, but it leaves the Indians without protection. Second, it might actually give the obligation some substantive content. To do so, however, the Court must decide what is best for the Indians, out of the almost infinite range of possibilities, and then review each statute with that policy in mind. The Indians-as-peoples view at least focuses the inquiry somewhat: courts must decide on a context-by-context basis whether tribal sovereignty is a reality on a given reservation. I would develop a clearer standard if I could find one, but I think that this is the view that the legislative materials of the Fourteenth Amendment and the moral reality of the Indians suggests. If it should ever be adopted, I would hope that courts could bring greater determinacy to it over time.

But Professor Goldberg-Ambrose's final objection is that she thinks it highly unlikely that courts will ever adopt my standard, because it would involve abandoning their "interpretive role" for the "vagaries of definitions emerging from international politics." But I do not suggest that the courts abandon their role as interpreters of the text; my standard is an interpretation of the language of the Constitution with, I think, strong roots in its legislative history. By contrast, the trust responsibility has roots in neither the constitutional language or debates. In addition, I emphatically do not mean for American courts simply to adopt "definitions [of peoplehood] emerging from international politics"; I contemplate a careful evolution of standards over time, tailored to the particular condition of the tribes and responsive to the language and tradition of the Constitution. I offer international law definitions simply to illustrate the idea of peoplehood and to provide a starting point for discussion. Finally, this view of the Indians as peoples is hardly a

79. Thus, Philip Frickey has argued that the Court could not find a "judicially manageable" duty in the General Allotment Act, because the language of that statute could give rise only to "some general, undefined . . . duties out of whole cloth." Frickey, supra note 47, at 1182–83. By comparison, a constitutional trust doctrine would be even more vague and "out of whole cloth"; the language of the GAA may be vague, but the Constitution has no language setting up a trust responsibility.

80. See Williams, supra note 4, at 843.

81. Goldberg-Ambrose, supra note 1, at 187.

82. Professor Goldberg-Ambrose suggests that "Indians as Peoples does not seem to be aware of the range of groups "recognized as 'tribes' under American law today." She apparently bases this suggestion on the fact that certain tribes have "land bases of more than a few acres and no more than a dozen members" and "it is not clear to me [Professor Goldberg-Ambrose] how such groups would fare if measured against the
new idea in the materials of Indian law. Far from being "contrived," it seems to me to be a natural conclusion from the history, language, and policy of the Constitution.

So Professor Goldberg-Ambrose's strongest argument, I think, is that courts will not adopt my standard because it is vague. Perhaps she is right: the standard is "at this point, quite vague." But again, it is less vague than the trust obligation standard that both Professor Goldberg-Ambrose and the Court have endorsed. My hope was that my critique of Mancari would stir courts to look for another answer, because otherwise—with Mancari gone—all of Title 25 would receive strict scrutiny. By contrast, in context and hard fact, Professor Goldberg-Ambrose just promises more of the same. She endorses one of the Court's article I arguments (what I have called the "express reference" argument: since the Indian Commerce Clause expressly refers to Indians as a group, so may ordinary legislation) and the fiduciary responsibility standard of review. Perhaps the courts will not rush to adopt Indians as Peoples, but at least it represents an attempt to move in more positive directions by invoking the courts' traditional care about racially specific statutes.

In that sense, Indians as Peoples does not abandon context in favor of "abstract reasoning and inventive formulations"; rather it seeks to shift context from one of pure Indian law to one of mixed Indian law and constitutional law. The movement, among legal academics, toward contextual analysis and practical reason is one that I find powerful and exciting, but its danger is that it might rob analysis of critical edge by simply ratifying context. The answer that some contextualists give to this threat is some version of

---

83. See, e.g., Ex parte Crow Dog, 109 U.S. 556, 568 (1883); Frickey, supra note 47, at 1189–1200.
84. Goldberg-Ambrose, supra note 1, at 172.
85. Williams, supra note 4, at 843.
86. Again, Frickey, upon whom Goldberg-Ambrose relies, believes that the Court declined to find a trust responsibility in the General Allotment Act because such a duty would be too vague. See Frickey, supra note 47, at 1182–83.
the "immanent critique": we use some parts of existing culture to critique other parts, to move forward dialectically. My hope in *Indians as Peoples* was that the materials of constitutional law—the history of the Fourteenth Amendment, the antidiscrimination norm—might supply the critical edge that Indian law did not seem to offer. From within Indian law, this shift may seem like an abandonment of context, because it draws on different materials and traditions. But it really is an attempt to cross-pollinate contexts, to formulate an answer that neither context alone could supply. I find that kind of discussion, like this colloquy with Professor Goldberg-Ambrose, enormously fruitful and illuminating.
