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ARTICLES

THE BORDERS OF THE EQUAL PROTECTION CLAUSE: INDIANS AS PEOPLES

David C. Williams*

INTRODUCTION

In the Pacific Northwest, a relatively liberal area, apparently law-abiding citizens paste bumper stickers on their cars proclaiming, "Save a salmon; can an Indian."1 This behavior seems to reflect an open and virulent racial hostility similar to the Southern reaction to the civil rights movement. The law, one might suppose, should set its face against this Northwestern racism, as it did against its Southern cousin. And yet there is a difference between the two situations: in 1964, the law required identical treatment of blacks and whites in many areas of social life, and Southern whites resisted such treatment; by contrast, the law today not only allows but requires different treatment of Indians and non-Indians, by guaranteeing to the tiny Indian population the right to take one-half

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1. There are variations on this theme elsewhere in the country. In Wisconsin and Minnesota, where Indians spear fish, the slogans read, "Spare a fish, spear an Indian." See Johnson, Indians Send Signals That Rile Neighbors of Station WOJB, Wall St. J., July 8, 1988, at 1, col. 4. In the same area, citizens protest Indian hunting rights in the same way: "Save a deer, shoot an Indian." See Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1616 n.16 (1985).
of all the harvestable salmon in the Pacific Northwest. The Northwesterners perceive themselves to be the victims of legally sanctioned racial discrimination: the Indians, by virtue of their race, have substantially greater fishing rights than other local citizens.

Fishing rights are only one small part of a pervasive tendency in federal Indian law to accord Indians, especially reservation Indians, different treatment from non-Indians. Indians have unusual water rights, hunting rights, and health and education benefits. Most importantly, reservation Indians have the right to live under semisovereign tribal governments relatively free from state jurisdiction. No other minority group can claim anything like this special status; for a parallel, we would have to imagine that the federal government acceded to the demands of black militants to set up a separate African-American nation within the territorial confines of the United States.

The special status of Indians is a familiar feature of the American legal landscape. Native Americans have always received distinctive legal treatment; lawyers and judges apply that law without thinking much about its underlying legitimacy; non-Indian Americans drive through Indian reservations every day without much thought about tribal sovereignty except perhaps a vague puzzlement. It seems the most natural thing in the world to distinguish Indians and non-Indians in this way. And yet buried underneath this familiarity—and not too deeply buried—is a central worry: since on the face of things Indians are a racial group, why isn't all of Indian law tainted with racial discrimination in violation of the equal protection component of the fifth amendment due process


3. This anger is part of a more general "backlash" against special Indian rights, a conservative movement that perceives racial discrimination in such schemes, but that itself often reflects racism against the Indians. See, e.g., Sector, Chippewa Fishing Rights Dispute Stirs Lake Country, L.A. Times, May 1, 1989, pt. 1, at 1, col. 4; Johnson, Indian Fishing Dispute Upsets North Woods' Quiet, N.Y. Times, Apr. 24, 1988, at 20, col. 3; Johnson, Indian Hunting Rights Ignite a Wisconsin Dispute, N.Y. Times, May 16, 1987, at 8, col. 1; McCann, Whites Claim Indian Treaties Discriminate, Milwaukee J., Aug. 16, 1984, at A13, col. 1; Gilmore, 'Bolt Revolt' Bids for Funding After Getting on Ballot, Seattle Times, July 9, 1984, at A6, col. 1.


Why shouldn't Indians be extended precisely the same treatment as all other racial minorities? And, depending on one's view of Indian reservations, why aren't reservations either enclaves of special privilege for a coddled racial minority or "relocation centers" for America's despised aboriginals, comparable to South Africa's homelands?

The Supreme Court has dealt with this problem primarily by denial or evasion. The Court has held that the category "Indian" and the tribal subcategories such as "Arapaho" or "Mescalero Apache" are not racial categories at all but political ones, because they refer to the tribe constituted as a political body, not the tribe constituted as a racial group—even though virtually all tribes are simultaneously constituted as both racial and political bodies. As a result, according to the Court, a legal distinction between Indians and non-Indians receives only limited judicial scrutiny. Some commentators have applauded this approach, although not all of its applications, without taking seriously enough its analytical difficulties. Other pro-Indian writers have maintained that "Indian" is and should be a racial category receiving strict scrutiny under the Constitution, but these same commentators have failed to acknowledge that such a course of action might have devastating effects on distinctive Indian rights. Indeed, largely for this reason, the claim that different treatment for Indians constitutes racial discrimination is primarily the darling of very right-wing anti-Indian groups that want to eliminate any perceived Indian special privilege.

The risk of a casual constitutional acceptance of the separate status of Indians is at least threefold. First, precisely because it is so casual and vulnerable to attack, it does not offer that separate status a secure analytical basis in the law. Second, the Court's position

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8. Technically, the fourteenth amendment and the equal protection clause do not apply to the federal government, which is limited only by the equal protection component of the fifth amendment. The Court has, however, "reverse incorporated" the equal protection clause into the fifth amendment due process clause; it has construed the latter as imposing the same requirements as the former, see generally Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C.L. Rev. 541 (1977), because "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government," Bolling v. Sharpe, 347 U.S. 497, 500 (1954). To avoid wordiness, and following conventional usage, this Article uses the phrase "the equal protection clause" to include both that clause of the fourteenth amendment and the equal protection component of the fifth amendment. Cf. text accompanying infra notes 183–191.


10. See infra notes 37–42.

11. See supra note 3.
more or less deprives Indians of all significant protection under the equal protection clause and leaves them open to real racial victimization. Third, the Court's view risks cheapening the equal protection clause as a whole; within American society, for better or worse, the category "Indian" functions as a racial category, and Indians receive special treatment as a racial group. To argue that the Constitution—the same Constitution that applies to other racial groups—allows that special treatment is to risk suggesting that the equal protection clause does not really forbid racial discrimination. It is to intimate that if a racial group has received separate treatment for long enough, today's Court—unlike the Supreme Court of 1954—will allow Congress to treat that racial group in any way it chooses by pretending that the racial group is not a racial group.

For these reasons, this Article will give serious attention to the argument that separate treatment of Indians and non-Indians under federal Indian law constitutes racial discrimination. It will try to grasp the argument's power in its best guise, and will ultimately conclude that no-one has yet developed a wholly satisfactory response. Indian law really is an aberration in American law: a legally condoned system that treats individuals differently—at least in some cases and to some extent—because of their race. And believers in expansive tribal sovereignty should not try to avoid a blunt recognition of this truth.

Such a recognition, however, does not lead one ineluctably to the conclusion that the special status of Indian rights must be dismantled. True, if the equal protection clause applies to Indians in the same way and to the same extent as it does to other racial minorities—as the Supreme Court apparently believes it does—it would be very difficult to argue for the continued existence of the reservation system. But, this Article will argue, the equal protection clause does not fully apply to reservation Indians, because the fourteenth amendment has never been and should not be extended in its entirety over members of semisovereign tribes. From the beginning of Indian/non-Indian relations in this country, tribal jurisdictions have existed as islands where the law of the United States and of the various states does not fully apply. This Article suggests that the equal protection clause functions in the same way: Indians who maintain tribal relations fall outside the scope of the clause to a significant extent. Indians, in other words, are a special case—still partially "foreign," still partially beyond the reach of even the most fundamental federal law.
This Article does not mean to suggest, on the other hand, that the clause never applies to the category “Indian.” For one thing, only reservation tribal Indians, not detribalized urban Indians, are beyond the reach of the clause. The clause, moreover, has some application even to reservation activities. My argument is limited to the following claim: the clause does not run to Indians under tribal relations because the clause itself considers them to be a separate people. Thus, for the clause not to apply, the jurisdictional or geographical area that the federal government is seeking to regulate must be “foreign” in the sense that it is largely controlled by tribal sovereignty. So, in singling out Indians, the federal government may act only upon areas subject to tribal control and only to the extent that the government is genuinely proceeding from a view of the area as subject to tribal control.\textsuperscript{12} If the government ever eliminates tribal sovereignty in a given geographical or jurisdictional area, the strict standards of the equal protection clause should come to control government actions in that area. If the government is in fact proceeding from an assumption that Indian Country is really only one more federal enclave, subject to federal power like all other such enclaves, then the clause also must fully apply. Otherwise, the reservation system and tribal sovereignty become a convenient cover under which the government can effectuate racial policies which are barred in other legal contexts.

The argument will proceed in four parts. Part I will set up the apparent conflict between special treatment for Indians and the equal protection clause; it will sketch out the reasons that special treatment for Indians should give a believer in the equal protection clause cause for concern—at least prima facie concern. Part II will analyze the Supreme Court’s response to the argument that different treatment for Indians is racial discrimination, and detail why that answer may be inadequate. Part III will consider a range of other possible answers and their respective defects. Finally, Part IV will begin to develop what may be a more satisfactory resolution of the problem and suggest some of that resolution’s implications.

\textsuperscript{12} The tribe itself, as a preconstitutional and extraconstitutional body, is not subject to the constraints of the Constitution, including the equal protection clause. See Talton v. Mayes, 163 U.S. 376 (1896).
I. THE PRIMA FACIE PROBLEM

A. The Doctrinal Difficulties

If Title 25, the title of the United States Code that governs Indians, used the term "African-American" everywhere that it used the word "Indian," the Court would surely waste little time in striking down the whole volume as part of the lingering vestiges of past discrimination. With Title 25 would fall all of the special treatment accorded to these hypothetical African-Americans, especially the rights of tribal sovereignty. If the Court therefore recognized that Indians are a racial group in the same way that African-Americans are, the special status of the Indians would have to come to an end, unless there was some extraordinary state interest. Today, the doctrinal basis for such a ruling might take one of two forms, depending on whether the Court decided that the overall effect of the system was to help or to hurt Indians.

First, the existence of separate territories reserved for Indians might be characterized as illegal segregation, to the detriment of the Native American residents, under Brown v. Board of Education. Just as the government once compelled blacks and whites to attend "separate but equal" schools, so here they once forced Indians and non-Indians to reside in separate and only fictionally equal territories. The effect of this segregation on at least some Indians is the same as that noted by the Court in Brown—low feelings of self-worth, and despair about their future and abilities. True, Native Americans are now free to leave the reservations and sever their tribal ties at any time, but that emigration would result in a tremendous loss of benefits. And even if the government were now to grant equal benefits to Indians both on and off the reservation, a "freedom of choice" plan is not an adequate remedy for past dis-

14. Through much of the nineteenth century, the government sought to separate the Indians, first by removing them from the advancing white frontier, and then by shunting them onto reservations. See F. Prucha, The Great Father 64-77, 181-97 (abr. ed. 1986). At various points, the government has made some effort to assimilate the Indians and to give them the tools necessary to compete in the larger culture, as in the General Allotment Act. See infra notes 293-300 and accompanying text. That effort, however, has never been consistent or successful, and the government sanctioned separation of Indians on Indian Country remains today.
15. See Brown, 347 U.S. at 494.
16. Statutorily, most of the benefits provided by the Bureau of Indian Affairs are limited to Indians who live on or near reservations, and the Bureau has further attempted administratively to limit those benefits to Indians who live on reservations. See Morton v. Ruiz, 415 U.S. 199 (1974).
The government is under an affirmative obligation "to effectuate a transition to a unitary system"—to achieve integration. The government, not individual Indians, is under a responsibility to remove the lingering traces of segregation. Second and more likely, however, the opponents of the system might characterize it as excessive affirmative action, giving special benefits to Native Americans. Such an attack seems especially likely against certain features of the system: the sovereignty granted to the tribal governments, hiring preferences for Indians in the federal agencies granted responsibility over the separate territories, and health and education programs granting Indians benefits different from those extended to other minority groups. Although the justices are deeply divided on the issue, most of the opinions exhibit a familiar ideology. The equal protection clause imposes an ethos of individualism on the state; the "ultimate goal" is to "eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race." State or municipal programs that benefit traditionally disadvantaged minorities are subject to the same strict standard of scrutiny as programs that benefit advantaged groups; they must serve a compelling state interest in the way least objectionable to the individualist ideal. Congressional programs may be subject to a less exacting standard of review, but at a minimum they must "serve important governmental objectives within the power of Congress and [be] substantially related to achievement of those objectives." At present, the Court has identified only two

18. Id. at 441. That affirmative duty apparently obliges the government to correct only that deliberate segregation extant during or after 1954, the date of Brown. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979). As noted, however, the government's benefit policy did create official segregation during that time period. Moreover, only extensive research could determine how extensively the Bureau of Indian Affairs has maintained an unofficial policy of segregation since 1954. Cf. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (non-statutory policy of segregation can create duty to desegregate).
19. The ability to emigrate may thus render the common comparison of reservations and South African homelands inapt, see Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 STAN. L. REV. 979, 1050–51 (1981), but not the comparison to other sorts of state-sponsored racial enclaves such as segregated schools.
22. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009 (1990). After Metro Broadcasting, it is difficult to discern what the Court's standard of review for congres-
governmental interests that will justify affirmative action programs—creating diversity in activities tinged with first amendment values and remedying past "identified" discrimination.

The system of separate territories and special benefits for the Native Americans, at least at first glance, singles out individuals for special treatment on the basis of race: most of the programs require, inter alia, that eligible participants must have a certain quantum of Indian blood. Further, the action taken by the government to benefit the Indian tribes separates them from society at large. But both creating diversity and remedying discrimination, as the Court described them, involve bringing minorities into the mainstream, not allowing them permanently to stay out. The Court has held that creating diversity of viewpoints will justify affirmative action programs only in activities invested with some first amendment significance—such as university admissions or broadcasting. Creating diversity of viewpoint would presumably involve bringing Indians and non-Indians together into a common forum, like a school or the airwaves, where they can learn from each other, not separating them into homogeneous bodies.

Remedying "identified" discrimination seems a little more promising: in the past the federal government has intentionally sequestered American Indians and in a general sense prevented them from acquiring the tools necessary to compete and succeed in the dominant culture. The Court has made clear that Congress—the principal actor in the field of Indian law—has considerable latitude in discovering, defining, and remedying such past discrimination. But even if discrimination has occurred, special programs for Indians are not designed to remedy it. The ultimate goal of all of these

sional affirmative action programs will be. In that case, four members of the Court argued that strict scrutiny should apply, id. at 3029; and five, including Justice Brennan, held that only intermediate scrutiny was appropriate. With Brennan's retirement, the Court is evenly balanced, four to four, and so its position depends on the as yet relatively unknown views of Justice Souter.

23. See id. at 3010-11; Bakke, 438 U.S. at 311-13.
25. See infra note 132.
27. See Metro Broadcasting, 110 S. Ct. at 3010-11.
28. See id. ("Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a "constitutionally permissible goal," the "American public will benefit by having access to wider diversity of information sources [in broadcasting].") (quoting Bakke, 438 U.S., at 311-13, and H.R. CONF. REP. No. 765, 97th Cong., 2d Sess. 45, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2237, 2289).
29. See supra note 14.
programs—with a few exceptions—31—is not to bring individual Indians up to the starting line so that they may fairly compete with others in the dominant culture. Rather, the goal is to assure Native Americans a permanent separate home, for their exclusive “absolute and undisturbed use and occupation,” where they may exercise perpetual self-determination. The desired end is not to use temporary race-conscious measures to erase the effects of past race-consciousness, so that we may all be race-blind in the future; the end is to set up separate lasting enclaves defined by race. For this reason, Congress has not bothered to make findings of discrimination against individuals as a predicate for its actions in the Indian law field, and it has not bothered to offer a remedial justification for its actions.32

B. Theoretical Difficulties

The doctrinal difficulties in justifying Title 25 are matched by theoretical difficulties. The field of constitutional theory in the last several years has tended to divide into two general, muddily defined sets of value commitments—liberal individualism33 and republicanism. Neither has an easy time accounting for the special status of Indians as a group.

As its name would suggest, liberal individualism is usually associated more clearly with emphatic individualism, even atomism. For the liberal individualist it is generally unjust to treat individuals as members of a group, rather than as unique aggregations of qualities, desires, and talents. In particular, it is wrong to treat individuals differently on the basis of their membership in a racial group,

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31. The chief exceptions are federal programs that make health and education benefits available to nontribal, nonreservation Indians. See infra text accompanying notes 135–136.

32. Congress has occasionally predicated its actions on a fiduciary duty owed the Indians, perhaps in part because of past wrongs, but the remedy for those wrongs is protection for the Indians’ ongoing corporate existence, not help to merge into the mainstream. See 25 U.S.C. § 450a (1988). The past wrong, therefore, seems to be not disadvantaging discrimination but assault on the separate tribal existence of the Indians. It is theoretically possible that the Court might find some interest other than creating diversity or remediying discrimination justifies the separate territories for the Native Americans. This Article will consider whether such a course is feasible at a later stage. But the point in the text is that Title 25 seems to require precisely such extraordinary justification. It cannot be casually upheld.

33. This Article uses the term “liberal individualism” to refer to the group of values against which neo-republicans believe themselves to be reacting. It uses liberal individualism for this purpose, rather than the more common liberalism, because at a later point it uses the term liberalism in its nonacademic sense—as an antonym for conservatism—meaning generally the left of the current political spectrum.
because of 1) the moral irrelevance of race; 2) the meritocratic irrelevance of race; and 3) the involuntary character of race. Justice Powell’s opinion in Bakke may be the judicial opus classicus of liberal individualism in recent decades. Liberal individualism may be able to tolerate some race-conscious measures—again diversity programs and remedial action are two examples—as consistent with the required regard for the individual.\footnote{Race-conscious action may be necessary to remedy past race-conscious action, so as to restore some “undistorted” individualist situation. Academic diversity programs grant preference for the individual experience of growing up as a minority in this country, not for race as such.} But Indian reservations—permanent, separate, insular racial enclaves created precisely to preserve the separation and insularity of their members—are exactly the kind of institution that liberalism most abhors.

Republicanism, on the other hand, is quite comfortable with group membership as a key concept in political discourse. Yet none of its versions easily accommodates Indian reservations. One version—which might be loosely called “inclusory republicanism”—proposes the possibility or necessity of a “process of personal self-revision under social-dialogic stimulation . . . reaching for the perspectives of other and different persons.”\footnote{Michelman, Law’s Republic, 97 YALE L.J. 1493, 1528 (1988).} In many of the modern forms of republicanism, this dialogue must be richly pluralist, committed to bringing in voices from the margin and recreating a story about ourselves that is about all of us. It promises acceptance and inclusion. Yet, ultimately, inclusory republicanism is an alchemy of combination, not of separation. The hope for the Indians in this vision must be of adding their voices to the rich, polyphonic chorus, not chanting alone. This republicanism commits them to a participation that may not be what they want and that is certainly not what the law demands.

Other forms of republicanism, closer to the original, hope that there will be not one political dialogue at the level of the nation, but many, occurring in smaller groups that stand intermediate between the individual and the state.\footnote{See Abrams, Law’s Republicanism, 97 YALE L.J. 1591, 1604–05 (1988); cf. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1555–56, 1578 (1988) (recommending both decentralization and republican reforms at the national level).} This prescription seems to lead to Indian self-determination, with the tribes functioning as an intermediate group. However, one of the negative features of the old republicanism was that these richly constitutive smaller groups, such as established religions or small towns, sometimes offered oppression.
rather than self-determination.\textsuperscript{37} And this danger of oppression was at its highest when groups were based on race. Perhaps some version of decentralized republicanism might find a way to accommodate a system of racially defined blocs, but only after long pause and extraordinary justification.

C. Scholarly, Historical, and Political Commentators

The unique and tension-filled status of Indians has generated a body of scholarship that is remarkable in that commentators arrive at wildly different conclusions, even though they begin with a common desire to help the Indians. Nell Jessup Newton maintains that Indians are a racial category. She believes that the Supreme Court should reinvigorate the equal protection clause for Indians, so as to strike down state and federal laws that harm Indians.\textsuperscript{38} But she never addresses the fact that such an interpretation of the clause might also lead to dismantling the features of Indian law that the Indians want to retain. Similarly, Milner Ball criticizes the Court for holding that Indians are a political group and thereby leaving them without the protection of strict scrutiny.\textsuperscript{39} He does not, however, explain how, if the Court held that the Indians are a racial group, it could then go on to uphold their special rights under the equal protection clause. Ralph Johnson and Susan Crystal have argued, on the other hand, that the category "Indian" can be political: to the extent that a law helps Indians, it treats them as a political body, but to the extent that it hurts them, it treats them as a racial group.\textsuperscript{40} This position may be good policy, but it is difficult to perceive the logic in it: Congress sometimes hurts political bodies and sometimes helps racial groups. Robert Clinton has echoed the Court's claim that the Indian commerce clause implicitly recognizes the legitimacy of singling out the Indians; but Clinton argues that the Indian commerce power gives Congress the authority only to regulate "commerce" with the Indians and not to meddle with their internal affairs.\textsuperscript{41} Unlike the Court, Clinton does consider the pos-

\textsuperscript{37} See Abrams, \textit{supra} note 36, at 1606–07; Sunstein, \textit{supra} note 36, at 1574, 1581.


\textsuperscript{41} See Clinton, \textit{supra} note 19, at 1011–12, 1018. The Indian commerce clause provides: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.
sibility that the equal protection clause effectively repealed the Indian commerce clause on the legitimacy of racial classifications; he alone notices that the exclusion of "Indians not taxed" from apportionment in the fourteenth amendment suggests that the framers of the amendment may have intended to allow for the tribes' separate status. But Clinton does not explain why the amendment still allows for their separate status, since Indians now are "taxed" citizens included in the apportionment. And his analysis offers the Indians little protection, under either the equal protection clause or the Indian commerce clause. On the one hand, the limitations of Congress's power to "commerce" may well prove ephemeral, in light of the expansion of the scope of the parallel term "interstate commerce." On the other hand, if the Indian commerce clause really does allow Congress to single out the Indians for special treatment, Clinton offers no reason that Congress may not, for example, require Indians to ride in the back of interstate buses.

The scholarly literature therefore still leaves Indians in a double bind. If the Court should hold that Indians are racial groups, their special status must disappear. If the Court holds, as it has, that they are exclusively political and not at all racial, the Indians may be left with little protection under the clause.

Conditions of tension also characterize the political discussion, contemporary and historical, concerning the Indians' special status. One might expect those on the liberal end of the spectrum to have a more or less unified view of the matter, because they presumably consider themselves to be the "friends of the Indian." As it turns out, they do not, because liberals are caught between two views of what might be the best future for the Indians—full and equal participation in the nation or separate self-determination.

42. See Clinton, supra note 19, at 1011-12 n.201.

43. See Newton, supra note 38, at 237-39.

44. Clinton does assert at one point that states may not discriminate against Indians because they are citizens under the fourteenth amendment. See Clinton, supra note 19, at 1016-17. That claim, however, fails to address the danger of federal discrimination, and without elaboration, it is inconsistent with his earlier suggestion that the fourteenth amendment excludes "Indians not taxed" from its reach.

45. Conservatives are also caught between two contradictory value commitments, although those commitments derive from ideas not so much about Indians but more about the role of the Supreme Court. On the one hand, they believe in a relatively passive judiciary and a relatively unintrusive equal protection clause. This commitment would reaffirm Congress's traditional dominance in the Indian affairs arena and counsel judicial acquiescence in the long-standing reservation system. On the other hand, conservatives today are also very opposed to special rights for minority groups. One of the few areas in which many conservatives suggest the judiciary should be active is in striking down "reverse discrimination" schemes, and the reservation system seems to many
On the one hand, liberals have struggled for many years for a broad interpretation of the equal protection clause, so as to bring traditionally marginalized ethnic and racial groups into the mainstream of national life. The goal of the civil rights movement was to integrate blacks as fully and effectively as possible. Even today, when liberals have begun to realize that some race-conscious measures may be necessary to create racial justice, probably most support such measures as a way to aid, not retard, true integration. To defend the reservation system, however, liberals must defend a scheme of law that originated in the racist desire to push Indians to the geographical and social margins of the country, and that today effectively functions to discourage reservation Indians from full integration into mainstream culture.

On the other hand, liberals have also become defenders of cultural pluralism, the right of ethnic groups to retain a vigorous separate culture. Destruction of Indians' separate treatment under law might lead to destruction of their traditional culture. In addition, liberals have a general disposition to aid traditionally disadvantaged minority groups; and as long as Indian fishing rights, tribal sovereignty, and the rest seem advantageous to the Indians, there will be liberals to support them for that reason.

Kenneth Karst is offered as an example only because he has so long and so ably propounded the need for a commitment to both integration and robust pluralism. In his new book on the equal protection clause, Karst argues that the clause and the Constitution as a whole should allow individuals to participate in both a local or ethnic culture and in the national culture. Accommodation may be necessary: if the national culture will not tolerate a certain ethnic culture, the national culture may have to become more broad-minded; if the ethnic culture keeps its members from participating in the nation, the ethnic culture may have to adapt or even assimilate a particularly egregious example of such special rights. Justice Stewart's performance, for example, suggests that, at least in this area, his primary devotion was to congressional dominance; the category "Indian," he opines, should receive only the weakest level of judicial scrutiny. See text accompanying notes 121-123. Other conservatives, especially the militant groups in the West, believe that the fundamental conservative commitment should be to eradicating racially based rights; they would have the Court strike down all or most of Title 25 as unconstitutional. See supra note 3.

46. As Vine Deloria puts it, many liberals have tended to believe that all dark-skinned peoples pose the same problems and demand the same solutions; thus, Indians are a subcategory of blacks. See V. DELORIA, CUSTER DIED FOR YOUR SINS 170 (1969).

late to some extent. Praising either experience to the exclusion of the other would be folly. But the condition of the Indians seems to give Karst pause. Karst seems to suggest that the law may concede too much to Indian autonomy.

Karst writes:

[T]he separation of the Indian nations from the rest of American society now rests on more than white domination and is actively cultivated by a number of Indian leaders who see separation as the only way to preserve their cultures. Among Indians, cultural politics has always faced issues that differ markedly from those faced by immigrant groups. None of our immigrants, from the Irish to the Vietnamese, have faced anything closely comparable to the questions raised by the role of the reservation, the reach of sovereignty of Indian nations, or the pan-Indian movement. Those issues confront Indians, as individuals and as nations, with some hard choices as they seek to preserve their separate cultures and still to participate in the American economy and society. Whatever political forms may emerge from the current ferment, the larger society has an obligation—the obligation of citizens to each other—to see that the Indian peoples have the resources they need if those choices are to be real.48

In other words, Karst recognizes that the separation of Indians is qualitatively greater than that of other ethnic groups, and he seems to suspect that it may become too great. He warns that the Indians face “hard choices” in deciding how to reconcile the demands of reservation and nation. He casts Indian leaders as seeking separation because it is “the only way to preserve their cultures”; if there were another, less separatist way, presumably they should take it. Implicitly, then, they will presumably not choose—or not be allowed to choose?—to cut themselves off too much. But what if in fact the Indians do want real, thoroughgoing separation on the reservation, never venturing forth into the great cosmopolitan bazaar of American political life? Would the equal protection clause say to them as it would to every other ethnic group: no, you must “belong to America”? Karst’s discomfort with this question is apparent; he does not further pursue it.

The same ambivalence is evident among past reformers. In the 1880s, the then-liberals maintained that the races had no inborn characteristics and all discrimination against Indians could and should cease. As a result, there was a liberal consensus on the Indian problem: rapid and complete assimilation and the elimination of all laws that relegated Indians to a separate status. Indeed, many

48. Id. (footnotes omitted).
of these reformers, ex-abolitionists, regarded the segregation of Indians as the unfinished business of the Civil War; having freed one race, they believed it high time to free another.\textsuperscript{49} In the 1930s, however, a growing number of liberals began to believe that Indian separatism and cultural autonomy ought to be available to the Indians as an option. These liberals rallied behind John Collier long enough to ensure the passage of the Indian Reorganization Act.\textsuperscript{50} But that liberal consensus was never quite secure either, and shortly after the war, many liberals—this time in alliance with conservatives—again began to call for Indian “liberation.” Caught up in the battle against racism toward blacks, these liberals assumed that the problems of the Indians were essentially the same and required essentially similar solutions.\textsuperscript{51} More recently, with the events of the 1960s creating at least a temporary sympathy to claims of cultural autonomy for all of America’s subgroups, a liberal consensus may have re-emerged in favor of Indian rights of separatism.

Today, even the forthright supporters of Indian separatism probably hold that opinion for a wide range of reasons. Many may support tribal self-determination because they would support comparable rights for all minorities. They are concerned not about formal equality but about substantive justice between the races. Many other supporters of special Indian rights, however, see Indians as a special case. After all, they were here first, the government has uniquely mistreated them, and they offer exceptional cultural diversity. This Article will discuss all of these at a later point.

There are other, less savory reasons that some might support special rights for Indians and not other racial minorities, especially blacks. For one thing, there exists the romantic stereotype of the Noble Savage, so American in his simplicity and love of liberty, now so relevant in his harmony with nature.\textsuperscript{52} There is no comparable positive stereotype for blacks.\textsuperscript{53} Blacks and Indians also differ in terms of the threat they pose: many are surely able to retain the romantic stereotype of Indians because they seem the quaint and dwindling remnants of a past age, not a real political presence. We do not have an Indian mayor and an Indian underclass in Washington, where federal Indian policy is formulated. Last, it seems likely

\textsuperscript{49} See sources cited infra note 291.
\textsuperscript{51} See B. Dippie, The Vanishing American 342 (1982).
\textsuperscript{52} Glad Company is currently airing a commercial featuring Indian ghosts in full Plains regalia as a way to sell plastic, nonbiodegradable garbage bags—touted in the commercial as a way to clean up the environment by picking up trash.
\textsuperscript{53} See also infra notes 198–199 and accompanying text.
that many feel more residual guilt about the theft of the country from the Indians than the theft of blacks from Africa—as if the property rights of the Indians mattered more than the liberty rights of blacks. This result seems so plainly counter-intuitive that it prompts one to wonder whether the romantic stereotype helps explain the discrepancy. The loss of his wild domain by the Lord of the Woods and Plains is a tale sure to wring tears from the stoniest heart; but seeing blacks only in negative terms, many may be unprepared to feel remorse for their mistreatment in the past.

This pervasive tension should make us uncomfortable about casually accepting the special treatment of Indians. The division within liberal ranks highlights the latent contradictions in the values of even those who believe themselves to be “friends of the Indian.” If Indian law does rest on racial distinctions, and if many reservations are special racial preserves, their existence poses a challenge to the vision of an individualist, integrated American polity. Because of other values, perhaps we should nonetheless accept, even defend, the special status of Indians, but it would be wrong to let that integrated vision, dear to many, go gentle into the night. It is important to take seriously the idea that even if the reservation system might be good for the Indians today, even if Indians may leave the reservations if they so desire, even if the Indians themselves ardently desire reservations at present, they contribute to the spectre of racial politics and so should be dismantled.

The range of motives of those who support tribal autonomy highlights a different danger: much of the reason for the special status of Indians in America today may in fact rest on an affirmative stereotype of Indians. If so, much of the field is colored with racism toward both Indians and other minority racial groups. Part of the function of the equal protection clause is to expose that kind of racist motivation to the light of day and to disallow it as a source of law. If we casually accept the special status of Indians, that process will never even begin. Yet, as the next Part will argue, the Supreme Court’s acceptance of the present situation has been casual in the extreme. The Justices seem to want this whole issue just to disappear, so that they need not seriously examine the anomalous position of Native Americans.

54. This claim is based in part on informal observation: students seem much more prepared to recognize the legitimacy of redistribution to Indians than to blacks because of past wrongs.
II. THE SUPREME COURT'S ANSWER AND ITS INADEQUACY

In 1974, the Supreme Court first explained why it thought that singling out Indians for special treatment does not constitute racial discrimination. Until the early 1970s, while Indians were tucked out of sight on reservations, there was little serious challenge to their special, historically rooted status. But then in 1974, Indians were drawn into the vortex of national racial politics. In *Morton v. Mancari*, non-Indian employees of the Bureau of Indian Affairs argued that Section 12 of the Indian Reorganization Act, which granted an employment preference to Indians, unconstitutionally discriminated against non-Indians. This provision from the 1930s closely resembled more recent and more controversial affirmative action plans for other minorities. For decades, the country had calmly accepted the kind of special treatment for Indians that when extended to other minorities would be severely divisive. Perhaps aware that they would soon need to decide the constitutionality of affirmative action in general, the Court apparently felt at last compelled to address the question, not whether Indian law discriminates against Indians, but whether it discriminates against non-Indians.

The Court's answer was an unequivocal no, but the rationale for that answer is harder to discern. The problem is that *Mancari* proposed several different reasons, without plainly endorsing or adequately defending any single one. Since *Mancari*, moreover, the Court's treatment of the issue has become increasingly casual, at

55. *Morton v. Mancari*, 417 U.S. 535 (1974). In some ways, it is surprising that *Mancari* had to wait so long to be born; since the Civil War, reformers had argued that the philosophical inheritance of the sectional struggle required those of good will to "liberate" the Indians next. See sources cited infra note 291. On the other hand, *Mancari* 's late date is not terribly surprising; most federal officers apparently just assumed—for good reason, as we shall see—that the fourteenth amendment changed nothing about the Indians' status, and the reformers' voices were very much from the margin.


57. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

58. The immediate occasion for the challenge was the Secretary's decision to extend the preference not only to initial hiring but also to promotions. See *Mancari*, 417 U.S. at 538.

59. Perhaps the most famous such plan is the admissions policy of the medical school of the University of California at Davis, considered by the Court in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).
times irascibly so. In the section that follows, this Article will therefore describe each of Mancari's proffered explanations and trace how each has fared in later cases. These explanations fall into two general categories: those that are drawn from article I and rest on the idea that Congress's powers over the Indians are unusually broad; and those that are drawn from the equal protection clause and rest on the idea that discrimination singling out Indians is not like discrimination singling out other racial minorities.

A. Article I Answers

1. The Court's Position

In Mancari, Justice Blackmun began his analysis of the challenge to Section 12 by asserting that "[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress."60 The next section will consider the Indians' "unique legal status" as sovereigns, not racial groups. This section will address the Court's consideration of Congress's plenary power over Indians. Blackmun explained that the plenary power is drawn from both explicit and implicit sources in the Constitution. One explicit source is article I, section 8, clause 3, which gives Congress the power to "regulate Commerce... with the Indian Tribes" and which therefore "singles Indians out as a proper subject for separate legislation."61 This Article will call this the constitutional reference argument, because it maintains that since the Constitution itself refers to Indians, it must be legitimate for modern legislation to do so as well. The Court has repeated the argument several times since Mancari,62 and it seems alive and well.

The second explicit source of the plenary power is the treaty power, which "gives the President the power, by and with the ad-

60. Mancari, 417 U.S. at 551.
61. Id. at 552.
62. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) [hereinafter Fishing Vessels], modified, 444 U.S. 816 (1979); United States v. Antelope, 430 U.S. 641, 645 (1977). Fishing Vessels upheld fishing treaty rights for Northwest Indians on the grounds that their "peculiar semisovereign [i.e., political, not racial] and constitutionally recognized status [presumably a reference to the constitutional reference argument] . . . justifies special treatment on their behalf," 443 U.S. at 673 n.20. Antelope was more direct: "[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution"—with a citation to the Indian commerce clause. 430 U.S. at 645. Both Fishing Vessels and Antelope, however, bolstered the constitutional reference argument with the political/racial distinction, so the Court may be uncomfortable relying on that argument alone.
vice and consent of the Senate, to make treaties." It is unlikely, however, that the treaty power alone is the source of Congress's plenary power over Indians. Blackmun seems to have merged the explicit treaty power into an implicit source of congressional authority: Congress's "implicit" plenary power. In a long quotation from a 1943 case, Blackmun explained that the federal government has used the treaty power to create a special relationship with the Indians:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

The classic formulation of this argument occurred in an even earlier case, United States v. Kagama: the United States mistreated the Indians and left them helpless; the United States therefore owes the Indians a moral duty of care; from that duty necessarily arises a very broad power to help them, even in the absence of any explicit grant of power in article I.

This argument, which this Article will call the fiduciary power argument, has not proved a favorite with the Court. Yet one otherwise puzzling aspect of this line of cases makes sense only in light of the fiduciary power argument—the Mancari standard of re-

63. Mancari, 417 U.S. at 552.
64. In later cases, the Court has never singled out the treaty power, separate from the "implicit" plenary power, as the justification for Indians' special status.
67. 118 U.S. 375, 383-84 (1886). Mancari follows the Seber material with a citation to Kagama.
68. The closest the Court has come to endorsing this argument was in passing references in two cases. First, Antelope explained that classifications singling out Indians are "supported by the ensuing history of the Federal Government's relations with the Indians." United States v. Antelope, 430 U.S. 641, 645 (1977). The Court follows this language, however, by stressing not the fiduciary relationship, but the sovereign status of Indian tribes, thus suggesting the political/racial distinction. In Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), the Court explained that states acting without federal authorization may not single out Indians, because they do not enjoy the "same unique relationship with Indians" as does the federal government. 439 U.S. at 501. Yet, as explained in the text, Yakima also eliminated the "fiduciary relationship" standard and substituted the "rational basis" test for laws that single out Indians. Yakima may therefore mean that the federal government has a political but not necessarily fiduciary relationship with the Indians.
view. At the end of the opinion, tucked away in the last substantive paragraph and without explanation, the Court lays out its standard for laws that single out Indians for special treatment: "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." \(^{69}\) This test seems quite unusual. On the one hand, \textit{Mancari} is blunt that the standard is not strict scrutiny. But on the other hand, the standard seems to be more stringent than mere rationality review: it requires that laws singling out Indians be tied not to just any governmental interest but to the fiduciary obligation in particular. The Court gave no hint of the origin of this test, but the fiduciary power rationale offers a source. \(^{70}\) If Congress may single out Indians because it owes them a special duty and its power arises from that duty, then it logically follows that every instance of special treatment must be executed within the parameters of that duty. If this argument is correct, every citation to \textit{Mancari}'s standard of review—and they are legion\(^{71}\)—is also a citation to the fiduciary power rationale. In later cases, however, the Court gradually undermined even this support for the rationale: as the cases began to accumulate, it became apparent that the "fiduciary obligation" standard was toothless. By 1979 the Court had equated it with rationality review: any state interest, not just the fiduciary obligation, could justify singling out Indians. \(^{72}\)

Next, Blackmun turned to the weakest argument of all—the straight consequentialist argument. \(^{73}\) He warned:

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\(^{69}\) \textit{Mancari}, 417 U.S. at 555.

\(^{70}\) As this Article will explain, the political/racial distinction leads most directly to a "rational basis" standard of review. The constitutional reference argument also leads to such a minimal standard: if the reason that Congress may single out Indians is that the Indian commerce clause does, then one would expect the limits on Congress's power to arise in the definition of "commerce" and not from any fiduciary obligation. The Title 25 argument, too, suggests mere rationality review. That argument, as this Article will explain, is consequentialist: if singling out Indians were illegitimate, then all of Title 25 would be invalid, and that result is simply unthinkable. But it would be little less unthinkable to invalidate those parts of Title 25—potentially numerous, if the \textit{Mancari} standard is vigorously applied—that are not tied to Congress's fiduciary obligation.


\(^{72}\) See Washington v. Confederate Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 500–01 (1979); see also \textit{infra} notes 121–123.

\(^{73}\) The term "consequentialist" is used here in its traditional legal sense: a holding is consequentialist if it is based not on pre-existing rules and standards but on a preference for a given result.
Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, singles 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.\textsuperscript{74}

This language suggests two readings. First, one may read it as threatening dire consequences: to invalidate special treatment for Indians would mean massive changes. The weakness of such a consequentialist argument is so obvious, however, that one might favor a different reading, suggested by the location of the Title 25 argument in the opinion: it immediately follows the discussion of the fiduciary power. Blackmun warned that if Title 25 were struck down, "the solemn commitment of the Government toward the Indians would be jeopardized."\textsuperscript{75} He may mean here that to strike all Indian-specific laws would make it impossible for the federal government to use its fiduciary power to execute its fiduciary duty. So interpreted, the Title 25 argument is only a continuation of the fiduciary power argument.\textsuperscript{76}

If the Title 25 argument began as a part of the fiduciary power argument, however, the Court soon recast it as a straight consequentialist argument standing on its own. In 1976, the Court announced, "We need not dwell at length on this constitutional argument [that laws singling Indians out are equal protection violations], for . . . we think it is foreclosed by our recent decision in [Mancari]. In reviewing the variety of statutes and decisions according special treatment to Indian tribes and reservations, we stated . . . ," and then quoted the language quoted here.\textsuperscript{77} In this passage, Justice Rehnquist emphasized not the fiduciary duty—indeed he did not discuss the duty at all—but the amount of federal

\textsuperscript{74} Mancari, 417 U.S. at 552.
\textsuperscript{75} Id.
\textsuperscript{76} Another possibility is that Blackmun was invoking deference to other decision makers across time. Those who built the edifice of Indian law obviously assumed that special treatment was valid. When such an assumption is shared for decades at all levels and among all branches of the government, one must pause before bringing the whole building crumbling down. This argument, however, requires elaboration: the existence of such a widely shared belief may be a reason to pause and to defer, but not to desist in the inquiry entirely. Mancari, moreover, never uses the language of deference; if Blackmun had such an argument in mind, he never said so.
law that would fall if the argument were admitted. The threat is only one of distasteful consequences.  

2. Critique of the Court’s Position

The central problem with any article I answer to an equal protection challenge is simply that it is unresponsive. Article I and the equal protection clause are separate and independent limits on Congress’s powers. True, the grant of power to Congress over the Indians may be “plenary”—but only in the sense that its power over interstate commerce is plenary. Just as Congress must regulate interstate commerce consistently with the equal protection element of the fifth amendment (it may not, for example, require African-Americans to ride in the back of interstate buses), it must regulate Indian affairs consistent with the same provision. Thus, even if article I gives Congress unlimited power over Indians, the equal protection clause may effectively take away that power by forbidding Congress to single out Indians for special treatment. The Court may not simply stop after it has made its article I argument; it must then go on to deal with the latter clause, which is the real concern.

Once upon a time, in the bad old days of the 1800s and early 1900s, Congress’s powers over the Indians may not have been limited by other constitutional provisions, because the Court regarded Indian affairs as a political question not subject to judicial review. In recent decades, however, the Court has been forthright in its rejection of this view: even if Congress’s power to abrogate treaties with the Indians is immune to judicial review, that fact “has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.” Indeed, the Court has in-

78. Justice Rehnquist does include in the language quoted from Mancari the warning that the government’s “solemn commitment” would be at risk. In context, however, this concern seems not to be about the duty but about disruption to Title 25: Rehnquist introduces his argument not with a discussion of the duty, as Blackmun had done, but with a reference to “the variety of statutes and decisions according special treatment to Indian tribes.” Id. at 480. The following term the Court continued this recasting of the Title 25 argument. In Antelope, Chief Justice Burger pointed out that legislation singling out Indians has repeatedly been sustained against claims of racial discrimination. In support, he quoted again the passage from Mancari excerpted above, this time omitting the warning that the Government’s fiduciary duty would be imperiled. See United States v. Antelope, 430 U.S. 641, 645 (1977).


continued

interpreted *Mancari* itself as standing for the proposition that Congress's power over Indian affairs is subject to judicial review under the Bill of Rights. Even the *Mancari* Court, then, must have believed that a citation to article I would not answer an equal protection challenge.

This inadequacy in the Court's article I discussion appears most clearly in the treaty power argument. The treaty clause gives the President and the Senate together the power to enter into a broad range of agreements. But the power has one definite limit: it may not be exercised to offend other provisions of the Constitution, especially the Bill of Rights. The breadth of the treaty power, therefore, cannot free the Court from confronting the equal protection clause directly.

Blackmun in *Mancari*, however, seemed to merge the treaty power argument with the fiduciary power argument: pursuant to the war and treaty powers, the federal government reduced the Indians to a deplorable state and thus owed them a duty of care; from that duty arose all power necessary to execute the duty. This argument, too, fails. As developed in *Kagama* and *Seber*, the “fiduciary power” arises not out of the text but from moral necessity; it produced a political question, in part because it was extratextual. But in the modern era, the Court has utterly rejected this reasoning. The idea that a source of Congressional power may be found outside the constitutional text and in the realm of moral “necessity” is anathema to any court that claims to believe in a strict interpretivist approach to the document. Not surprisingly, in recent years,

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81. See United States v. Sioux Nation of Indians, 448 U.S. 371, 413 & n.28 (1980); *Delaware Tribal Business Comm.*, 430 U.S. at 84 (citing *Mancari*). The political question doctrine in Indian law has a long and interesting history. In all its incarnations it was based largely on the idea that Indian tribes were in some important sense outside the texture of the American political community. Indians have, as a legal matter, moved substantially more into the community, and so it stands to reason that in the modern age the Court should reject the older idea that Indian affairs are properly wholly political matters. For a history of the political question doctrine in Indian law, see Newton, *supra* note 38.


83. Justice Black in *Reid v. Covert* held that the United States may not, in pursuance of international agreements, deny to civilian dependents of members of the armed services the right to trial by jury and other constitutional procedural protections: “[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” 354 U.S. 1, 16 (1957); see also *Geofroy v. Riggs*, 133 U.S. 258, 266–67 (1890) (“The treaty power . . . . is in its terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments. . . . . . . . It would not be contended that it extends so far as to authorize what the Constitution forbids . . . .”).
the Court has taken pains to trace the origin of the plenary power to specific constitutional grants, and not to a disembodied moral duty. As already noted, the resulting power, which does not exist outside the text, also does not exist beyond the limits imposed by the text: the plenary power is no longer a political question. Today, then, Congress's "fiduciary" power may be plenary but it is subject to the restraints of the equal protection clause.

The difficulties with the consequentialist Title 25 argument are so obvious that one should almost feel embarrassed addressing them, as if shooting fish in a bucket. A very large school of legal thought in America—possibly a mainstream orthodoxy—still holds that the Court should pay no attention to the consequences of its holdings, but instead should look only to pre-existing rules and standards; if the Court delivers a holding based on the rules and people are discomfited, so be it. The Court itself has often agreed with this view, at least to some degree. Even those who believe that the Court should pay attention to consequences and self-consciously engage in social engineering also recognize that the Court must discuss why a given consequence would be good or bad. The Mancari Court did explain how a conclusion that special treatment for Indians is racial discrimination would have farreaching consequences—but the Court has never explained why those would be bad consequences. Indeed, the consequences that Blackmun foretold are not even real-world effects on real-world people but rather only the scrapping of a substantial body of law—Title 25 and its appurtenant regulations. Thus phrased, the consequentialist argument is nothing more than an assertion that the Court cannot scrap law because that would involve scrapping law.

Finally, the constitutional reference argument may be the most plausible of the group, but it too suffers from fatal defects. The Court is right that article I itself singles out Indian tribes by giving Congress the power to regulate commerce with them. If article I

86. In the context of the equal protection clause, moreover, consequentialist arguments should be particularly malodorous because of the ever present memory of Brown v. Board of Education, 347 U.S. 483 (1954). When Brown was initially handed down, there were many who argued that it was wrongly decided because it invalidated so many laws and would lead to such far-reaching changes. Indeed, if one believed that Title 25 involves unjust discrimination, one might understand Mancari as an opportunity for the Court to write a Brown for the Indians, an opportunity that the Court missed.
singles them out, the argument goes, it must be legitimate for ordinary legislation to do so as well. This argument commits the same error as the other article I arguments. We have two constitutional provisions relevant to this issue, not one: while article I may single out Indians, the equal protection clause may forbid singling them out.87 There is an apparent tension between the two clauses, and the task is to determine how to resolve that tension. There are well-established methods of performing that task, but the Court ignores them all by completely overlooking the equal protection end of the calculus. The Court either chooses article I over the equal protection clause, making the latter clause meaningless; or it reads the equal protection clause in light of article I, rather than the other way around. An application of the standard rules for reconciling conflicting provisions would lead to a very different result.

To begin with, the rules require the Court to try to make the requirements of the two clauses consistent.88 One way to do that is to hold that the equal protection clause does not forbid giving Indians special treatment, but the plausibility of that strategy depends entirely on how plausible it is to read the equal protection clause in that way. This article will suggest in a moment that the Court's reasons for so reading the clause are not very plausible. Another way to reconcile the two clauses is to go in the opposite direction—to hold that article I gives Congress the power to regulate Indian affairs, but not by singling out Indians for special treatment. This treatment, too, does not sound very plausible: if Congress's power over Indians can never be exercised by legislation directed specifically at Indians, then it hardly seems worth singling them out as fit objects for federal power.89

87. Of course, the equal protection clause may not regard singling out Indians as racial discrimination, but the Court needs to offer an interpretation of that clause, not of the Indian commerce clause, to make that point.
89. It is worth noting, however, that the interpretation is only implausible, not nonsensical. As interpreted in the text, the clause would give the federal government the following option: it could adopt general federal legislation on the basis of some other article I power and extend that legislation to the Indian tribes on the basis of the Indian commerce clause. The government would thus not have singled out Indians, but it might have needed the clause to reach them, especially in light of the quarrels during the Articles of Confederation period over state-federal control over Indian affairs. Under this view, the clause does serve some function, but it is always in a sense an ancillary function: if the federal government has the power and intends to enact general legislation, then the Indian commerce clause allows it to "piggyback" regulation of the Indians onto that legislation. The reason this view is implausible is that under it the federal government could never undertake regulation of Indian affairs alone, but the clause seems precisely designed to allow it to do that, by denominating commerce with
It seems more honest to conclude that the two clauses really are in tension with one another and cannot be easily reconciled. We must therefore choose one or the other, and to guide this choice we have two general rules: choose the more specific over the less specific, and choose the latter in time over the former. As to the first, degrees of specificity are often difficult to calibrate, and this problem is no exception. On the one hand, the Indian commerce clause seems quite specific: it names a given population and a given area of human activity (commerce with the tribes), and it expressly grants the government the power to control that area. On the other hand, the power to govern Indian commerce is potentially a tremendously broad grant of jurisdiction, just as is the power to govern interstate commerce—it "comprehend[s] all that is required for the regulation of [the United States'] intercourse with the Indians"—and it made up an even larger portion of the Republic's activity at the time it was adopted. Similarly, under its present interpretation, the equal protection clause seems very general in its universal proscription on racial discrimination against anyone anywhere under any circumstances. On the other hand, that proscription does seem quite specific precisely because of its seemingly—perhaps illusory—determinate quality: as Justice Powell put it in *Bakke*, "the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude."

So the rules about specificity may not help resolve this question. As a result, we are thrown back onto chronology: quite contrary to *Mancari*, the later equal protection clause should control the earlier Indian commerce clause. This technique seems most appropriate anyway, because the tension between the two provisions really seems to grow out of their origin in different eras. The Constitution of 1787 was much more patient with various forms of discrimination than the Constitution of 1868, at least as the latter has been interpreted. The original document contained a ban on congressional restrictions of the slave trade until 1808; it apportioned representation under the infamous three-fifths clause, by which the Indian tribes as one of the "great substantive and independent power[s]." *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) (describing commerce clause).

slaves counted for three-fifths of a person;\(^5\) it made no effort to limit state establishments of religion. The world of 1787 was simply much more comfortable with corporatist unities based on what we would today consider highly suspect characteristics. By contrast, the mid-nineteenth century had already witnessed the first great stirrings of liberal individualist America in the market, religion, and politics.

Indeed, it is possible to understand abolitionism and the eventual relative liberation of African-Americans as the product of precisely this new, more thoroughgoing individualism.\(^6\) Under this construction, the tension between the equal protection clause and the Indian commerce clause makes perfect sense: the intellectual underpinnings of the former replaced the latter, just as the new provisions governing representation replaced the old three-fifths clause. We had entered a newer, freer world. By rights, that freedom should have been directly and quickly extended to the Indians as well, and many of the ex-abolitionists and other promoters of the clause were outraged at the failure of that seemingly natural extension.\(^7\) So, if the clause really did mean to proscribe all racial classifications—and that is still a big "if"—then we have a simple scenario: once upon a time, the Constitution allowed Congress to single out Indians, but then we had a great war and a great ideological struggle, and the upshot was that the equal protection clause put limits on Congress's ability to give Native Americans special treatment.

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\(^5\) U.S. Const. art. I, § 2, cl. 3.


\(^7\) See infra notes 291–292. One might also argue that political changes in the status of Indian tribes lend support to the idea that the morality of the equal protection clause should replace the morality of the Indian commerce clause. In 1787, the nation looked forward to a westward expansion across a continent largely peopled by independent Indian tribes. In a sense, Indian relations were therefore at least largely "external" relations between sovereigns, and so the Framers gave Congress the power to regulate commerce with the Indian nations along with the power to regulate commerce with foreign nations and between the several states. At this stage, one might argue, the attitude of the Indian commerce clause was appropriate: the federal government had to be able to single out Indian nations and individuals—as objects of external concern—just as it should be able to single out France and French nationals. At some point, however, all of the Indian nations and all of the individual Indians in the geographical boundaries of the United States became subject to the ultimate jurisdiction of the federal government. They became internal to the country and so received protection against discrimination on the basis of race. However, this Article does not rely on this argument here, because ultimately it rejects the idea that the Indians' political status has changed so radically, at least as a matter of constitutional law.
Thus, all of the Court's article I arguments suffer from problems inherent in the tension between article I and the equal protection clause. But a deeper, more pervasive problem exists as well: none of the Court's article I arguments squarely faces the persistent rejoinder that Indian separatism, while often taken for granted, may nonetheless rest on disturbing racial lines. Throughout its article I discussion, the Court never even addresses the concept of race; instead it behaves as if the breadth of Congress's power is such that the whole idea of racial discrimination is made irrelevant. But no amount of article I hocus-pocus will get the Court out of addressing the equal protection clause itself, and the Mancari Court does finally get around to doing so.98

B. Equal Protection Answers

1. The Court's Position

At last, Blackmun confronted the equal protection clause and Section 12 itself. He first explained that the employment preference was part of the policy of the Indian Reorganization Act to restore to Indians “a greater control over their own destinies.”99 Since the BIA exercised great control over the lives of Indians, it was important to staff the BIA as much as possible with Indians, hence the preference. Blackmun then reached the nub of the matter: “Contrary to the characterization made by appellees, this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference.”100

Here, he dropped a footnote to explain: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial

98. For that reason, it is hard to know how much weight the Court meant to put on its article I arguments. On the one hand, the Court did spend time in Mancari developing them, and it has repeated some of them since. On the other hand, in the ensuing years, the article I arguments have taken a back seat to the equal protection arguments. Even within Mancari, at the close of his article I analysis, Blackmun referred to that analysis as merely the “historical and legal context” in which he would consider the constitutionality of Section 12; he then turned to the political/racial distinction. Morton v. Mancari, 417 U.S. 535, 553 (1974). The opinion reads to this point as if the Court has been muttering in its beard about how preposterous the claim is—before it finally decided to recognize that the equal protection clause exists.

99. Id.

100. Id.
in nature."\textsuperscript{101} The footnote then went on to quote the eligibility criteria: one "must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe."\textsuperscript{102}

Back in the text, Blackmun offered a slightly different distinction. Having asserted that the preference is not racial, he elaborated: "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."\textsuperscript{103} He compared the preference to a residency requirement for politicians and added: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."\textsuperscript{104} Next, Blackmun emphasized the narrowness of his holding:

Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.\textsuperscript{105}

The text thus contrasts uses of the term "Indian" as an employment criterion with uses of it to describe a race, while the footnote contrasts political uses of the term with racial uses. The distinction in the text could be simply a restatement of the distinction in the footnote: an employment criterion based on tribal membership draws a line based on a political, not a racial, feature. But there are two important differences of emphasis. First, the footnote's focus is quite general: it maintains that as generally used in federal statutes the term "Indian" is political, not racial. The textual distinction seems narrower: use of the category "Indian" as an employment criterion to support self-government is constitutional, but other political uses may not be.\textsuperscript{106} Blackmun was careful to

\textsuperscript{101} Id. at 553 n.24.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 554.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Some political uses might not have anything to do with employment or with the promotion of self-government, such as statutes terminating the political status of individual tribes.
note that the preference applied only to "employment in the Indian service," and he reserved judgment on any broader exemption.

If Blackmun did mean to reserve such questions, however, the other members of the Court quickly scotched that possibility. In United States v. Antelope, the Court dealt with one of the more quixotic elements of Indian law: when a non-Indian kills a non-Indian in Indian Country, he is punished in state court according to state law; but when an Indian kills a non-Indian on Indian Country, he is punished in federal court according to federal law under the Major Crimes Act. Gabriel Antelope killed a non-Indian on Indian Country and was convicted under federal law of felony murder. The state of Idaho, in which the reservation was located, had no felony murder statute, so if Antelope were a non-Indian, he would have been tried in state court and could not have been convicted of felony murder. The distinction between Indians and non-Indians thus operated to treat Indians more harshly than non-Indians: the Indian defendant could be tried for a crime for which a non-Indian committing the same act in the same place against the same victim could not be tried. This use of the category "Indian" neither promoted Indian self-government nor served as an employment criterion. But the Court quickly rejected the argument that Mancari allowed only such uses:

Both Mancari and Fisher involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in Mancari and Fisher point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial" group consisting of "Indians."

The Court, in other words, opted for the footnote distinction between racial and political categories: if the federal government deals with the tribes as political units, then the law presents no suspect classification, even if the law does not involve employment or self-government.

107. Mancari, 417 U.S. at 554; see supra text accompanying note 105.
111. Antelope, 430 U.S. at 646.
There may also be a second and more subtle difference between the footnote and the text. The distinction in the footnote focuses on the form of federal statutes and regulations: it asserts that as used in federal statutes, the category "Indian" refers to a political element, not a racial one. If one sees that the category is used in its political sense, one need go no further; there is no suspect category here to worry one. The textual distinction, on the other hand, focuses on the motive, not just the form of statutes. According to the Court, Congress intended Section 12 to promote Indian self-government. It is related to a "legitimate, nonracially based goal [self-government for Indians]," and the existence of this goal is "the principal characteristic that generally is absent from proscribed forms of racial discrimination."[112] The evil in some racial discrimination, in other words, is not that it formally draws racial lines, but that it is aimed at a malignant goal. One might conclude that there is such a thing as a benign and constitutional use of a racial category for nonmalignant ends. If Blackmun did indeed write Mancari with an acute awareness of the affirmative action issue in the offing, he may have been staking out a position here in advance.

The Mancari standard of review offers some support for this interpretation. Remember that Mancari requires that all laws that single out Indians must be tied to the fiduciary relationship, and the opinion does not offer a source for this unusual standard. But if Blackmun is claiming that racial categories can be used for benign reasons, the standard of review functions as a threshold test: if the law is tied to the nonracist goal of advancing the fiduciary obligation, then it is benign; if it is not, then it must be struck down.113

113. Fisher v. District Court, 424 U.S. 382 (1976)—the first of Mancari's progeny and a case that preceded Bakke—provides support for this interpretation of Mancari. Fisher held that tribal courts had exclusive jurisdiction over some Indian adoption proceedings, thus denying Indians the right enjoyed by non-Indians to bring suit in state court. After explaining that the different treatment was based on the sovereign status of the tribe and not on race, the Court went on to add:

Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government

Id. at 390–91—and, presumably, for that reason satisfies the fiduciary obligation standard of review. The Court, in other words, suggested that it is fair to make an individual bear the burdens associated with helping the class of which he is a member. This suggestion is an almost direct repudiation in advance of Justice Powell's pivotal opinion in Bakke. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (There are "serious problems of justice connected with the idea of preference itself. First, it
This position echoes Blackmun's view in Bakke: if a law that draws racial lines serves the benign goals of affirmative action, then it is permissible; if not, then it must be struck down as serving racist ends.\(^{114}\) By contrast, the footnote suggests a simpler standard of review: if the category "Indian" really is simply and only political, then we have no suspect classification at all, and we would expect the Court to apply its minimal standard of review—the rational basis test.\(^{115}\)

Again, however, if Blackmun meant to move in any such direction, the Court put a stop to the idea very quickly, just as it did to Blackmun's analogous view in the affirmative action context. The Court repeated, not the textual distinction, but the flatter and easier one from the footnote—and it did so perfunctorily, in bald assertions that the category is political.\(^{116}\) Indeed, if the problems with the distinction are as severe as this Article will suggest, the citations to the distinction seem almost talismanic: a magical incantation,
without accompanying analysis, to make the issue go away rather than to address it. The circuit courts have followed suit: they have taken from Mancari only the political/racial distinction and ignored its other rationales. If, then, there is a single orthodox view of why Indian legislation does not offend the equal protection clause, this is it.

The Court has also changed its standard of review in the years following Mancari, moving from the fiduciary relation standard best associated with the textual view to a rational basis standard associated with the footnote distinction. Only two terms after Mancari, the Court, without seriously applying the fiduciary obligation standard at all, upheld a law that may have helped tribal self-government but restricted the options available to individual Indians. Next, in Antelope, the Court upheld a jurisdictional arrangement that hurt both tribal self-government and individual Indians; and the Court did not deny those effects. But, the Court explained, federal legislation need not help Indians, because it is based not on racial classifications at all, but rather on the sovereign status of the tribes. The Court nowhere mentions the fiduciary obligation standard. After the invocation of the racial/political distinction, the analysis is over, because there is no suspect class warranting increased scrutiny.

Yakima Indian Nation completed the process of transformation of the standards of review. Yakima addressed PL-280, a federal statute which delegated some jurisdiction over Indian Country to the states and under which the state of Washington had extended its jurisdiction over the Yakimas in a very odd and partial way. Justice Stewart noted that only the federal government may single out Indians; states may not. But in this case, the state was acting under the authorization of the federal government, so it enjoyed all the options available to Congress. And those options apparently are


119. See supra notes 108–110 and accompanying text.

120. "Both Mancari and Fisher involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests." Antelope, 430 U.S. at 646.
virtually unlimited: at no point in his opinion did Justice Stewart mention the *Mancari* fiduciary relation standard of review. Instead, he explained that Congress and states acting under Congress's power may employ classifications singling out Indians if those classifications "rationally furthe[r] the purpose identified by the state"—with no suggestion that that purpose must be the execution of the fiduciary duty. And he drew the quoted language not from a case about Indians but from one about economic regulation—*Massachusetts Board of Retirement v. Murgia.* The Court has here at last followed out the meaning of the *Mancari* footnote to its logical conclusion: since the political category "Indian" is in no way suspect, it should receive no heightened review. When all is said and done, then, the Court's position comes down to this: as long as the government uses the term "Indian" in a political sense, neither Indians nor non-Indians will receive any real protection from laws singling out Indians for different treatment. As a result, the only significant doctrinal question that remains from *Mancari* is what it means to use the term in a political, rather than a racial, sense.

2. The Critique of the Court's Position

Unfortunately, that question is not an easy one to answer. The initial difficulty is that the Court might mean one of several different things when it says that, as used in federal legislation, the category "Indian" is political and not racial. The subsections that follow will consider how plausible each interpretation is, and critique each.

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123. This interpretation of *Yakima* leaves a seeming inconsistency within the case: if the category "Indian" can be used in a political sense, why cannot the states use it so, even without congressional authorization? The Court does not offer an explicit answer, but one might conceivably discern the following implicit answer. States may use the category "Indian" in either a racial or a political sense. If they use it in a racial sense, the classification is subject to strict scrutiny under the equal protection clause. If they use it in a political sense, they are violating one of the central principles of Indian law—that under federal law only the federal government may maintain a political relationship with the tribes, and so only the central government may regard them in a political light. *See, e.g., Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). As a result, the states' use of the category "Indian" will violate either the equal protection clause (if racial) or the supremacy clause (if political). This whole analysis, of course, depends on the central principle—that states may not have a political relationship with the Indians—and that is a proposition that the Court may open to question in the coming years if the judicial drift in favor of state regulation of Indian Country continues. *See Cotton Petroleum Corp. v. New Mexico,* 109 S. Ct. 1698 (1989).
They conclude that, regardless of which interpretation is correct, the Court's analysis cannot satisfactorily allay the worry that Indian law rests on racial discrimination.

\[a. \text{ The Category "Indian" Is Not In Any Sense Racial} \]

At its strongest, the Court's claim might be that the category "Indian" has no racial element in any of its meanings or usages. Such a claim is both clearly false and not what the Court meant. Despite reluctance to use the term "race" at all,\(^1\) scientists recognize three genetically distinct populations of Indians—Athapaskans, Eskimo-Aleuts, and descendants of the Paleo-Indians—based on dental morphology and protein variants.\(^2\) More pertinently, American culture and law have historically viewed Indians as a race, have created racial stereotypes of them, and have subjected them to hostile treatment on the basis of that view. Therefore at least some legal uses of the category "Indian" should conjure up the same suspicion as use of any other racial category.\(^3\) The point seems so obvious as not to warrant elaboration.\(^4\)

The Supreme Court, moreover, did not intend to argue that "Indian" can never be a racial term. Rather, the Court carefully distinguished between two usages of the term—racial and political. Mancari, for example, opposed a "'racial' group consisting of 'Indians'" to a category that includes only "members of 'federally recognized' tribes" and excludes "many individuals who are racially to be classified as 'Indians.'" It is therefore possible, in the Court's

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\(^1\) See P. Farb, Human Kind 275–78 (1978).


\(^3\) See Frontiero v. Richardson, 411 U.S. 677 (1973).

\(^4\) For those who are interested in elaboration of the racial attitudes of non-Indians in general and the federal government in particular toward Indians, the literature is increasingly rich and rewarding. See, e.g., R. Berghofer, The White Man's Indian (1978); B. Dippie, The Vanishing American (1982); R. Drinnon, Facing West: The Metaphysics of Indian-Hating and Empire-Building (1980); R. Pearce, Savagism and Civilization (1988).

\(^5\) Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). Similarly, Antelope explained that the defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they [were] enrolled members of [a tribe]." United States v. Antelope, 430 U.S. 641, 646 (1977). Even the Yakima Court implied that one might use the category in a racial way. Recall that the state of Washington had unevenly extended PL-280 jurisdiction over Indian Country, and the Court held that "the distinctions drawn [by the state statute] on their face [do not] violate the equal protection clause." Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 499 n.46 (1979). But before addressing this facial challenge, the Court considered whether the statute had been "applied . . . to discriminate against the Tribe or any of its members" or was "motivated by a discriminatory purpose." The Court casually affirmed the District Court's finding that the statute suffered from
mind, to think of Indians in a racial light and so use the category with a racial meaning. Apparently, however, the racial usage is confined to the general category "Indian," meaning all Indians; one cannot use the category "enrolled members of the Navajo Nation" in a racial sense. As long as the government confines itself to "legislation singling out tribal Indians," it is on safe ground. This Article will return to a critique of this position, but will first sketch and critique a slightly different interpretation of the Court's meaning.

b. As Used in Federal Statutes and Regulations, the Category "Indian" Is Not At All Racial

The Court may mean to make the more modest claim that the term "Indian" has many meanings, not all of them racial, and federal usage in particular refers only to the purely political definitions. Thus, for example, Mancari maintains that the Section 12 preference is "political rather than racial in nature"—seeming to suggest that it is all political and not at all racial. Antelope more bluntly insists: "[T]he federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications."

If this is the Court's meaning, the justices are either willfully ignoring the federal definition of what it means to be an Indian, or else they intend a very peculiar conception of what it means for a category to be purely political. Virtually all of the federal definitions of "Indian" contain, to the naked eye, a substantial genetic and therefore racial component. In Mancari, for example, the BIA regulations required that to be eligible for the preference, "an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe." At most, this definition

neither of these defects, but in so doing implicitly assumed that the state might harbor a racially discriminatory motive or apply the statute in a racially discriminatory way. 129. Yakima, 439 U.S. at 501 (emphasis added). 130. Mancari, 417 U.S. at 553 n.24. 131. 430 U.S. at 647. 132. 44 BIAM 335, 3.1. Indeed, Mancari quoted this language in the very footnote in which it distinguished political from racial uses of the term "Indian." 417 U.S. at 553 n.24. This definition is typical of federal regulations in its blood requirement. See, e.g., 25 U.S.C. § 479 (1988) (definition of "Indian" under the IRA includes "all persons of Indian descent who are members of any recognized Indian tribe... [and] all other persons of one-half or more Indian blood") (emphasis added); 25 U.S.C. § 601 (1988); Act of May 25, 1918, ch. 86, 40 Stat. 561, 564, repealed by Act of Dec. 28, 1985, Pub. L. No. 99-228, § 3(3), 99 Stat. 1747, 1748; 5 C.F.R. 213.3112(a)(7) (deleted 1976) (civil service exemption for BIA positions for those of "one-fourth or more Indian blood"); 5
contains one political element—membership in a federally-recog-
nized tribe.133 But the preference also has a second and openly ge-
netic requirement that has nothing to do with politics. If one were a
member of a recognized tribe but had less than one-fourth Indian
blood, then one would not qualify for the preference strictly because
one did not have enough Indian genetic material.134 Tying legal
benefits to this kind of racial calibration has historically been associ-
ated with racism at its most despicable; consider the distinctions in
this country between “octoroons” and “mulattos,” and in South Af-
rica between “blacks” and “coloreds.” It should make us nervous;
it should not be shrugged off with the blithe assertion that it is all
political. In most federal definitions, then, the category “Indian” is
both political and racial. The simple fact that race is one element
may not close the analysis; one might still argue that, by combining
the two factors, the government can somehow remove the constitu-
tional taint from the racial factor. But to retain any honesty, the
Court must acknowledge that the classification is partially racial.

This need becomes even more pronounced in certain health
and education programs that are not limited to members of recog-
nized tribes.135 These definitions contain no political element at all;
racial status is both necessary and sufficient for inclusion.136 Even

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C.F.R. 213.3116(b)(8) (deleted 1976) (same for Indian Health Services). Many statutes
do not contain a definition of the term “Indian”; in those statutes, the courts have
supplied one that requires, inter alia, some quantum of Indian blood. See 1982 Hand-
book, supra note 6, at 24–25 (1982). Some statutes defer to tribal definitions of mem-
bership, see 25 U.S.C. §§ 450b(d), 450b(e), 1452(b), 1603(c) (1988); 42 U.S.C. § 3002(5)
repealed by Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School
(1988); but those tribal regulations themselves contain a blood quantum, see infra note
161. The regulation at issue in Mancari itself has been amended but retains a classifica-
tion based on blood quantum: the preference now extends to anyone who is a tribal
member or has one-half or more Indian blood. See Tyndall v. United States, No. 77-

133. See supra text accompanying note 102. As this Article will argue, however,
even tribal membership has a racial basis as well. See infra notes 161–175.

134. The Court did not confront this hypothetical appellant in Mancari, and so we
cannot know for certain whether, when push came to shove, the Court would acknowl-
dge that the statute does contain a racial definition of the term “Indian”. But that
uncertainty is precisely the point: the Court seems to be willfully blinding itself to the
meaning of the federal statutes.

86 Stat. 354 (1972), repealed by Education Amendments of 1978, Pub. L. No. 95-561,

136. These programs extend benefits to members of recognized tribes, members of
terminated tribes, descendants of such members, individuals “considered” by the Secre-
tary to be Indians, individuals “determined” to be an Indian under regulations promul-
under *Mancari*, then, the Court should be prepared to apply strict scrutiny to these programs. In fact, however, the Court has shown no signs of doing so. It has not hinted that some parts of Title 25 might not survive analysis; its stance has become more, not less, hostile to equal protection challenges in this area.

The Ninth Circuit seems so to have read the Court’s mood, for it has upheld such programs for non-tribal Indians. The Circuit has also, alone among the appellate courts, wrestled seriously with the meaning of *Mancari*, and it has candidly conceded that the federal category “Indian” is usually a mixture of racial and other features. For that reason, as well as the Circuit’s preeminent position in Indian law, its work is worth examining. The court has offered one extended explanation of why race is sometimes not suspect. It rightly pointed out that the Court cannot have meant to invalidate all preferences involving a blood quantum requirement, because *Mancari* itself upheld such a preference. But sometimes, it seems, race can be political: “*Mancari* simply held that, as long as the special treatment is rationally related to Congress’s unique obligation towards the Indians, the preference would not violate equal protection. If the preference in fact furthers Congress’s special obligation, then *a fortiori* it is a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian.” In other words, if Congress uses the term “Indian” in a statute that helps the Indians, the classification becomes by definition political, regardless of the actual content of the classification itself.

This argument will not answer. For one thing, it rests on a misinterpretation of *Mancari*. *Mancari* involved a two-step analysis: 1) if a statute contains a political use of the category “Indian,”

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1. See Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).
2. Id. at 1168 n.10.
3. Id. at 1168.
4. Id. at 1168–70.
5. “Who is an Indian turns on numerous facts of which race is only one, albeit an important one. . . . Indian status is ‘based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive.’” *Duro v. Reina*, 851 F.2d 1136, 1144 (9th Cir. 1987) (quoting Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 518 (1976)), rev’d on other grounds, 110 S. Ct. 2053 (1990).
then 2) the standard of review will be the "rationally tied to Congress's fiduciary obligation" test. The Ninth Circuit reversed these steps: if 1) the statute is rationally tied to Congress's obligation, then 2) the use of the term is political. The Court's cases since Mancari have made even clearer that the Circuit's interpretation of that case is out of step with the Court's. In equating execution of the fiduciary obligation with political categorization of Indians, the circuit plainly hoped to secure some protection for Indians: the only time that the government may single out Indians is when it is taking special care of them.\textsuperscript{142} But the Supreme Court has since rejected this robust "fiduciary relationship" standard of review: today, the federal government may single out Indians in a political sense even when it is disadvantaging tribes or individual Indians or both.

Finally, if the Circuit's interpretation of Mancari turns out to be correct, then Mancari itself is plainly wrong, because the Mancari Court tried to use an article I argument to answer the equal protection clause challenge. The Circuit claims that "Indian" is a political category whenever Congress acts as a fiduciary.\textsuperscript{143} What makes the category political, then, is not its inherent content but Congress's article I fiduciary power. But that analysis cannot hold: Congress may owe the Indians a fiduciary obligation, and it may "of necessity" have the power to execute that obligation, but neither of

\textsuperscript{142} Other cases suggest that the Circuit still maintains this one-way ratchet view of Mancari, that the government may single out Indians to help them but not to hurt them. Thus, the court has explained: "[Certain state actions under federal authorization] appear to be a form of discrimination in favor of the tribes that will withstand an equal protection challenge. . . . No compelling state interest need be shown since preferential treatment for tribal members is not a racial classification, but a political one." Squaxin Island Tribe v. Washington, 781 F.2d 715, 722 (9th Cir. 1986) (emphasis in the original).

\textsuperscript{143} The court is more explicit about this view earlier in its opinion. It explains that special treatment for Indians is valid because of the Indians' "unique legal status"; but that status turns out to refer not to the Indians' political nationhood but to article I: "the special status accorded Indians in the Constitution through the commerce clause and the treaty power clause," and the "guardian-ward relationship." Alaska Chapter, 694 F.2d at 1167. In other words, the political/racial distinction is really just a restatement of the fiduciary power argument, with all its inadequacies.

The Supreme Court in Antelope suggested a structurally similar argument, never repeated—that the political/racial distinction derived from the Title 25 argument. The Court first noted that if all laws singling out Indians involved racial discrimination, then all of Title 25 would fall. It then explained: "In light of that result, the Court unanimously concluded in Mancari" that the preference was given not to "a discrete racial group" but to "members of quasi-sovereign tribal entities." United States v. Antelope, 430 U.S. 641, 645 (1977) (emphasis added) (quoting Morton v. Mancari, 417 U.S. 535, 552 (1974)). The Court seems unusually candid in this passage: to recognize racial discrimination would be to destroy Title 25, and in light of that fact the Court hatched up the political/racial distinction.
those points explains why preferences based on blood quantum do not still involve racial discrimination prohibited by the equal protection clause.\footnote{144}

The Ninth Circuit has thus candidly admitted that the category “Indian”, as used in federal statutes, is both racial and political,\footnote{145} but it has failed to offer an adequate explanation of why such dual categories are constitutional. The next subsection will consider the possibility that the Court itself meant that the category is both political and racial but that it is somehow constitutional nonetheless.

c. As Used in Federal Statutes and Regulations, the Category “Indian” Has a Racial Component, but in Combination with a Nonsuspect Component It Is Nonsuspect

The Court might intend a third distinction: as used in federal statutes, the term “Indian” has both a racial and a political compo-

\footnote{144. With a fair dollop of aggressive interpretation, one may read the opinion to hold the following: when the federal government uses the term “Indian,” even when based on blood quantum in whole or in part, it is responding to the fiduciary obligation. It is therefore setting up a category composed of those to whom it owes a fiduciary obligation, which happens to be defined racially, not a category composed of members of a race. But that argument just pushes the analysis back a step, because the Court must still answer: why is it not racial discrimination for the federal government to maintain a special fiduciary relationship with one race and not with others?}

\footnote{145. The Circuit has also considered the even harder case of a category that seems to be exclusively racial—and has upheld it. In Alaska Chapter, the court considered the constitutionality of a regulation promulgated by the Department of Housing and Urban Development pursuant to the Indian Self-Determination Act that extended a preference to Indian-owned firms in contracts to build low-income housing for Indians. The HUD regulation defines an Indian as “any person recognized as being an Indian or Alaskan Native by a tribe, the Government, or any state.” Alaska Chapter, 694 F.2d at 1168 n.8 (quoting 24 C.F.R. § 905.102 (1990)). Conspicuously absent from this definition is any requirement that the Indian be an enrolled member of a tribe. (Indeed, the Circuit seemed to accept the appellant’s characterization of the category as “so broad as to admit anyone who could be considered an Indian on the basis of blood quantum, regardless of tribal or political affiliation.” Id. at 1168.) The Court, nonetheless, insisted that the category did contain a political element because it is “not based solely on blood quantum, but on recognition by a tribe or governmental entity.” Id. at 1169 n.10. In other words, the HUD regulation requires that 1) the beneficiary be, by race, an Indian and 2) some political entity recognize him as such. But notice what an odd notion of a “political category” this view entails. The category is political not in the sense that every member of the class shares a political bond, such as membership in a tribe, but only in the sense that every member of the class has been recognized by some political entity (such as a tribe, a state, or the federal government) as an Indian by race. The class, in other words, is not inherently political at all; it is “political” only in the sense that some body has recognized it as racial. But by this analysis, “fire hydrants” could become a political class if a state should promulgate regulations recognizing some objects as fire hydrants and not others.}
inent, and the combination of the two renders the resulting classification "political," not racial. The cases offer some support for this interpretation. The Mancari court, for example, asserted that the regulation before it set up a "political" category consisting of Indians who are members of federally recognized tribes, which "exclude[s] many individuals who are racially to be classified as 'Indians.'"146 Thus, the federal category does not draw a line based exclusively on race; rather, it adds a nonsuspect characteristic—tribal membership—and so derives a subcategory of Indians—those with a particular blood quantum and membership in recognized tribes. The resulting distinction is between tribal Indians and everybody else, non-Indians and nontribal Indians. That distinction is not truly racial because there are Indians on both sides of the line.147

As this Article will suggest, the problems with this line of argument are so deep and numerous that one would be tempted not to take it seriously except that the Court has done something superficially similar on at least one other occasion—in Geduldig v. Aiello.148 In that case, the Court considered the constitutionality of California's disability insurance system, which paid benefits for a broad range of disabilities but excepted those associated with pregnancy. Buried in a footnote, much like Mancari's footnote twenty-four, is the Court's explanation of why pregnancy discrimination is not gender discrimination:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.149


147. It should be noted that even if the Court intends this distinction and even if the distinction is constitutionally valid, it still will not serve to justify all of Title 25, because some programs are available to Indians defined in an exclusively racial way. See supra notes 135–136.

148. 417 U.S. 484 (1974). The Court also adopted similar reasoning in Personnel Administrator v. Feeney, 442 U.S. 256 (1979), in which it held a state employment preference for veterans was not gender discrimination either on its face or in its intent, because many nonveterans were men and some veterans were women.

149. 417 U.S. at 496–97 n.20.
As others have noted, the parallel to Mancari's analysis is striking, and it is surely no coincidence that the Court heard one case the day after the other. In both, the Court held that the statute divided the world into two categories. One category consisted entirely of members of a suspect class (Indians and women), but because of the addition of a nonsuspect characteristic (tribal membership and pregnancy), the category was limited to a subset of that class (tribal Indians and pregnant women). The other category was composed of everyone else, including some members of the suspect class (nontribal Indians and nonpregnant women). As a result, the Court held in both cases, the statutes create no suspect discrimination because there are members of the suspect class on both sides of the line.

At first inspection, then, Geduldig and Mancari would seem to live or die together. That fact, however, is not necessarily good news for Mancari, because Geduldig's analysis has been the object of a torrent of ridicule, from the right and the left, from those who endorse the result and those who oppose it. Because pregnancy is one of the defining characteristics of gender, pregnancy discrimination is gender discrimination. And the criticism is not limited to


152. See Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 337 (1984-85); Comment, supra note 150, at 1551-54. Even those who agree with the result in Geduldig believe that discrimination on the basis of pregnancy constitutes gender discrimination. See Kirp & Robyn, Pregnancy, Justice, and the Justices, 57 TEX. L. REV. 947, 951 (1979); Larson, Sex Discrimination as to Maternity Benefits, 1975 DUKE L.J. 805, 812; Rutherglen, supra note 150, at 200, 217. True, only some women at any given moment are pregnant, but all women may become pregnant, so the burdened class really is all women. See Kirp & Robyn, supra, at 951; Comment, supra note 150, at 1532; Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 COLUM. L. REV. 441, 448 (1975). And even if the classification does single out only a subset of all women, since pregnancy discrimination is gender discrimination, those particular women have been classified on the basis of their gender, and they should have a claim. See Rutherglen, supra note 150, at 218. Others have argued that the Court compared the wrong two classes, pregnant and nonpregnant persons. Instead, the Court should have begun with the reference group of all workers who had engaged in reproductive activity leading to pregnancy. Within that group, all women are burdened by the exclusion of pregnancy, and all men are not. See L. TRIBE, supra note 151,
the academic world; Congress, federal agencies, and even the Court itself have cast doubt on the continued authority of the case.\textsuperscript{153}

Even if \textit{Geduldig} is good law, however, the similarity between \textit{Mancari} and \textit{Geduldig} is actually only superficial, so that even if the latter is good law, the former should still fall. For one thing, \textit{Mancari} involved a claim of racial discrimination, not gender discrimination, and the Court has always been more rigorous in its analysis of race cases. The commentators agree that the Court is unlikely to replicate its \textit{Geduldig} analysis in the context of race; the Justices will recognize that discrimination along a race-linked characteristic such as sickle cell anemia or skin color—or tribal membership—is racial discrimination.\textsuperscript{154}

More significantly, the statutes in \textit{Mancari} and \textit{Geduldig} are actually quite different. The two statutes are similar in that they divide the world into two analogous categories (one composed of a subset of a suspect group and the other of everyone else), but the method of division is dissimilar. The statute in \textit{Geduldig} did not set up a class based on one suspect and one nonsuspect feature. Rather, it concluded that the sole basis for discrimination in the disability statute was pregnancy—"an objectively identifiable physical condition with unique characteristics"—and that gender played

\textsuperscript{153} At the time the Court issued \textit{Geduldig}, the EEOC guidelines recognized that pregnancy discrimination is gender discrimination. \textit{See} 29 C.F.R. \textsection 1604.10(b) (1972). After \textit{Geduldig}, the Court extended its reasoning from the equal protection clause to Title VII, see General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and this extension prompted Congress to enact the Pregnancy Discrimination Act, which specifically provides that in the Title VII context pregnancy discrimination is gender discrimination, see 42 U.S.C. \textsection 2000(e)(2) (1988); during the debates, the Court's analysis in \textit{Geduldig} came under heavy criticism. \textit{See} H.R. REP. NO. 948, 95th Cong., 2d Sess. 2 (1978), \textit{reprinted in} 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750. Even before the Pregnancy Discrimination Act, moreover, the Court itself limited its \textit{Geduldig} rationale by explaining that it is gender discrimination to single out pregnancy for the purpose of imposing burdens, as opposed to the purpose of denying benefits. \textit{See} Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In light of this assault, \textit{Geduldig} may still be good law, but the Court is unlikely to replicate its style of analysis in other areas.

\textsuperscript{154} \textit{See} Kirp & Robyn, supra note 152, at 951; Newton, supra note 38, at 286; Ruther.glen, supra note 150, at 205–07; Comment, supra note 150, at 1553–54; Comment, supra note 152, at 447.
no defining role in the statutory class at all. True, "only women can become pregnant," but that fact is merely a biological coincidence: the statute draws its line based wholly on a physical condition without using gender.

To make the Court's argument in *Mancari* parallel, one would have to interpret it in the following way: the regulation does not use race as a distinguishing feature at all; its sole basis of discrimination is tribal membership—a political qualification comparable to the physical condition of pregnancy. The *Mancari* Court may have intended to advance this distinction. But if it did, it completely misconstrued the regulations before it. Those regulations, like most federal statutes, contained two separate and independent requirements: first, membership in a tribe; and second, a certain quantum of "Indian" blood. Unlike a statute singling out pregnancy, in which gender-specificity is a biological coincidence, the statutes singling out Indians are quite explicit about their racial requirements. The *Geduldig* category is based on a nonsuspect feature, the *Mancari* category on a combination of suspect and nonsuspect features. As a result, at a maximum, all that *Geduldig* means for Indian law is that the government may single out Indians if the definition of Indian omits any reference to blood quantum. Thus,

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155. 417 U.S. at 496 n.20. The Court noted that the program "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy"—from compensation. Id.

156. Id.

157. The Court made this interpretation of *Geduldig* explicit in a later case, *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Based on women's greater life expectancy, the city made women contribute more to an employee pension plan. The Court struck the plan down and distinguished *Gilbert* and *Geduldig*: "On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability." 435 U.S. at 715.

158. To be a tribal member, one must usually possess a certain quantum of tribal blood, but, the Court might maintain, tribal blood is not a racial feature—only "Indian" blood is. To have tribal blood, one must have Indian blood, but the Court might insist that that fact is wholly a biological coincidence.

159. Unlike *Geduldig*, then, the suspect feature is not merely a coincidence; it is written into the law. *Geduldig* claimed that the statute was gender-blind, focusing wholly on disabilities: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-97. So, if by some miracle, a man should ever become pregnant, he would presumably fall into the contested category because he is a pregnant person. By contrast, under the regulations in *Mancari*, if a non-Indian should ever become a tribal member, he still would not fall into the category "Indian" because he lacks the right genetic material.
the only definitions of Indian that will survive are those that confine themselves to the nonsuspect characteristic of tribal membership.\footnote{160}

But Geduldig should not mean even that much, because tribal membership should itself be a suspect classification. Virtually all tribal membership qualifications themselves contain two requirements: a political affiliation and a tribal blood quantum.\footnote{161} On its face, the tribal blood quantum—based as it is on genetic material—should be suspect. If so, tribal membership is itself based on one suspect and one nonsuspect classification. Mancari, by contrast, apparently assumed that tribal blood could not be a racial element—that the only possible "race" is the general group "Indians." Such an assumption reflects a persistent ethnocentric myopia: the general category "Indian" is a non-Indian innovation and rests on racist assumptions. When Europeans first arrived in the Americas, the aboriginal inhabitants existed in a great number of groups with a huge variety of cultures and physical appearances. Confronting this variety, the Europeans saw primarily unity—the "Indian," not members of various tribes—because the most important feature of any non-European was that he was not European, not a member of a civilized race.\footnote{162}

The aboriginal inhabitants, on the other hand, were acutely sensitive to tribal differences. The individual tribes tended to call themselves "the people" or "the real people" or a similar phrase—implying that all other peoples, Indian and non-Indian alike, were fundamentally similar in being not "the people."\footnote{163} Only in recent decades have large numbers of Indians begun to identify themselves as Indians and recognize common bonds with other Indians, and they have done so only in response to the continuing tendency of

\footnote{160. The Title VII "sex-plus" cases offer an analogy. The government may classify on the basis of a "neutral" physical feature unique to one gender, because the classification is on the basis of that physical feature alone. Government may not, however, classify on the basis of a feature shared by both genders and then treat men differently from women with regard to that feature; that classification would be based on one suspect and one nonsuspect feature. See K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 38–40 (1974); Thomas, Differential Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis, 60 OR. L. REV. 249, 251 (1981); Comment, supra note 150, at 1555.}

\footnote{161. See, e.g., BLACKFEET CONST. art. II, amend. III §§ 1 (a)–(c) (1962); CHEYENNE RIVER SIOUX CONST. art. II, § 1 (1935); COLORADO RIVER INDIAN CONST. art. II, § 1 (1937); HOPI CONST. art. II, §§ 1–2 (no date); MARICOPA AK-CHIN ARTICLES OF ASS'N art. III, §§ 1 (a)–(d) (1970); 1 AMERICAN INDIAN POLICY REVIEW COMM’N, 95TH CONG., 1ST SESS., FINAL REPORT 108–09 (Comm. Print 1977).}

\footnote{162. See R. BERKHOFER, supra note 127, at 3–31.}

the dominant culture in general and federal policy in particular to lump them together.\textsuperscript{164} Even today, however, most Indians still think of their identity fundamentally in tribal terms and only secondarily in pan-Indian terms.\textsuperscript{165}

Thus, the Court's assumption that tribal categories could not be racial is itself racist, refusing to see differences where they exist. On the other hand, the question whether tribal blood quantum requirements \textit{actually are} racial is slightly harder than it might at first seem, because of the place of the tribe within various Indian cultures. Plainly, the class defined by tribal blood is a genetic category, but is it the kind of genetic category that we would consider racial? If \textit{Geduldig} is not good law, the answer is easy: just as pregnancy is one of the defining characteristics of gender, so tribal blood is one of the defining characteristics of the "Indian race." Discrimination based on tribal blood is therefore discrimination based on Indian blood. If \textit{Geduldig} is still good law, however, that answer will not serve: tribal blood quantum requirements do not specifically state that one must be an Indian; that fact is merely a biological coincidence, and Congress may not have intended to invoke the category "Indian" at all.

So it appears we must consider whether tribal categories are themselves racial—or, more broadly, whether they bear sufficient "indicia of suspectness" to qualify for strict scrutiny, along with race, national origin, ethnicity, and similar classifications including discrete and insular minorities.\textsuperscript{166} The answer may vary with who is using the tribal membership definitions: tribes may well employ blood quantum requirements in nonsuspect ways, but the same is not true of the government. In the late twentieth century, tribes generally develop their own membership requirements, and whether their use of blood quantum is racial seems to involve difficult cross-cultural comparisons. The dangers posed by race under the equal protection clause are those generally associated with the thought-world of colonialism and imperialism, of European attitudes to-

\begin{itemize}
\item \textsuperscript{164} See id. at 126.
\item \textsuperscript{165} See id. at 144--45.
\item \textsuperscript{166} See Bernal v. Fainter, 467 U.S. 216, 219 n.5 (1984) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)); Frontiero v. Richardson, 411 U.S. 677, 682 (1973); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). These indicia refer to the risk of oppressive treatment of the minority, not to biological considerations. But even if the clause did use a biological definition, biologists categorize Native Americans into at least three racial groups, so that a law differentiating between Aleut and Navajo would be drawing a line between members of two different races. See B. FAGAN, supra note 125, at 92–95.
\end{itemize}
wards "lesser peoples." Indians often feel loyalty to their tribe and may feel hostility toward other tribes, but at least for some groups these feelings may grow less out of something we would call "racism" and more out of something akin to family or clan ties—a different constellation of ideas and perhaps less suspect. In any event, tribes are not subject to the equal protection clause at all, since they are preconstitutional bodies. They are subject to the statutory constraints of the Indian Civil Rights Act, which includes an equal protection component, but courts have concluded that it should be interpreted loosely, with an eye to preserving tribal culture.

Tribal use of blood quanta therefore may or may not be suspect. Federal use, however, presents a very different question. Congress and the agencies use tribal membership in two different ways. First, they sometimes draw a line between members of all recognized tribes and members of unrecognized tribes, as did the BIA preference at issue in Mancari. Second, they may draw a line between different recognized tribes, as do treaties with particular tribes. Either use should be suspect.

To begin with the latter distinction: ironically, the dominant culture's belief that Indians are all the same suggests that distinctions between tribes should not be suspect, because there is not as much history of racism toward particular tribes as toward Indians in general. In fact, however, such a view is an oversimplification—true in general but ignorant of different strains in white attitudes toward the Indians. As the country expanded, a belief grew up on

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170. See Smith v. Confederated Tribes, 783 F.2d 1409, 1412 (9th Cir.) cert. denied, 479 U.S. 964 (1986); Tom v. Sutton, 533 F.2d 1101, 1106 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653, 656-57 (10th Cir. 1974).

171. At the outset, one might argue that federal incorporation of a tribal definition of tribal membership presents a state action question. Since the government does not determine the tribes' qualifications for membership, it is the tribe and not Congress that is discriminating. Hence there is no state action and no violation. But the government's involvement is much more direct than this analysis suggests. Once the tribe has offered its definition, the government adopts it as its own and will take action of its own on that basis. In Mancari, for example, the BIA and not the tribe denied a preference to an employee on the basis that he had not the requisite blood quantum.
the frontier and in Washington that different tribes had different inherent characteristics. One need only think of the stereotypes, still with us, of the savage Apache and the peaceful Hopi. And the existence of tribes as "discrete and insular minorities" poses the constant risk that those stereotypes could be pushed into service again. We may therefore need a dual standard for tribal blood quantum requirements: within tribal culture, they are clan-based, but within the dominant culture they describe discrete and insular minorities.

The other distinction—that between members of recognized and unrecognized tribes—superficially turns not on blood quanta but on the fact of recognition. Blackmun may have intended this distinction when he contrasted "the racial group Indians" with "members of recognized tribes." But this contrast merely pushes the analysis back a step. The two large groups—recognized and unrecognized tribes—are themselves composed of individual tribes. In drawing a line between recognized and unrecognized tribes, the government distinguishes between individual tribes, both when it first decides whether to recognize a particular tribe and when it later decides to treat recognized tribes differently from unrecognized tribes. Or, to put the matter another way, the category "members of recognized tribes" is itself a combination of a suspect and a nonsuspect class—membership in a tribe, with its blood quantum requirement, and recognition of that tribe.

At this point, however, the analysis may have begun to take on an air of unreality. Surely those familiar with Indian law do not

172. Cf. United States v. Joseph, 94 U.S. 614, 616–17 (1876) (holding that Pueblos were not Indians under the Trade and Nonintercourse Act because they were "peaceable, industrious, intelligent, honest, and virtuous people" and so were "Indians only in feature, complexion, and a few of their habits"). By comparison, the cultural and genetic differences between the "Celtic Irishmen" of the nineteenth century, see Strauder v. West Virginia, 100 U.S. 303, 308 (1880)—believed to be lazy, criminal, and shiftless—and the lowland Scots—believed to be thrifty and hardworking—are tiny, but the nineteenth century attitude that "No Irish need apply" is a classic example of the kind of ethnic bigotry that the equal protection clause forbids.

173. I am indebted to David Vann, Cornell Law School '90, for this point.

174. Professor Newton has also observed that the Court should treat tribes as discrete and insular minorities because they are "vulnerable to and excluded from the majoritarian political process." Newton, supra note 38, at 287. Newton does concede that tribal status does not share one typical feature of suspect classes—unalterability—because tribal members may leave their tribes. That observation, however, focuses on only the Indian side of the analysis: non-Indians are inalterably fated by birth not to be tribal members, because of the tribal blood quantum requirements. After Bakke, therefore, the Court would presumably view tribal membership as immutable.

believe that in enacting general legislation, Congress thinks about all the individual tribes out in that great land of ours, carefully noting which are recognized and which not; rather, it thinks about Indians as a general group. But this unreality grows out of Geduldig's silliness: we are not allowed to believe that, when Congress uses a trait that is a defining characteristic of a suspect category, it necessarily invokes the suspect category. If we were allowed to believe that a distinction based on tribal blood is a distinction based on Indian blood, then the analysis would be easy: in using tribal membership, Congress is singling out Indians as such. Thus, regardless of the level of generality, blood requirements should be suspect. At the tribal level, they describe discrete and insular minorities, and at the pan-tribal level, they describe a race.

We are, then, left where we started before Geduldig appeared on the scene. As long as federal definitions of "Indian" include a blood requirement, they facially involve a suspect characteristic; if they combine it with a political affiliation requirement, the resultant class is facially drawn on the basis of one suspect and one nonsuspect characteristic. Geduldig does not address this question, but the question should not be hard to answer. Analogous categories include left-handed African-Americans, Asian-American citizens of California, and Latino government employees. True, the category does not include all members of a particular racial group, but then neither did the categories "black schoolchildren" in Brown, or "Japanese-American residents of the West Coast" in Korematsu v. United States,176 or "nonminority applicants to medical school" in Bakke. In all of these, the government had singled out individuals because of their race; it is irrelevant that other members of their race were not so singled out. If the government could discriminate against any given suspect group simply by subdividing the group with the aid of nonsuspect characteristics, the protection of the equal protection clause would quickly come to have little meaning. 177 It cannot be, then, that the simple addition of a nonsuspect trait to a suspect one yields a nonsuspect class. If the addition of the "political" requirement will save the federal definition of "Indian," it must be for some other reason.

176. 323 U.S. 214, 217 (1944). The Court in Korematsu did uphold the classification, but only after applying strict scrutiny.
177. See Comment, supra note 150, at 1557. After an initial stutter-step, the courts have had little difficulty reaching exactly this conclusion in Title VII "sex-plus" cases, which involve a less suspect classification than race. See id. at 1555.
d. As Used in Federal Statutes and Regulations, the Category "Indian" Has a Racial Component, but Because the Government Did Not "Intend" That Component, It Is Nonsuspect

One such reason might be that although the government may use blood quantum requirements, its goal is not racial. Again, one can find some evidence for this view in Blackmun's polytextured opinion: "Here the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." This passage seems to rest on the traditional distinction between purpose and knowledge or between primary and secondary intent. Since the government used race on the face of the statute, clearly it intended to employ the category, but its animating goal may have had nothing to do with race. Rather, it may have used the racial class as a means to achieve the political goal of executing its fiduciary obligation. That goal, in a sense, justifies the use of race.179

If the Court did mean to advance this argument, however, it stands in dramatic contrast to virtually all of modern equal protection clause doctrine. The whole idea behind strict scrutiny is that the government may not use race as a means to advance just any goal; it may do so only to achieve a compelling state interest in the narrowest way possible. The mere fact that the goal is unconnected

178. 417 U.S. at 554.
179. Other cases offer similar language: "[T]he peculiar semisovereign...status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians,'" Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); "[D]isparate treatment of [an] Indian [individual] is justified because it is intended to benefit the class of which he is a member," Fisher v. District Court, 424 U.S. 382, 391 (1976). The so-called "secondary effects" cases under the first amendment offer an analogy. In those cases, the Court held that some content-based regulations of speech should not receive strict scrutiny if the government's goal is not to restrict the content of speech as communication but to limit the "secondary effects" associated with certain categories of speech as a physical event, then the government cannot be said to have abandoned its "paramount obligation of neutrality." For example, the Court upheld "anti-skid row" ordinances that prevented a concentration of pornographic theaters, because the state's goal was to restrict not pornography but activities that pornography brought in its wake, such as neighborhood deterioration and crime. See Young v. American Mini Theatres, 427 U.S. 50, 71 n.34 (1976); see also City of Renton v. Playtime Theatres, 475 U.S. 41 (1986); cf. Boos v. Barry, 485 U.S. 312, 320 (1988) (three-Justice plurality) (extending secondary effects analysis to political speech but reaffirming that secondary effects are those that have nothing to do with the content of speech). By analogy, the Mancari Court might have meant that the government's goal was to use race as a way to effectuate a "secondary effect" connected to one particular race—the government's fiduciary obligation.
to race is not enough; the goal must also be of the highest magnitude. As the Korematsu Justices announced at the start of the modern era: "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." The reasons for this rule are well-established: even if no racial goal is immediately apparent, one may be hidden and strict scrutiny will help to "smoke it out"; racial classifications, regardless of their motivation, maintain and create stigma; and the use of racial classifications by nonminority legislators, even if not based on racial goals, may nonetheless reflect "racially selective sympathy and indifference."

It is possible that much of Title 25 would survive strict scrutiny, but in order to know, the Court would have to conduct a searching and careful investigation of each provision. That option is open to the Court, and the next section will consider it. But at this point, the Court has not yet taken it up, and the reasons seem plain. Clearly, the Mancari Court wanted to uphold Title 25, but if it had held that the category "Indian" was subject to strict scrutiny, it would have been deluged by cases challenging each and every provision. Even if the Court were willing to face that explosion of litigation, it would have risked trivializing the strict scrutiny standard if it had routinely upheld Indian statutes by finding a compelling state interest. And, as this Article will suggest, the government might have offered some particular state interests that would have proved embarrassingly inconsistent with the Court's post-Bakke view of the meaning of the equal protection clause.

180. Korematsu, 323 U.S. at 216 (emphasis added).

181. This function of the strict scrutiny test is well illustrated by its absence from the Court's handling of Indian equal protection cases. In United States v. Antelope, 430 U.S. 641, 645-47 (1976), for example, the Court casually upheld the Major Crimes Act, 18 U.S.C. § 1153 (1988), on the grounds that it was based on a political classification, without any serious investigation of the intent of its drafters. If the Court had looked a little closer, it might have discovered racism coloring the whole legislative process. Congress adopted the Major Crimes Act as a reaction to Ex parte Crow Dog, 109 U.S. 556 (1883), which held that only tribal bodies could punish an Indian for murdering another Indian on Indian Country. The decision created an outcry across the nation: as the tribes could never create more than "savage justice," the United States should extend the jurisdiction of the federal courts to major crimes committed by Indians on Indian Country. See Newton, supra note 38, at 212.

The Court has not yet adequately explained its repeated assertions that Indian law raises no serious issues under the equal protection clause. Title 25 rests on racial blood quantum requirements. No amount of handwaving about Congress's broad article I powers over Indians or the political component of the category “Indian” can make that reality go away. Nonetheless, the Court has considered the right facts; it just has not attributed the right legal significance to them. Indian tribes are political, sovereign bodies, and Congress therefore has a special relationship with them, reflected in its article I powers. If the equal protection clause were fully applicable to them in the same way that it applies to every other group, those facts could still not save Indian law from the charge of racial discrimination. But the existence of sovereignty might suggest a different conclusion: the tribe, not Congress and not even the Constitution, still sets the fundamental norms governing members of the tribe. The equal protection clause has a special and different meaning in Indian Country.

III. ALTERNATIVES

If the Court were to acknowledge that Indian law does involve suspect classifications, it would be faced with four alternatives. First, it could hold that the equal protection clause is not incorporated against the federal government when it comes to Indian tribes. In that sense, Indians would be like aliens: the equal protection clause involves one standard for the central government and another for the states. This Article will argue that the same reasons that support incorporation of the clause in federal treatment of other minorities would support incorporation of the clause in federal treatment of Indians as well. Second, it could apply strict scrutiny to Indian law. This alternative, this Article will submit, would involve invalidation of much of the field, because no compelling state interest exists for Title 25 that is consistent with the Court's value commitments under the equal protection clause. Third, the Court could revise its equal protection clause values and doctrine to allow room for benign, permanent uses of race. This option is part of a broader critique of the Court's work, and this Article will not address it at any length. Even if such a revision is a good idea, the Court does not need it to hold that the government may use race benignly in the special case of the Indians, because of the fourth alternative: Indians are a categorical exception to the requirements of the clause. This Part will consider the first three options and the next Part will propose the fourth.
A. No Reverse Incorporation

One path to defending Title 25 begins with the observation that the equal protection clause is located in the fourteenth amendment, which by its own terms applies only to the states. The Court has held that the clause does in general apply to the federal government through the fifth amendment, because it would be “unthinkable” for the federal government to be under a lesser obligation than the states. But in fact, the federal government sometimes is under a lesser obligation: state classification on the basis of alienage, for example, is subject to strict scrutiny, but federal immigration policy is not. Analogously, one might argue, the substance of the equal protection clause should not be reverse incorporated against the federal government when it comes to Indians. Certainly, that conclusion would accord with certain general historical features of Indian law. Historically, the federal government has exercised a dominant role in the field, and the states have largely been preempted from developing a separate Indian policy. And for many decades, Indian affairs were comparable to foreign affairs, like immigration policy an area in which the federal government has traditionally held broad power.

This course presents several disadvantages. The first is practical: it would still hold the states subject to the undiminished requirements of the equal protection clause, so that they may never single out Indians absent a compelling state interest. Although the federal government has in the past preempted the field to some extent, that preemption has never been complete; states have always exercised some role. If the reservation system is benign, then state legislation consistent with it is also benign. But if the clause fully applies to the states, the Court must strike all such legislation

183. See supra note 8.
184. See Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976). In addition, federal government affirmative action, as of last term, is subject only to intermediate scrutiny, whereas state affirmative action is subject to strict scrutiny. See supra text accompanying notes 27-28. This difference, however, is not significant: the Court assumes that the equal protection clause does apply to the federal government; the only question is which standard of review is appropriate. Analogously, federal Indian-specific statutes might be subject only to intermediate scrutiny, but they should still receive some heightened scrutiny. The Court would still have to point to some substantial state interest to justify Title 25, and as a later section will consider, that course does not seem promising.
185. See infra note 337.
down.\textsuperscript{186} If there is another path, then it would seem advisable to pursue it.

The second problem is analytical, for in terms of equal protection concerns, the Indians today are not comparable to aliens. The Court has explained that the special federal power over aliens derives from the sensitive nature of immigration policy. Indeed, immigration policy implicates concerns comparable to those involved in political questions: "Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."\textsuperscript{187} Immigration policy, then, is not subject to the full substance of the equal protection clause for the same reasons that political questions are not. But the Court has held that the reasons that once made Indian affairs a political question no longer do so in every case, and in particular do not bar review of federal action under the equal protection component of the fifth amendment.\textsuperscript{188} This conclusion makes good legal sense: although semisovereign, Indian tribes do not act in the community of nations and are not a threat to American security or flexibility in dealing with other nations.\textsuperscript{189}

As this Article will elaborate,\textsuperscript{190} moreover, congressional decisions about Indians implicate the risk of racist oppression in a way not faced by aliens. While aliens may return to their home countries or seek protection while here under treaties procured by their national governments, Indians and tribes are fully subject to federal jurisdiction. They have no place to retreat. It would be just as "unthinkable" that Congress could adopt racist legislation against its

\textsuperscript{186} If the federal government does have the power to single out Indians, then presumably the states would be able to single out the Indians if authorized by federal legislation. But absent such an enabling law, the states could not act on their own initiative to promote tribal government.


\textsuperscript{188} See supra text accompanying notes 80–81.

\textsuperscript{189} The Court has explained that tribes are not comparable to foreign nations for purposes of political question doctrine. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 249 (1985).

\textsuperscript{190} See infra text accompanying notes 309–310, and Part IV(C)(3).
Indian citizens as against its African-American citizens. Tribal Indians are both internal and external to the United States: they owe allegiance to tribes, but they are also subject to the full jurisdiction of the federal government. Any argument that the clause should not be incorporated against the federal government takes account of the externality of tribal Indians but not their internality.

A slightly different argument would suggest that the clause should be incorporated against the federal government but in a modified way, to allow for tribal self-government. Congress would thus be debarred from passing legislation that would oppress the Indians, but could adopt legislation that would promote tribal self-determination. As a practical matter, this Article will support precisely that rule, but from a slightly different basis: it is contemplated by the equal protection clause itself. There are two advantages to the latter basis. First, it would apply the rule both to states and to the federal government, so that the states could promote tribal government as well. And second, it makes better sense. The decision not to reverse incorporate the clause as to the Indians essentially rests on the notion that the federal and state governments should take different moral positions toward the tribes—that Congress may promote tribalism but that the states must not. But if the norm of racial equality does debar states from protecting tribal self-government, and if that norm should generally be applied to the federal government, it is unclear why it should not be applied to Congress in the case of the Indian as well. Once upon a time, there was an answer: Indian affairs were akin to foreign affairs and so were a political question. But that situation is no longer the case.

B. Possible Compelling State Interests

Any compelling state interest that would validate Title 25 must meet at least three requirements. First, it must explain why the federal government may treat the Indians differently from all other races. Second, it must be consistent with the Court’s dominant mood of liberal individualism in equal protection cases. In addi-
tion, any compelling state interest will justify only the "least restrictive means"—rules that use race no more than absolutely necessary to accomplish their goal. As a result, the contours of any state interest must be such that the means/ends "fit" between it and Title 25 is exact. None of the most likely candidates adequately fulfill these requirements.

Finally, even if the Court found a compelling state interest to justify all or most of Title 25, it would then painstakingly have to go through the volume to make sure that the proposed interest—and not racism—was the actual purpose of each and every provision.\textsuperscript{193} Under this scrutiny, much of the Indian law that originated in the nineteenth century would have to fall. Congress might re-enact that legislation for a nonracist compelling state interest, assuming that it could find one, but then again it might not.\textsuperscript{194}

1. The Fiduciary Obligation

The fiduciary obligation may be the most prominent doctrinal difference between the case of the Indians and all others. As John Marshall explained, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."\textsuperscript{195} The fiduciary obligation makes the Indians unique: the Court has never recognized that the federal government bears a special legal relationship to any other minority group.

The problem with using the fiduciary relationship as a compelling state interest, however, is that standing alone it does not explain anything. Why does the federal government owe the Indians so much? If the answer is the theft of the continent, systematic destruction of a culture, or other historical wrongs, then we must consider those wrongs directly. If the answer is a special fondness for the Indians as a people, a paternal affection for the Great White Father's Red Children, then the Court would presumably condemn that goal as "discrimination for its own sake"—not only not compelling but positively illegitimate.\textsuperscript{196}


\textsuperscript{194} To take only one example, most of the removal statutes would fall because they were based upon the racist "theory of virtues and vices." See B. DIPPIE, supra note 51, at 25. Anglo-Saxons and Indians, the theory held, each had their racial virtues and vices, but in proximity to the former, the latter lost their virtues and retained their vices. As a result, they had to be moved beyond the Mississippi, away from contact with civilization. Id. at 60–61.

\textsuperscript{195} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

2. The Ethic of Promise-Keeping

A similar flaw infects another possible compelling state interest—the ethic of promise-keeping. The Indians are unique among the races of the United States in that the federal government has made treaties with them guaranteeing them special treatment—and in the frequently quoted words of Justice Black, "Great nations, like great men, should keep their word."197 Certain jurisprudential theories aside, however, promise-keeping is never an absolute value in constitutional law, nor should it be when in tension with other constitutional values. Suppose, for example, that the federal government had solemnly promised the antebellum Cherokees that they could keep their black slaves and the federal government would return escaped slaves. Surely, if the government then made good on its pledge, the "ethic of promise-keeping" would not justify such a blatant violation of the Civil War amendments. If the reservation system really does rest on racial classifications, then, a mere promise would not save it. Concealed behind the promise-keeping argument may be a conviction that the promises were good ones, promises that we ought to keep because of their particular content. But to assess that claim, we must directly consider their substance, not their form as promises.

Thus, racial classifications may permeate the content of the federal promises; they may also permeate the decision to make such promises. Africans were made no promises when they were taken from Africa as slaves; American Indians were, when large portions of their land and sovereignty were taken. A part of the reason for this difference is that the Native Americans were a real military threat, and the government used treaties to pacify them.198 It is likely, however, that racial stereotypes entered into the decision to accord different treatment as well. Indians were perceived as fierce warriors and fearsome opponents; blacks were perceived by many as docile, lazy, and good-natured, by others as lustful and hate-filled but lacking intelligence and guile. There is often a hint of respect in writings about Indians that is virtually always lacking in writings about blacks.199 This stereotyped vision of the two races may have prompted the federal government to treat the Indians as "more equal" by extending them the dignity of formal agreements.

198. See 1982 HANDBOOK, supra note 6, at 55.
199. See B. DIPPIE, supra note 51, at 82-94.
3. Cultural Pluralism

Indian separatism also promotes cultural diversity. By maintaining a separate existence, Indians contribute richness and variety to the national fabric in the same way as other distinct groups, such as Japanese-Americans, Gaelic speakers, and the Amish. The government has an interest, perhaps a compelling one, in seeing that these groups have the opportunity to express their heritage, for their own benefit and the benefit of the nation. Cultural pluralism may even have some constitutional protection under the rights to religious liberty, self-expression, and association.\(^\text{200}\)

For all other groups, however, cultural pluralism also has inherent limits. Within a liberal individualist framework, two values go into making a rich, diverse state: the state should be composed of differing ethnic, religious, and cultural groups, but these groups must all yield their distinct identity sufficiently to allow the nation to function.\(^\text{201}\) In particular, all the various groups in the nation must be united under one civil government, not separated into racially or ethnically or religiously defined governments.\(^\text{202}\) They maintain their existence as private associations, not as semisovereign bodies. This restriction on cultural pluralism goes hand in glove with another: the various minority groups may not use government to obtain special advantages. If private individuals, through a series of independent choices, decide to protect their cultural identity, well and good; that course is not only constitutionally allowed, it may be constitutionally protected. But those individuals may not recruit the heavy hand of the government to promote this kind of group formation. The state has an interest in allowing cultural diversity, not in enforcing it. Indian law rather dramatically crosses that line. It allows Indians to form separate governments, and the federal government offers them a variety of inducements to pursue that course, extended only to those individuals with the right genetic material.

\(^{200}\) See Clinton, \textit{supra} note 19, at 1060–64.

\(^{201}\) See, e.g., K. KARST, \textit{supra} note 47, at 81–98.

\(^{202}\) This is not to say that individuals may never be subject to more than one government; states are a standing counter-example to any such principle. Rather, it is intended to suggest that liberal individualism generally rebels at the idea of granting governmental status to a group defined along ethnic, racial, religious, or cultural lines because of the risk of animosity and anti-individualism.
4. Reparations for Historical Dispossession

Perhaps the most intuitively obvious way to distinguish the Indians begins with the common claim: “They were here first.” In other words, the conquest and dispossession of the Indians was either entirely unjust or so inherently suspect that the federal government is justified in allowing the Indians to retain some distinctive status as the original masters of the continent. The wrong in this view consists of the theft of two elements of precontact Indian life—the land and sovereignty. All Indian tribes lost some land. Many lost all of their sovereignty; all lost total sovereignty over part of their territory; some retain some sovereignty, but with distinct limits, over the rest. It is appropriate that much of Indian law involves distinctive forms of Indian self-government and landholding.

This argument is dear to the hearts of virtually all those who see themselves as advocates of Indian interests, and this Article does not mean to debunk it. In fact, this argument does justify the special treatment of Indians, but not when cast as a compelling state interest in equal protection analysis. Thus described, it suffers from several flaws. One initial but hardly fatal difficulty is that it tends to lead to rather extreme conclusions—conclusions that do not fit with Title 25. Its logical direction is not to justify the reservation system, but to maintain that the United States should get out of North America and leave the continent to its aboriginal inhabitants. That claim may or may not be correct, but it is not a justification for Title 25.

The claim that this argument would lead to something more radical than Title 25, however, is hardly fatal as an intellectual matter. So assume for a moment that the Court might be prepared to face the practical consequences and mandate them in the name of principle. The historical dispossession argument still does not adequately distinguish Indians from other racial groups, particularly

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203. It might be fatal as a practical matter because the Court is unlikely to accept such consequences. The Court, moreover, is unlikely ever to recognize the underlying claim that the conquest was unjust. Ever since John Marshall’s initial decisions in the area, the Court has been reluctant to concede the illegitimacy of the conquest because, it argued, such a concession might suggest the illegitimacy of the Constitution and the Supreme Court itself. See Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 588–89 (1823). Judicial review is based on the idea that the Constitution is the supreme norm of legitimacy, so in reviewing legislation the Court could hardly claim that the Constitution is itself illegitimate. The claim, however, that an illegitimate conquest entails an illegitimate Constitution is facile at best. The Constitution is designed to provide the governing structure for a group of people, not for a particular territory. “We the People” would be “We the People” in the thirteen colonies or on ships in the middle of the Atlantic.
African-Americans. The historical dispossession argument essentially rests on the claim that because the federal government stole land and sovereignty from Indians in the past, the federal government today owes land and sovereignty to contemporary Indians. But think of the elements of life stolen from Africans in the past:

- membership in a society not dominated by members of another race, a society in which blacks did not have to struggle with the knowledge that most of those around them regard them as different;
- the inheritance of a traditional culture shaped and developed by their own ancestors, rather than forced introduction into a foreign culture with foreign ideas, concerns and desires; and, like the Native Americans, land and self-government. By analogy, if the federal government may offer the Indians a separate territorial base in return for past thefts, it should be able to offer African-Americans the same amends.

The Court's liberal individualist jurisprudence clearly could not accommodate such a remedy. The Court's affirmative action cases have acknowledged that the government may use race-conscious measures to make amends for past wrongs against a race, but those wrongs are of a distinctive character. The chief historical evil is that blacks were denied an equal opportunity to participate in this culture, on this land-base, under the rules of this government. They were denied, in other words, the right to assimilate effectively. And the only race-conscious remedies allowed by the Constitution are those designed to bring African-Americans ever more securely into the fold, to remove the lingering effects of that past exclusion, to create a truly color-blind society. The Court never even consid-

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204. It is true that much of the dispossession of black slaves was done by private slave-traders, while much of the dispossession of the Indians was done by the federal government. This difference, however, is more apparent than real. The slave trade could never have existed without slavery, and slavery could never have existed without the legal sanction of the federal government and its predecessor governments. In the realm of Indian affairs, moreover, much if not most of the dispossession was prompted not by the desire of the federal government itself but by private parties near the Indians. The government often tried to keep the border quiet by restricting interaction, but in resolute defiance non-Indians flouted treaty provisions and created violent incidents in Indian Country. As a result, the federal government felt constrained to take retributive action against the Indians (it was never a viable political option to punish the non-Indians) by taking more land and sovereignty.

205. The Indians, too, suffered such wrongs, and one could easily justify remedial affirmative action measures for Indians. Under this theory, the wrong done them was not the deprivation of land and sovereignty but particular abuses during the conquest—racially motivated violence, theft of land with recognized title, routine treaty violations, and the whole range of exclusionary practices. Such a view harks back to Marshall's early view that the principal harm done the Indians was not the denial of self-govern-
ers the other losses suffered—the loss of land, culture, and government—presumably because the remedies would involve a permanent recognition of difference, just as Indian reservations do. Indeed, the recognition of separate African-American nations would presumably call up for the Court its nightmare vision of permanent, estranged racial blocs struggling against each other.

Thus, before it writes a “black” opinion or an “Indian” opinion, the Court has already sorted them into two entirely different categories. In the realm of Indian concerns, the ideal is one of peaceful coexistence in two overlapping but significantly different political communities; in the realm of black concerns, the ideal is one of eradication of differences within one overarching politico-cultural enterprise. Blacks may have been robbed of the possibility of a separate existence, but that harm is all in the past now. They must face forward and cast their lot with the nation, even if involuntarily propelled in that direction by the weight of the equal protection clause.

The analogy between wrongs done to African-Americans and Native Americans is not, however, exact; there are some differences between the two groups, and the Court might try to exploit these to allow for different treatment. For one thing, Indians have maintained their sovereignty in somewhat modified form across the generations, while African-Americans lost theirs. As a result, one might argue, the best hope of the blacks lies in merging, the best hope of the Indians in separation. This characterization, however, rests on wild historical exaggerations and shaky moral underpinnings. During the era of assimilation, Indian tribes lost virtually all of their practical sovereignty, and during the early twentieth century they lost much of their traditional culture. During the decades before and after emancipation, African-Americans lost much of their distinctive culture but retained much as well. During the latter half of the twentieth century, both groups have sought to revive and reconstruct an ancestral culture. Many young Indians on Indian Country today are “more Indian” than their grandparents.206 The practical difference between the two groups, moreover, seems, if anything, to suggest an obligation to make greater reparations for

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206. See S. CORNELL, supra note 163, at 187–90.
blacks, precisely because the harm was greater. Slavery more effectively and savagely destroyed African-American uniqueness, whereas the reservation system was somewhat more congenial to the maintenance of a separate Indian existence.

Another difference is that Indians exercised their sovereignty here, and African-Americans exercised their sovereignty in Africa. At most, however, this distinction leads to the conclusion that the federal government may undertake voluntary colonization schemes to return African-Americans to Africa—surely not a proposal on which the Court would bend a kindly eye. And in any event, it is unclear that the distinction should make any difference at all. People who attribute significance to the fact of an ancient Indian sovereignty over this continent seem to do so on the principle that first in time makes first in right. Under this argument, the Indians have a claim to sovereignty that is superior to the claim of the federal government, whereas the African-Americans have at best a claim that is comparable. Recognizing a superior claim is a compelling state interest; recognizing a comparable claim is not.

The most potentially troubling criticism of this idea arises from its easy acceptance of the principle that first in time really does make first in right as between different nations and cultural groups. Nativists in this country made the same argument about restricting immigration: this country was made for Anglo-Saxons or Northern Europeans or Protestants or English-speakers, and since they were here first they could exclude later, different groups. This view has since been generally rejected, primarily on the grounds that it

207. Some also ascribe significance to it because of the nature of the Indians' religious attachment to this continent in particular. And it may be true that the Indians' connection to the land is more site-specific than that of other groups. See Williams & Williams, Volitionalism and Religious Liberty, 76 CORNELL L. REV. — (forthcoming May 1991). Title 25, however, does not “fit” this compelling state interest well; it does allow Indians certain reservations of land, but many of the most religiously significant sites are located off-reservation on federal land that the government has begun to develop. African-Americans, moreover, have now been here for a long time, too. Although their attachment to this continent may not equal the Indians' extreme identification with it, moving them to Africa would be a severe dislocation. Just as non-Indians have been here for many generations and their “in-placeness” must be taken into account in fashioning a remedy for the Indians, African-Americans have also been here for many generations and that fact should be recognized in fashioning a remedy. If racially defined nationhood within the geographical confines of the United States is an appropriate remedy for thefts of land and sovereignty, a Republic of New Africa in the Deep South, see A. MEIER & E. RUDWICK, FROM PLANTATION TO GHETTO 311 (1976), should seem no more offensive than any of the Indian reservations.

208. This conclusion is itself by no means self-evident: as a wrongdoer, the federal government may have a claim inferior to that of the African-Americans.

exhibited an insufficien openness to other cultures and an unwillingness to share the bounty of America. Yet these were precisely the grounds that Europeans used to justify the original invasion: Indians should learn from Christian civilization; because Indians underutilized the land, the bounty of America was more than enough for all. True, the original European-Americans proposed to enforce these claims by violence, and the later immigrants wanted only a chance to participate in the democratic process. But the difference in practical reality is not great. The Nativists feared that foreigners, coming in droves and multiplying like rabbits, would use the ballot box to impose their "un-American" ideas on those around them. And if the issue came down to the ballot box, the Indians would still lose, because the early European immigrants also came in droves, vastly outnumbering them. Theft of land and sovereignty after a full and fair vote in which the Indians could participate is no less theft of land and sovereignty.

First in time, then, is not an absolute; at best, it is one part of a complex analysis. But the other parts of that analysis involve a sweeping cross-cultural comparison that the Court, as an institution within one culture, is not competent to make. For example, in order to resolve whether the Indians are the rightful owners of the continent, the Court could consider not only the relative priority but also the relative value of the rival claimants. Much of what fuels the repudiation of the Nativists is surely the conviction that the new immigrants were not bringing evil ideas to these shores. Much of what fuels the defense of ancient Indian sovereignty is surely the belief—relatively recent among non-Indians—that Indian cultures are not depraved and hateful but benign and harmonious. Much of what fuels the non-Indian impatience with Indian legal claims is surely the substantive conclusion that the conquest was just because Anglo culture is superior—and the sooner the Indians come to accept that fact, the better. The history of judicial treat-

210. See, e.g., id. at 344–45.
211. See, e.g., R. Berkhofer, supra note 127, at 117–18, 120–21, 144–45; B. Dip- Pie, supra note 51, at 41–42.
212. Alternatively, one could argue that the Indians may need to claim the first-in-time principle, whereas the Nativists did not, because the Indians need to be culturally exclusivist in order to maintain internal cohesion and vitality, whereas the Nativists did not. But, like the argument about the relative worth of Indian and western society, this argument calls for a large-scale, sensitive comparison of cultures for which the Court is ill-equipped.
ment of Indians suggests that the Supreme Court is a poor institution for such comparison of the two cultures.\textsuperscript{213}

Yet as long as the question is cast in an either/or form—either the Indians have legitimate sovereignty or the non-Indians do—the choice seems unavoidable. It leaves us in a situation where the answer most appealing to many is ruled out of bounds: that Indians and non-Indians are both legitimate inhabitants of the continent; that each culture and sovereignty is legitimate for its own members; and that each must find a way to respect the other.\textsuperscript{214}

It is the casting of the question, then, that leaves us with unacceptable alternatives. And the question is cast into that mold because of the structure of equal protection clause doctrine. To recapitulate: the doctrine begins with an assumption of the prima facie invalidity of all facial racial classifications. Proponents of Indian nationhood must then offer a compelling state interest to repudiate that assumption; reparation for thefts of land and sovereignty enters the analysis at this point as such a possible interest. But the fit between means and ends must be exact; and if racial subnations are an appropriate remedy for the theft of Indian lands and sovereignty, they should also be an appropriate remedy for the theft of African-American lands and sovereignty. At that point the liberal individualist promise of the equal protection clause seems to disappear into a nightmare of racial homelands. It is to distinguish the

\textsuperscript{213} This is not intended to broadly suggest judicial passivity. Rather, it means to suggest that in cross-cultural comparisons in particular, the Court is not at its best. It was only in 1955 that the Court asserted the legality of the conquest as the act of a militarily superior civilization:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955). And it was only in 1980 that Justice—now Chief Justice—Rehnquist borrowed the following words to describe the Plains Indians: “They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.” United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) (quoting S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 540 (1965)).

\textsuperscript{214} In Robert Williams's powerful metaphor, the relationship would be one like that between friends travelling down the same river in different boats: “We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.” Williams, The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 WIS. L. REV. 219, 291 (quoting Indian Self-Government in Canada, Report of the Special Committee (back cover) (1983)).
two groups that the claim of prior and superior Indian sovereignty becomes necessary.

We are driven to this point because of the initial supposition: the equal protection clause applies to the Indians in the same way that it does to everyone else. This supposition leads to the prima facie assumption that classifications based on Indian blood are illegitimate, and to the comparison of Indians to other domestic racial groups. But the supposition itself misses the real power and direction of the argument that Indians were unjustly dispossessed. The equal protection clause is itself a domestic, internal norm. As presently interpreted by the Court, it asserts that race is a presumptively suspect category for this culture and this sovereign. It requires all domestic races to be treated in the same way. The point in the claim of unjust dispossess is that rightly considered, the Indians are in important ways still foreign and not subject to the same political morality.

This point highlights another reason for the inappropriateness of applying standard equal protection clause doctrine to the Indians. The balancing metaphor does not fit our moral intuitions as the right way to approach the field of Indian law. Probably very few observers analyze Title 25 in the following way: it employs inherently suspect and malign classifications, but that evil is outweighed by a positive good. Rather, opponents of Indian separatism do believe that the field involves malign racial classifications but do not believe that they are outweighed by any sufficiently compelling interest. Supporters, on the other hand, do not really think that the racial classifications in Title 25 are malign in the first place.215 The Court’s individualist principle is simply inapplicable in this particular field. This Article will return to that argument in the next section. First, however, it will consider another possibility—rewriting the Court’s equal protection clause jurisprudence to wean it of some of its liberal commitments.

C. Rewriting the Clause

For some time now, commentators have been urging the Court to adopt a less strictly individualist position under the equal protection clause. These commentators all agree that groups can serve important and benign functions. Because an extremely individualist  

215. Certainly, from the outside, the Court itself seems to embrace this view. The Court has consistently, often even casually, held that Title 25 uses no racial classifications, even though, as this Article has argued, it would have recognized the racial categories if Title 25 involved any other minority group.
interpretation of the clause will inevitably make it difficult for these
groups to survive, the Court should instead distinguish between be-
nign and malign group classifications. For purposes of this Article,
these commentators may be divided into two general categories.
First, some advocate the view that the clause should generally allow
benign uses of group classifications for all significant or important
groups. The second group of commentators argues that Indians are
peoples under international law and so have rights of self-determi-
nation. This group does not directly address the equal protection
clause, but one could derive from their argument the idea that pro-
tecting indigenous peoples should be a benign purpose under the
clause, in line with international law norms.

1. General Benign Uses of Race

Among legal writers, Owen Fiss offers an example of the first
group. Fiss criticizes the individualist interpretation of the equal
protection clause based on the antidiscrimination principle, that like
individuals must be treated alike. In its place, he proposes the
“group disadvantaging principle.” The core of the equal protection
clause is a concern for distributive justice among groups, not for a
blindness to group affiliations. In the interest of dismantling castes
and compensating for past wrongs, it therefore prohibits not all
race-conscious actions but those that would worsen the position of
traditionally powerless and subordinated groups. Fiss does not
specifically discuss the reservation system, but one can extrapolate.
For Fiss the simple fact that it rests on racial classifications would
not be enough to reject Title 25. He would presumably want to
know in context whether Title 25, on the one hand, subordinates
racial groups and promotes caste, or, on the other, compensates for
past wrongs and helps protect those groups. The resolution would
turn on particular social realities.

Vernon Van Dyke is more explicit: he plainly believes that
under the right circumstances, government should recognize the
special rights of racial, religious, ethnic, and linguistic groups. In
particular, he describes a “theoretical general acceptance” of the
principle that “where concern for equality requires it, certain weak
groups should have special protection.” Van Dyke specifically de-
scribes American policy toward Indians as an instance of this prin-

216. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Affairs 107,
217. Id. at 151.
218. Id. at 157.
This view of equality is very different from the Supreme Court’s, in which equality entails the illegitimacy of special protection. Van Dyke suggests that such a view works best when a society is fundamentally homogeneous; in a heterogeneous society, some members of minority groups may achieve substantive equality only by having a protective group around them. Merger into a single, large democracy dominated by members of other groups offers no real equality for these minorities.

Arend Lijphart has advanced a similar thesis that he believes is required by democratic values. Lijphart draws a distinction between two forms of democracy—“majoritarian” and “consensual.” The former is perhaps most familiar to Americans: we vote, and the majority wins. As long as the society is largely homogeneous, this system may work well. When the society becomes very heterogeneous, however, majoritarian representation may offer no protection to distinctive racial, cultural, or linguistic groups. They vote, but they always lose and may lose big, so that mere representation leads only to long-term subjugation. To give them true equality within the polity, the government may have to adopt measures specially designed to increase their realistic capacity for self-determination. Examples drawn from actual practice include a reservation of a certain number of seats in the legislature for certain groups, drawing of electoral district lines to ensure minority groups a voice, minority group legislative vetoes, and various forms and degrees of group home rule for geographically concentrated minorities.

Any or all of these ideas may be interesting, plausible, and significant ways of reinterpreting the equal protection clause, and the particular case of the American Indians may be a useful illustration or an effective prism for reflecting upon them. For present purposes, however, this Article will not pursue that line of analysis, primarily because it may be unnecessary. Because these theories are so far-reaching, they will surely stir intense controversy and involve enormously difficult and painful issues. In addition, simply as a

220. Id. at 607–08.
221. Van Dyke also offers another principle relevant to the American Indians: “[S]pecial status and rights should be extended to some groups to enable them to survive.” Id. at 612. As his discussion makes clear, id. at 613, he has in mind here the international law treatment of aboriginal peoples, discussed in the next section. See infra text accompanying notes 224–234.
matter of instrumental success, the Court is plainly prepared to up-
hold dramatically greater special rights for Indians than for other
minority groups. An ideal answer, therefore, seems to be one that
calls for special treatment of the Indians and might allow for special
treatment of other groups but does not necessarily demand it.\footnote{223}
Such an answer is available, and its roots lie in yet another set of
arguments about the Indians' special status.

2. The Rights of Aboriginal Peoples

This set of arguments compares the Indians not to other Amer-
ican racial groups but to indigenous peoples in other countries, such
as the Maoris in New Zealand or the Palestinians in Israel. As this
Article will suggest, this comparison does highlight an important
moral reality about the Indians' situation. On the other hand, how-
ever apt the comparison, it does not resolve the difficulties with In-
dian separatism under the equal protection clause.

Increasingly in recent years, advocates of Indian autonomy
have begun to appeal to norms of international law, which broadly
guarantee self-determination to "peoples."\footnote{224} At least until quite
recently, Indians have faced a substantial difficulty in claiming pro-
tection under these norms: the "Blue Water Thesis," which holds
that the right of self-determination does not extend to groups lo-
cated wholly within the borders of a state, argues against their sta-
tus as a people.\footnote{225} The right of self-determination thus appears as a
means not to free indigenous peoples but to prompt overseas decolonization, across "Blue Waters." In the last decade, however,
the United Nations has formed a working group on the rights of
indigenous peoples, which has adopted a number of declarations re-
pudiating the Blue Water Thesis and elaborating a right to self-de-
determination for aboriginal peoples.\footnote{226} It remains to be seen how
much of an effect the work of the group will have on international

\footnote{223. For a brief discussion of how this proposal could justify special treatment for
Indians but could also extend to other groups, see infra note 236.}

\footnote{224. See Barsh, \textit{Indigenous North America and Contemporary International Law}, 62
OR. L. REV. 73 (1983); Clinebell \\& Thompson, \textit{Sovereignty and Self-Determination: The
Rights of Native Americans Under International Law}, 27 BUFFALO L. REV. 669 (1978);
Clinton, \textit{supra} note 19, at 1054-60; Kronowitz, Lichtman, McSloy \\& Olsen, \textit{Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations}, 22
HARV. C.R.-C.L. L. REV. 507 (1987).}

\footnote{225. Barsh, \textit{supra} note 224, at 80-90; Kronowitz, Lichtman, McSloy \\& Olsen,
\textit{supra} note 224, at 593-94.}

\footnote{226. See Barsh, \textit{supra} note 224, at 99-102; Kronowitz, Lichtman, McSloy \\& Olsen,
\textit{supra} note 224, at 613-20.}
law in general and United States policy toward the Indians in particular.

Even if international law does recognize the self-determination rights of indigenous peoples, however, another problem remains: international norms draw a distinction between a people and a racial minority. The former have the right to self-determination; the latter have only the right to be free of discrimination against them. The law conceptualizes the former as an independent political group, albeit one that may not exercise all the rights of sovereignty and may be closely bonded to a larger nation; the law conceptualizes the latter as internal to a given nation and discourages any group from using the right of self-determination in order to secede and impair the territorial integrity of a nation. The path for the former clearly lies in some measure of separate self-definition; the path for the latter in full and equal participation in the affairs of the state, free of discrimination.

Despite these radically different prescriptions, however, it is by no means easy to distinguish minorities from peoples. Race plays a part in the definition of both. Racial minorities have only two characteristics: they must share a race and be in the minority. The International Court of Justice (ICJ) has offered the most frequently cited definition of a people:

[A] group of persons living in a country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religions, language and tradition, in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

Race thus plays a very large part in the definition of a people as well: a people must have a race of its own, be united by an identity of race, and want to bring their children up in the "spirit and tradi-

227. See Barsh, supra note 224, at 91.
228. Id. at 91–94.
tions of their race.” Both peoples and minorities then are racial groups.

The difference seems to lie in historical background: a people remains in some important sense separate, never having been absorbed; a minority has become a part of the nation within which it lives. Some process of merger or assimilation distinguishes the two, hence the ICJ’s emphasis on common language, religions, and traditions, as well as race. In 1982, the Mikmaq Nation suggested that a minority is a people that has chosen to merge into a nation: “The distinction between a minority and a people, in our conception, flows from the quality of consent. A people can become a minority, if it chooses. Minorities cannot be made by violence or oppression, however.” Even if they can be made by violence or oppression, however, clearly they must be made; they must be effectively assimilated. Racial groups thus have two options. If they are sufficiently separate, they may go their own way as a people; if they are not sufficiently separate, they must enter the life of the nation around them. As one commentator put it, if “beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded.”

Most Indian Nations still meet the definition of “people” offered by the ICJ, and someday international law may formally recognize them as such. This distinction between peoples and minorities offers us another approach to the treatment of the Indians under the equal protection clause. Indians, so the argument goes, are not “racial minorities” at all; they are “peoples.” True, the definition of “peoples” includes a racial element, and so at first it seems that we have returned to a category that uses one suspect and one nonsuspect feature in its definition. But international law maintains that racial classifications based on “peoplehood” do not savor of the pernicious features associated with racial classifications based on minority status. The nonsuspect classification—separate language, traditions, etc.—is a special one; through chemical combination, it transforms the poison of race into the curative of decolonization.

Ultimately, this Article does take the position that the distinction between peoples and minorities does offer the best way to think

232. See, e.g., Clinebell & Thompson, supra note 224, at 710.
about the status of the Indians. But the argument that 1) the equal protection clause applies to the Indians but 2) they are peoples, not racial minorities, faces a grave difficulty, arising from the difference between municipal and international law. International law norms may recognize a distinction between peoples and minorities, but does the equal protection clause and its norms? An affirmative answer to that question faces some daunting obstacles. As noted earlier, republican and liberal theorists alike, despite their disagreements, agree that race should not divide us into different polities; the goal of the clause seems precisely to make us one nation, to remove racial consciousness, to bring outsiders in, to let us all “belong.” The spirit is thus one of breaking down racial barriers, but the whole idea of “peoplehood” is that some racial barriers are legitimate. International law may admire the idea of separate peoplehood, but we are a more united, integrated nation, made so in large part by the equal protection clause itself. All can find a home here; that is the promise of American inclusiveness. We are from many peoples, one—not many, from one. The Indians must accept that fact and enter the life of the nation.

All of these claims of mandated inclusion rest on a hidden or not-so-hidden premise: the clause with all of its norms of inclusiveness applies everywhere across the nation, in the same way and to the same extent. Or to put the premise another way: real unity without permanent racially defined subgovernments is a binding norm for all those fully within the nation, and all those permanently resident within our boundaries are fully within the nation. That premise, however, is faulty. The equal protection clause is a domestic norm, not only in the sense that it makes us a nation but also in the sense that its reach is limited to the nation. It makes full insiders only of those who are “supposed” to be insiders. Once it is clear that a group is within the national fold, the clause makes their inclusion a reality. But it would not include Canadian citizens or foreign diplomats living in Washington—although it would provide them with some, more limited protection against arbitrary action. And mere geographical location is not enough, as this Article will show, to make Indians insiders in the same way as everyone else.

233. See supra notes 33–37.

234. Again, the text advances the view that the Indians are outside the reach of the clause and so are unlike other minority groups, but one could also argue that the Court has misinterpreted the clause in generally prohibiting even “benign” racial classifications. Along those lines, one could derive some guidance from the case of the Indians: that other minority groups are sufficiently like peoples to warrant special treatment even under the clause.
The same point emerges from the internal logic of international law itself. "Peoples" are in an important sense outside the ambit of the norms of any other nation; that is part of what it means to say that they are self-determining peoples. In claiming peoplehood, the Indians are really claiming immunity from United States domestic norms. Indeed, as this Article will later elaborate, that immunity is precisely the reason that we do not find racially defined peoples troubling but we do find racial minorities troubling. To maintain, then, that the equal protection clause draws a distinction between peoples and minorities, one is really arguing that peoples are outside the reach of the clause because outside the reach of the nation's fundamental morality. The equal protection clause, with all of its associated domestic morality, does not apply to Indian sovereigns and never has.

IV. A COUNTER-PROPOSAL

The primary error that the Court has made in analyzing the status of Indians under the equal protection clause is to assert that the clause applies to Indians in the same way and to the same extent that it applies to everyone else. A more honest approach would begin from a very different point: reservation Indians are simply a categorical exception to the requirements of the equal protection clause. This position is more consistent with what the Court actually does, with the historical underpinnings of the clause, and with the moral intuitions of many of those who believe in the right of Indian separatism.

Any such view must answer at least two substantial objections. First, as a matter of positive law, how can one say that the clause—with its apparently universal language—does not prohibit discrimination based on Indian ancestry, as it does every other kind of racial classification? And second, as a theoretical matter, does not removing the Indians from the protection of the clause raise all the same concerns that a removal of any other group would? Does it not expose the Indians to even more of the kind of governmental racial hostility with which they are already too familiar? And, on the other hand, does it not allow the possibility for rank racial preference for the Indians to the detriment of the "the majority"?

The answer to the positive law challenge begins with a fact that the Court has almost willfully overlooked in its opinions dealing with Indians and the equal protection clause: the fourteenth amendment itself says some specific things, both explicitly and implicitly,
about the Indians. In particular, the amendment plainly contemplates that the protections of the amendment would not extend to Indians who owed at least partial allegiance to a tribal government. The Indians, under the amendment, are in a profound sense still subjects of a semiforeign government and so may be treated differently from other inhabitants of the United States. And, importantly, nothing in the amendment is meant to prevent Congress from continuing that pattern: as long as—but only as long as—Indians are subjects of sovereign tribal governments, Congress may single them out for special treatment, even if that treatment incorporates racial classifications.

This answer from positive law offers the beginnings of a theoretical answer. It may be the case that everywhere the writ of the equal protection clause runs, the government may not use racial classifications, but the reach of that writ has never been extended to Indian Country. The domestic morality of the clause has no more applicability to Indian reservations than it does to Sweden or Nicaragua, because all of that territory is still under the governance of different cultural concepts and has never been fully and permanently invaded by American ideological imperialism. It is true that the federal government currently exercises some jurisdiction over Indian Country, and to that extent the Indians need constitutional protection in a way that the rest of the world does not. But as long as the tribe retains enough sovereignty to control the texture of daily life on the reservation, then it can act as a buffer to federal incursions and constitute Indian Country as an area not fully "inside" the union. If the federal government should ever fully dismantle the tribe, however, then the situation would change dramatically, and there would be no option for the Indians other than full and honest application of the equal protection clause. Without the clause and without the tribe, individual Indians would have no protection against racist legislation except the good will of

235. It is conventional in Indian law scholarship to begin with Christopher Columbus and work one's way forward chronologically. This Article begins this discussion, in a sense, in medias res—1866—simply because that is the date of the fourteenth amendment, and the Article intends to explore the effect of that amendment on the condition of the Indians. The framers of the amendment were, however, writing against a backdrop of Indian sovereignty, and their solution was continuous with that backdrop. The historical discussion of tribal sovereignty as a matter of federal policy is rich and rewarding, and well worth pursuing. The standard work in the field is Clinton, supra note 19.
a public not always noted for its good will toward Indians. We would then truly be in the world of plenary power.\textsuperscript{236}

A. The Argument from Positive Law

The fourteenth amendment refers twice to Indians, once explicitly and once implicitly. The explicit reference occurs in section 2's explanation of the method for apportioning representatives: "Representatives shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed."\textsuperscript{237} The implicit reference occurs in the definition of citizenship laid out in the first sentence of section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."\textsuperscript{238} As this Article will detail, the legislative history indicates that the requirement that citizens be "subject to the jurisdiction" of the United States was designed primarily to exclude tribal Indians. The amendment itself, then, contemplates a special treatment for some Indians: they are not citizens and do not count in apportionment. The Court may have ignored this language because the condition of the Indians has so changed: all Indians are now citizens, and they do count in apportionment. This Article will discuss the significance of these changes at a later point. First, it will consider in greater detail the status of the tribes contemplated by the amendment at the time of its adoption.

The two phrases—"Indians not taxed" and Indians "not subject to the jurisdiction" of the United States—turn out to have identical meanings. The Committee of Fifteen adopted section 2 to remove the three-fifths clause from the Constitution, so as to count blacks as whole persons rather than fractional ones for the apportionment.\textsuperscript{239} In the process, the Committee casually carried over from the original text of the Constitution the exclusion of Indians

\textsuperscript{236} This answer thus serves to distinguish Indians from other minorities because only Indians were mentioned in the text of the amendment and the framers considered only Indians in writing the amendment. On the other hand, it is possible that other groups also exhibit some "people-like" qualities, so that the normative argument might justify extending them special treatment, although presumably in more limited ways. If one did not find the linguistic and historical arguments to be necessary, then one might want to extend this proposal to other groups; if one viewed those arguments as critical to the force of the proposal, one would not be willing to consider such extensions.

\textsuperscript{237} U.S. Const. amend. XIV, § 2 (emphasis added).

\textsuperscript{238} U.S. Const. amend. XIV, § 1.

not taxed.\textsuperscript{240} As a result, the debates over the amendment offer little exposition of the meaning of the language. A different source, however, does offer a contemporary explanation. The 1866 Civil Rights Act, which preceded the adoption of the amendment, offered its own definition of citizenship: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."\textsuperscript{241} The provision thus serves the purpose of section 1—defining citizenship—but uses the language of section 2—"Indians not taxed." The Senate engaged in lengthy debates over the meaning of this phrase before adopting the Civil Rights Act. In addition, the debate over the meaning of the section 1 language—persons "subject to the jurisdiction of the United States"—is also fulsome and complicated, sometimes farcically so.

These debates reveal two general features. First, all of the participants sought to distinguish two vaguely imagined categories of Indians—"wild" Indians and "domesticated" ones. Second, the debates swirled around several possible ways to distinguish these two groups but ultimately settled on one central difference: tribal Indians owed partial allegiance to a foreign sovereign. For that reason, they were "not subject to the jurisdiction" of the United States and "not taxed."

The debates began when Lyman Trumbull introduced the Civil Rights Act without the language excluding "Indians not taxed" from citizenship. When asked whether he intended the provision to naturalize the Indians, he explained that he would naturalize Indians who are "domesticated and pay taxes and live in civilized society"; but tribal Indians were members of foreign nations and so would be excluded as subjects of "a foreign power."\textsuperscript{242} To make the provision more explicit, "Bloody Jim" Lane of Kansas offered an amendment to exclude those subject to a "foreign power or tribal authority," and Trumbull accepted the amendment but regarded it as unnecessary.\textsuperscript{243} Reverdy Johnson then rose to argue that Lane's amendment was necessary because Indian tribes were not foreign governments since by federal law they held self-government only at the pleasure of Congress.\textsuperscript{244}

\begin{itemize}
\item \textsuperscript{240} U.S. Const. art. I, § 1, cl. 3.
\item \textsuperscript{242} Cong. Globe, 39th Cong., 1st Sess. 498 (1866).
\item \textsuperscript{243} Id. at 504.
\item \textsuperscript{244} Id. at 506.
\end{itemize}
The next day, after some initial discussion of a new amendment proposed by Lane and quickly discarded, the Senate returned to a discussion of the "tribal authority" language. Henderson rose to support the language, but Guthrie objected to imposing citizenship on anyone against his will, even an Indian. Pomeroy explained to Guthrie that by his reasoning Congress could not give citizenship to the freedmen, who had not consented either: "There is no reason why the two [blacks and Indians] should be separated, so far as their relation to the Government is concerned, except in regard to such Indians as have tribal relations, and are responsible and amenable to a government of their own." At this point, two western Senators pointed out that some "wild" Indians did not have tribal relations. In particular, Conness of California described certain reservation Indians in his home state who had been herded together, allowed no tribal government, and subjected to the absolute control of agents of the federal government. Ramsey of Minnesota conjured up the specter of bands of "renegade" Indians roaming his frozen state, wreaking destruction and owing allegiance to no-one. As a result, these two believed that the grant of citizenship to all nontribal Indians was too generous.

Faced with this fragmenting discussion, Trumbull had a stroke of tactical genius. His real concern throughout had been for the citizenship of blacks; he viewed Indians as a separate problem; and he regularly urged the Senate not to get bogged down in this problem. After the speeches by Ramsey and Conness, he rose to explain that he wanted to accommodate everyone but had trouble finding a formulation. He agreed that perhaps Conness's nontribal reservation Indians and Ramsey's renegade Indians "have not so far withdrawn from their wild relation" to be citizens. Nonetheless, he thought he sensed agreement: "Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make

245. Lane altered his amendment to focus more on a particular concern of his constituents: certain Kansas Indians had accepted allotments of land and had severed tribal relations but were nonetheless immune from taxation according to the state supreme court. The new amendment would make citizens of all "Indians holding land in severalty by allotment." Id. at 522. Trumbull resisted the amendment because it might make some "wild" Indians citizens, such as those who had allotments outside the "organized jurisdiction of the United States" in Indian Country; he urged Lane to return to his earlier amendment. Id. at 525. Pomeroy chimed in to support the new amendment because he like the idea of taxing Indians who had allotments; he seemed to associate domestication especially with "owning property and doing business." Id. at 525–26.

246. Id. at 526.

247. Id. at 526–27.
treaties, who have their own regulations" as citizens. And he thought that the best way to describe this group might be by use of the venerable language from the Constitution itself: "Indians not taxed." With this invocation of the spirit of the Fathers, nitpicking opposition crumbled.248

Hendricks of Indiana alone objected to the new formulation, on the grounds that it sounded like a property qualification: why, he asked, should poor Indians be excluded if poor blacks are not? Trumbull's response is significant. He explained that the Constitution already used the language and then added: "The Indians have separate governments of their own. They do not recognize nor are they made subject to the laws of the United States." The amended provision merely "brings in even the Indian when he shall have cast off his wild habits and submitted to the laws of organized society."249 The phrase "not taxed" clearly does not mean "not taxed"; it means "not subject to the jurisdiction of the United States."250

The following day, the Senate finally adopted the exclusion for Indians "not taxed."251

Several features of these proceedings bear emphasis. First, the Senators had a vague sense that some Indians were "part of our population" and some were not, and they were seeking ways to express the difference. There was general agreement on specific examples—Lane's Kansas Indians came in, the Plains Indians stayed out—but some disagreement on what were the crucial differences between those examples. The factor that bulked the largest was tribal allegiance. Lane's amendment specifying tribal allegiance as the grounds for exclusion had general support, and all agreed that no tribal Indians should become citizens. The only reason that Lane's version did not pass is that two Senators believed that it went too far in granting citizenship. Some Indians were in a state of transition: they had severed their tribal relations but had not yet adopted enough of the habits of civilized life. So the exclusion of "Indians

248. Id. at 527.
249. Id. at 527–28.
250. Id. at 527. Nonetheless, on the following day, the Senators repeated this discussion for good measure. Henderson again objected to the amendment as a property qualification, and Doolittle again explained that the phrase meant those who "were not regarded as a portion of the population of the United States. They are subject to the tribes to which they belong, and those tribes are always spoken of in the Constitution as if they were independent nations." Id. at 571. Trumbull then reiterated that the phrase "not taxed" was only a "description of persons connected with those tribes with whom we make treaties." Id. at 572.
251. Id. at 575.
not taxed" was adopted to exclude them as well. Even after the adoption of that language, however, Trumbull and Doolittle continued to explain its meaning in terms of tribal affiliation. And, propaganda by extremist groups notwithstanding, there are no bands of nontribal "renegade" Indians remaining, but there are tribal Indians. As a result, the only contemporary relevance of the phrase is its focus on tribal relations.

Another noteworthy aspect of the debates is the Senators' apparent ignorance of the possibility of mixed jurisdiction. They assumed that individual Indians who were subjects of tribes were subjects only of tribes; they have their own laws and "do not recognize the Government of the United States at all." Johnson did remind the assembly that Congress claimed the right to extend control over the Indians at any time, but that point generated no comment. The assumption of unitary jurisdiction was mistaken: even at the time, both the federal government and the tribe exercised some jurisdiction on the reservations.

Several months later, in the debates on section 1 of the fourteenth amendment, the Senators exhibited more sophistication about the legal status of Indians. Howard of Michigan moved to add the first sentence of the amendment defining citizenship: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Doolittle, echoing the debates over the Civil Rights Act, urged the exclusion of Indians not taxed, but Howard responded that tribal Indians would already be excluded because "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States." This argument quickly prevailed.

252. Id. at 527.
253. Id. at 506. See supra note 234 and accompanying text.
254. This greater sophistication may have been due to Senator Doolittle's self-education during his tenure on the Indian Affairs Committee. See R. MARDock, THE REFORMERS AND THE AMERICAN INDIAN 20-21 (1971).
255. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). This was later changed to read "All persons born or naturalized . . ." U.S. CONST. amend. XIV, § 1.
256. Doolittle repeated the argument that the language "Indians not taxed" had become hallowed by age, but it fell on deaf ears. CONG. GLOBE, 39th Cong., 1st Sess. 2892-93 (1866). Trumbull resisted the "not taxed" language because of a fear that it might, after all, be misread as a property qualification; Howard's amendment, he thought, was clearer. Indeed, looking back, he regretted that the earlier session had not adopted the jurisdictional proviso rather than the taxation proviso. Id. at 2894. No-one mentioned the fear that nontribal "renegade" Indians might become citizens under the
For the first time, however, the Senators recognized that some Indians who had tribal relations were also partially subject to the jurisdiction of the United States. The assembly was clear in its mind that such Indians were not to become citizens. Doolittle initiated the discussion by claiming that many “wild” Indians were subject to the jurisdiction of the United States but should not be citizens. Thus, he described the Navajos then subject to the despotic rule of “General Carleton, in New Mexico, upon the Indian reservations, managed, controlled, fed at the expense of the United States, and . . . by the War Department.” 257 Trumbull responded quite pointedly that “subject to the jurisdiction” of the United States meant “subject to the complete jurisdiction” of the United States, “[n]ot owing allegiance to anybody else.” Tribal Indians did not fit that description because they owed “allegiance, partial allegiance if you please, to some other Government.” 258

At this point, Reverdy Johnson rose to point out that tribal Indians are in “one sense” subject to the jurisdiction of the United States because they are within the territorial limits of the United States and because the federal government grants them self-government only as a matter of grace. Thus, because “the United States may—that is the test—exercise jurisdiction,” Howard's language would make tribal Indians citizens, or at least some irresponsible court could so construe it. 259 Howard and Trumbull both acknowledged that the United States could extend full jurisdiction over the tribes, but they repeated that their language covered only Indians “owing allegiance solely to the United States,” 260 subject to the “full and complete jurisdiction of the United States, . . . the same jurisdiction in extent and quality as applies to every citizen of the United States now.” 261

In this proceeding, the Senators all displayed remarkable substantive unity; their only disagreement was over how best to express that agreement. All agreed that Indians who maintained tribal rela-

amendment, presumably because of a slight change in language from the Civil Rights Act debate. Trumbull's original civil rights bill excluded all those subject to a foreign power, but the renegades were not subject to any tribe and so would be citizens. By contrast, the fourteenth amendment excluded all those not subject to the United States, and the renegades were presumably subject to U.S. jurisdiction no more than tribal Indians.

257. Id. at 2892.
258. Id. at 2893.
259. Id.
260. Id. at 2894.
261. Id. at 2895.
tions were not "subject to the jurisdiction" of the United States in the constitutional sense, even if any or all of three conditions were true: 1) they were born within the territorial limits of a state; 2) the United States granted them separate nationhood as a matter of grace but could take it away; 3) the United States exercised some jurisdiction over them, including management, financial support, and general "control." The simple fact of any tribal affiliation, regardless of the federal presence, made them a part of another people.262

One point is therefore clear from the debates: the framers believed that nothing in the amendment prevented Congress from treating the Indians differently from other races. And the reason was also clear: tribal Indians were in a sense separate nations, not a "part of our population," not counted in the apportionment, not citizens. In other words, they were beyond the reach of the amendment because they had their own laws and governments. They were, in modern international law parlance, a separate people. And that status did not change even if the federal government had asserted some jurisdiction over them, as long as it had not destroyed their tribal government.263

262. In the same way, all agreed that "Indians not taxed" and Indians not "subject to the jurisdiction" of the United States referred to the same group, tribal Indians, and the only question was which phrase was clearer. To make this point crystal clear, Senator Williams closed the debate by explaining to Doolittle that everyone would read section 2, with its "not taxed" language, together with section 1, with its jurisdictional language, to reach the only possible conclusion: "I do not believe that 'Indians not taxed' are included, and I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." Id. at 2897.

263. This conclusion is consistent with legal materials both before and after the adoption of the amendment. In the years before the Civil War, courts regularly denied that Indians were citizens on the grounds that they owed allegiance to tribes; the few Indians that did become citizens were assimilated Indians whose tribes had disappeared as tribes. See J. Kettner, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870, at 288–300 (1978); P. Schuck & R. Smith, CITIZENSHIP WITHOUT CONSENT 63–66 (1985). Similarly, in 1869, Senator Ben Butler argued against making treaties with the Indians because he mistakenly believed they were citizens. CONG. GLOBE, 41st Cong., 1st Sess. 560 (1869). This remark prompted a Senate Report that recapitulated much of the 1866 debate and summarized: "Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the fourteenth amendment, 'subject to the jurisdiction' of the United States." S. REP. NO. 268, 41st Cong., 3d Sess. 10–11 (1870). Decades later, an opinion of the Secretary of the Interior explained the meaning of the term "Indians not taxed" in similar fashion. The opinion noted that the phrase was chosen to describe Indians who were "members of sovereign and separate communities...outside of the community of people of the United States even though they might be located within the geographical boundaries of..."
It is true that all of these observations grow out of debates over the apportionment and citizenship clauses, not the equal protection clause. It is also true that the latter clause extends protection to all "persons," not just "citizens." But the Senators could scarcely have gone to all the trouble in the former two clauses to make sure that the Indians remained a separate people, only to turn around and declare in the latter clause that they could not stay separate because of the ban on racial discrimination. As others have noted, the framers did not carefully single out the separate meanings of different clauses; they tended rather to speak in general terms of the amendment as a whole. And with regard to the Indians the general effect is clear: tribal Indians are part of a separate people and may remain so. The norms of the amendment, including the ban on racial discrimination, are for "our population."

On the other hand, the Senators did not necessarily mean to leave tribal Indians entirely without protection from the federal government. They clearly assumed that the primary protection would be the tribe's existence as a separate government with its own laws, and the federal government's reluctance to intervene in those affairs. If ever the federal government did intervene so far as to destroy the tribe, then the Indians would become wholly "subject to the jurisdiction of the United States"; by operation of the citizenship clause, they would ipso facto become citizens and receive the same rights and responsibilities as everyone else. Congress had two options: it could either leave the tribes alone and leave Indians noncitizens; or it could dismantle the tribes, but then the fourteenth amendment would require that the Indians become citizens. The Indians thus received protection in either of two ways: either the tribe set the pattern of their lives, or else they received full constitutional protection.

The assembly also recognized that the federal government might intervene in the tribe's affairs short of actual destruction of the tribe, but they assumed that such Indians would still be a separate people. On the other hand, such federal intervention might

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1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917–1974, at 990–91 (1979). Having recognized that the "Indians not taxed" language referred, perhaps inartfully, to tribal Indians, however, the letter then surprisingly concluded that there were no "Indians not taxed" because federal income tax laws now apply to tribal Indians! See id. at 203.


265. For amplification of this point, see infra notes 273–277 and accompanying text.
pose a tremendous threat of arbitrary oppression, a threat realized by Doolittle's cited example, General Carleton's treatment of the Navajos. Comments in the debates and legal writings afterward suggest that even tribal Indians would receive some limited constitutional protection short of the full rights of a citizen, even though they remained a separate people.

During the debates themselves, Cowan argued for a restrictive definition of citizenship because even noncitizens receive a certain amount of protection: “If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend.”266 But, Cowan insisted, he is not a citizen and so has not the right to vote and the other political rights associated with citizenship. Because Cowan advanced this view in the course of the discussion excluding Indians from citizenship, one may assume that he also thought that tribal Indians deserved the same protection of the laws.267

That view, in any event, soon entered roughly contemporaneous legal materials. Cooley wrote of the citizenship clause:

Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either State or territorial are extended, they are protected by and at the same time amenable to those laws in all their intercourse with the body politic and with the individuals composing it; but they are also, as a quasi foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities.268

267. The distinction between the rights of aliens and the rights of citizens was a traditional and widely recognized one in nineteenth century law well before the introduction of the fourteenth amendment. Indeed, under one possible explanation, that distinction explains the reason that the equal protection clause offers protection to “persons” not just to “citizens”: the privileges and immunities clause guaranteed to citizens their traditional rights, and the equal protection clause guaranteed to aliens theirs. See W. Nelson, supra note 239, at 52–53. At an earlier point, Republican reformers had anticipated roughly the same treatment for blacks: they would receive civil but not political rights. See E. Foner, Free Soil, Free Labor, Free Men 290–91 (1970).
Other commentators echoed Cooley: Indians may not have the rights of citizens, but the equal protection and due process clauses extend rights of personal security and legal redress to “persons” and not citizens. One commentator was more specific: a tribal Indian “sojourning” off-reservation is a person under the fourteenth amendment and so may claim protection against both the actions of individuals and against unjust action by the legislature; on-reservation, the same Indian is a legal but not constitutional person and so may claim protection in the courts only against the actions of individuals. To some extent, then, the equal protection clause does apply to Indians, but only in a unique and limited way. As of 1866, they enjoyed some constitutional rights, just as foreigners did. The application of the clause was limited by the extent of the Indians’ allegiance; they were entitled to receive some protection because they were somewhat exposed to federal power. That limited jurisdiction and limited protection in no way interfered with their separate status under federal law as members of semiforeign sovereigns.

B. The Normative Argument

A relatively clear position emerges from the debates: because the Indians had tribal relations, they were separate peoples; and because they were separate peoples, the norms of the fourteenth amendment did not fully apply to them. The amendment would apply if ever the federal government destroyed the tribe, and in the interim the Indians could expect some limited protection in the courts for at least their physical safety. But while the tribe existed, it set the fundamental rules for its members. The whole complex of Western ideas associated with antidiscrimination and the privileges and immunities of citizens was irrelevant.

This position, however, need not take its authority exclusively from the will of the framers, because it rests on a view that should be normatively persuasive to modern sensibilities as well. Again, the argument grows out of the distinction between a minority and a people. Within a given polity, many believe that race should generally be a dispreferred category. Racial classifications threaten to create caste divisions and irrational racial hatred, and they are often

269. See Lambertson, Indian Citizenship, 20 AM. L. REV. 183, 186 (1886).
270. See Canfield, The Legal Position of the Indian, 15 AM. L. REV. 21, 34–35 (1881). This distinction is also consistent with the language of the clause: states are forbidden to deny to any person “within [their] jurisdiction” the equal protection of the laws. In the 1880s, Indians on-reservation were for all intents and purposes beyond the reach of state jurisdiction, but “sojourners” were not.
unconnected to any legitimate policy goal, especially rewarding or encouraging merit. As between polities, however, race and its neighbors ethnicity and national origin often function as dividing lines. Most citizens of most countries achieve that status by birthright; they are born into membership because of their parents' membership. Others may be allowed to become citizens, but only a limited number, only through a different and usually more exacting process, and only as a matter of grace, not a matter of right.

This use of race and ethnicity to distinguish between members of polities may be partially just a product of the realpolitik that characterizes much of international law; each nation cleaves to its own, regardless of the legitimacy of that connection. But there is a more defensible moral argument for the use of race in this context: it simply has a less worrisome quality than it does when used in domestic law. In the case of the Native Americans, the use of a racial category might have two negative effects: it might hurt Indians, and it might hurt non-Indians. Neither is comparable to the negative effects of using race in wholly domestic affairs.

1. Harm to Indians

The essential bulwark against oppression of the Indians is their separate peoplehood: as long as the tribe sets the basic rules of tribal life, the federal government will have only an indirect and attenuated effect on reservation life. But notice the implicit restriction on the government's ability to single out Indians: the government can do so only as long as it respects the tribes' basic right to self-determination. If it does not, then the tribe has ceased to exist as a people and the reason justifying its separate treatment has ceased to exist. In other words, Justice Blackmun happened on something like the

271. Again, this Article offers here the narrowest version of its argument: one could accept the concept of a benign, permanent use of race for Indians, but reject it for other minorities within a given polity. It might also be possible to argue that the benign use of race for Indians could be suggestive for the treatment of other minorities, but this Article will not do so.

272. For example, the United States Code grants citizenship to "a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person." 8 U.S.C. § 1401(c) (1988). Indeed, in one sense, the fourteenth amendment itself contains a birthright prescription: those born subject to the jurisdiction of the United States automatically become citizens of the United States. Technically, this provision speaks directly not of heredity but of jurisdiction: the person must be born under the rule of the United States, regardless of the allegiance of her parents. But in effect, the requirement is one of heredity: to be a fourteenth amendment citizen, a person must be born to citizens or alien residents in the United States.
correct standard but for the wrong reasons. Blackmun held that the federal government may single out Indians only if that treatment is tied to the fiduciary obligation. This Article’s proposed standard differs from Blackmun’s in two ways. First, the fiduciary obligation has a specific meaning: the federal government must protect the right to tribal self-determination. Second, the Court need not defer to Congress in deciding whether the government’s treatment meets this standard. The question in each case is whether Congress has recognized the peoplehood of a group of Indians sufficiently to justify singling them out for separate treatment; if it has not, then Congress is engaged in domestic racial discrimination. But to make that determination, the Court must strictly scrutinize Congress’s actions for all the reasons that it must strictly scrutinize every other race case.

The Indians’ right to self-determination is not, however, inconsistent with all federal jurisdiction over them. Plainly, the framers of the fourteenth amendment believed that the tribes could still exist with some federal supervision, and some of the international law literature argues that the best treatment for different aboriginal peoples may vary, ranging from outright independence to a variety of forms of self-determination within a larger nation. For the same reason, not every federal action that singles out Indians need actively promote self-determination; it need only be consistent with self-determination. There are, however, two limits on such assertions of federal jurisdiction, one that focuses on impact and one that focuses on intent.

First, the cumulative effect of all federal intervention into the affairs of a tribe cannot be such as to reduce too severely the possibility of meaningful self-determination. If the federal government ever does so reduce the tribe, it will be setting the basic rules for life on the reservation and the Indians will face the same dangers of racial oppression as do all other racial groups. That standard—the government may not “too severely” infringe on self-government—is, at this point, quite vague. Any workable definition would require elaboration in a series of cases, but this Article will offer some possible applications in its last section. The beginning principles and the form of analysis can be sketched: as long as the tribe sets the basic fabric of life on the reservation and thus acts as a buffer between individual Indians and the hand of the federal government, then Indians need not fear racially discriminatory legislation in the

273. See infra note 335 and accompanying text.
way that other racial minorities do. On the other hand, whenever the federal government so dismantles a tribe that it has in effect substituted itself for the tribe as the direct supervisor of individual Indians, its actions become subject to the full restrictions of the equal protection clause and any actions singling out Indians must receive strict scrutiny. At that point the federal government has two options: it may restore the tribal government, so that the Indians may be a people again, or it may treat the Indians in the same way as everyone else. There is no middle ground. The government may not destroy the tribe but continue to adopt particular legislation for racial Indians.

The second limit on the government’s action concerns its intent. To this point, both the normative and positive arguments have focused on effect: because tribal Indians are in fact a separate people, the government may single them out. In the years since the adoption of the amendment, however, the Court has come to inspect carefully the intent of legislation, and for good reason. Effect wholly aside, racist legislative intent is an evil under the clause. Systematically disallowing malign intent helps to accustom legislators to self-conscious habits of purging themselves of racism. And a legislature seized with malign intent will produce a long-term malign effect, even if any individual action may have no discernible negative effect.274 “Peoples” are racial bodies and for that reason would be suspect categories under the clause; the only reason that they are not is that division into different polities is an appropriate way to treat different peoples. A legislative motive that reflects a view of the Indians strictly as a race and not as a self-determining people, then, requires strict scrutiny.

The debates surrounding the amendment exemplify this concern. The framers recognized that tribal Indians were different peoples and so should have their own polity or semi-polity; to that extent, the view of the framers is consistent with the modern notion

274. The evils include the “intangible” ones of indignity, stigma and caste; they also include more concrete harms that can be discerned only over a whole course of government conduct, and harms by private parties, encouraged by the racial attitudes of the government. See, e.g., Brest, supra note 182, at 6–12; Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1050–51 (1979). In a sense, laws that do not destroy a tribe’s peoplehood but are nonetheless racist are the Indian analogue of the kind of laws prohibited by Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977): the government has not engaged in “facial discrimination” on the basis of race (because the Indians are still a people) but the underlying motive is to discriminate.
of peoplehood. But the debates are also suffused with what we would today consider racism: \(^{275}\) the Indians were a separate people, yes, but an inferior and savage one. Legislation grounded in such an outlook would and did, in the long run, produce a policy that, taken as a whole, allowed the Indians to remain semi-independent nations, but subjected them to repeated racist regulation. \(^{276}\)

The emerging rule, then, is the following: because the reason that the government may single out the Indians is their peoplehood, the purposes of all of its Indian-specific legislation must be consistent with such a view. Congress could, for example, make tribes immune from state taxes, because that action would reflect the traditional tax-immunity of different governments. But the government could not—absent wildly implausible facts—make tribal members ride in the back of interstate buses, because such legislation would reflect traditional notions of racial inferiority and not tribal self-determination. The vision of the tribe, not geography, is the key to this contrast. The government may single out Indians off-reservation if the special treatment reflects a vision of the tribes as peoples, and it may not single out Indians on-reservation if the treatment does not reflect that vision. The standard does not require every federal act, in purpose or effect, actually to promote Indian peoplehood, but it does bar federal actions that positively contradict that vision. Indian-specific legislation could not, for example, be based on a view of the tribes as mere private associations. At the point that Congress adopts that view, the Indians will have become in the mind of the legislators a racial minority and will have to receive all of the protection accorded other racial minorities. \(^{277}\)

\(^{275}\) In effect, this argument is similar to the one often made about Brown v. Board of Education: even if the framers specifically intended to allow segregated schooling, today we ought to ignore that intent in favor of the more general principle underlying the clause—a principle about which the ensuing years have taught us more than the framers ever knew. See, e.g., Perry, supra note 274, at 1030-32.

\(^{276}\) Again, the removal and concentration policies are good examples: they left at least some tribal government intact, but they were based on the idea that Indians, as racial savages, were acutely vulnerable to the vices of civilized people. See supra note 194.

\(^{277}\) The standard may cast doubt on the constitutionality of federal benefits available to nontribal Indians. On the face of things, those programs seem to reflect less concern about Indian peoplehood and more concern about the problems of impoverished and disadvantaged racial minorities in general. If so, the Court ought to scrutinize them under the same standard it applies to every other race-conscious measure. The programs might well survive even under this analysis. Indeed, it might not be unreasonable for the Court to conclude that Congress could extend greater affirmative action benefits to Indians than to other groups. It might also be possible to argue that legislation singling out urban Indians could be based on a view of Indians as separate
Both of the foregoing limitations emerge logically from the central concept of self-determination. In addition, the debates suggest two other, appropriate protections for tribal Indians. First, it is possible that even limited federal intervention could create some of the negative effects associated with racial discrimination; Indian reservations could become a kind of rural ghetto, supported by federal legislation, as indeed many are today. But in that event, as the debates clearly contemplate, individual Indians may sever their tribal relations, leave the reservation and receive all of the fourteenth amendment protections extended to other racial minorities.

This right of individual Indians to emigrate and thus become citizens is of constitutional dimension; the framers drafted their definition of citizenship in part to give the Indians that option. And it makes good sense that only Indians should have this unilateral, constitutional right to merge with the rest of the population. Alone among foreign governments, Indian tribes are currently subject to ultimate federal jurisdiction; Indians alone need the ever-present exit option.

Second, as this Article has indicated, the debates do show an awareness that tribal Indians, like "sojourners," may need some constitutional protection short of the full rights of citizens, simply because they are subject to some degree of federal jurisdiction. The degree of federal jurisdiction over Indians has changed enough—Indians, for example, are now citizens by statute—that the exact...
extent of the protection contemplated in 1866 is not very relevant. The principle is the important point: tribal Indians should receive some constitutional protection commensurate to their vulnerability. This Article will consider the appropriate modern scope of that protection after a review of subsequent history of developments in Indian law.

From the Indian perspective, then, the dangers in losing the full protection of the equal protection clause should be minimal. The alternative is even less acceptable: if the equal protection clause does extend over Indian Country, the Constitution might well require the dismantling of the tribal governments. That result would lead to even worse oppression. Forced to merge into a different, unreceptive, and often hostile culture, the "democratic" rights of the Indians would be next to meaningless. Permanently outvoted, they would have lost all opportunity of real self-determination. In that case, the equal protection clause would have brought the Indians not freedom and equality, but semipermanent, structural repression.

2. Harm to Non-Indians

The second harm that special treatment of the Indians might cause is to non-Indians. As long as the tribes really are peoples, however, those harms are no greater than federal legislation that singles out the nationals of particular nations or foreign diplomats or aliens in general. It is true that special treatment of either Swedish nationals or Navajo tribal members may be based on ethnicity or race. And, for that reason, some have argued that birthright citizenship is pernicious, based on ascription rather than volition.280 The vision of a liberal, voluntarist world state is not unknown: all nations would grant citizenship without regard to the racial, ethnic, religious, or national background of the applicant, and individuals would accept citizenship based on the congeniality of a nation, wholly apart from the racial, ethnic, or national background of its population.

That vision, however, rests on the possibility and desirability of a sufficiently homogeneous world-wide population that race, religion, and ethnicity are truly irrelevant.281 In a post-Enlightenment

281. Schuck and Smith would actually offer a liberal defense of Indian separatism, because they focus only on the consensualist element of liberalism. Thus, Indians could refuse to consent to United States citizenship, and the United States could refuse to allow their admission. Even if both sides in this transaction were motivated by racism,
liberal universe, that situation might pertain. Characterized primarily by our capacity for rational choice and unentangled by the accidents of culture, we might all be able to join into one polity and one political discussion. Perhaps the United States should internally strive for exactly that condition; that may be precisely the promise of the equal protection clause. But on the world level, that situation does not exist today, and as long as it does not, coerced liberalism will lead only to oppression. The free world celebrates the move for independence of the ethnic Lithuanians, Kazakhs, and Kurds. Their desire for independence stems partly from an impulse to decentralization and partly from anger at being denied what we would regard as democratic rights. But those groups do not want simply federalism and political rights within host states; they also want some measure of independence, because they feel themselves to be a different people. Culture and propositional morality may form a part of that sense of themselves, but so do those liberal bug-bears, race, religion, and ethnicity. The history of the twentieth century offers the lesson very clearly: forcing different ethnic and racial groups into one liberal nation usually leads to disaster. Political boundaries ought not cut across deep fault lines. The framers of the fourteenth amendment understood that fact; they carefully distinguished between Indians that are "a part of our population" and those that are not. The effect on non-Indians of separate Indian autonomy would thus be no more illegitimate than the effect on Turks of an autonomous Kurdistan. One suspects, however, that many of the very individuals who cheer for a semi-independent Kurdistan are outraged at the idea of a semi-independent Navajo Nation. Self-interested reasons aside, the basis for this distinction may be a perceived difference between the surrounding civilizations. Kurds are right to throw off the yoke of Turkish tyranny, the argument may go, but Indians should accept with gratitude merger into the American Republic, the most just and liberal in the world. On first inspection, this position may reek of cultural imperialism and discredited assimilationist attitudes, but it cannot be re-

Schuck and Smith apparently would not view the result as illiberal; indeed, they describe the federal government's early policy of denying citizenship to blacks and American Indians as consensual. See id. at 54. This view, however, leaches liberalism of much of its attractiveness. Liberalism also contains a strong belief in a unified rational human nature and therefore a strong streak of antidiscrimination, as seen in Powell's opinion in Bakke. On the international level, this position would deny nations the right to make decisions based on race as unconnected to any rational ground of decision.

jected for that reason alone. We do attempt to force nations into religious toleration even when most of the population finds that ideal arrogantly American. Cultural imperialism might thus have "good" and "bad" forms, and one might want to determine into which category coerced Indian assimilation would fall.283

Although perhaps relevant as a matter of policy, however, that question should be irrelevant to the constitutional issue of whether the equal protection clause allows special treatment of the Indians. The clause may prescribe a certain morality in which the use of race is inherently suspect, but the clause does not say anything about the territory over which that morality must run. In particular, the clause does not specify that its morality is ideologically evangelical and colonial. Congress may conquer great territories and subjugate peoples, but the equal protection clause does not require it to do so. The clause's only suggestion on the subject is its association of protection and jurisdiction: if a people is subject exclusively to United

283. Even if this analysis were relevant, destruction of Indian autonomy based on a charge of racial discrimination should constitute "bad" cultural imperialism for two reasons. First, non-Indians are excluded from tribes primarily because of the decision of tribes to exclude them, not the decision of the federal government. As this Article suggested earlier, see supra notes 164–170 and accompanying text, tribalism for the Indians may not be based on racial consciousness in the way that non-Indians understand that term, and so imposition of color-blindness on the tribes may be a "bad" instance of cultural imperialism. The central government does adopt rules to effectuate that decision, so it is plainly an accomplice in the action and there is plainly state action. But that federal action takes its moral coloring from the underlying tribal action. In advancing the tribal membership policy, the federal government is merely respecting the tribes' decisions.

Second, whether cultural imperialism is good or bad is always a question of balance. Even if we are convinced that the export of particular American values is a positive good, that good must be weighed against the harm done to the indigenous culture by the dislocation wrought by those ideas. Again, much of the lesson offered by the twentieth century is the failure of well-intentioned reformers who brought "the light of Western Civilization" to darker peoples all over the world, only to watch the local cultures collapse with nothing left in their stead. See, e.g., B. DAVIDSON, LET FREEDOM COME: AFRICA IN MODERN HISTORY (1978). And the lesson of twentieth century Indian policy is an exact replication of that larger lesson in microcosm. Early efforts to assimilate the Indians failed utterly, leaving them penniless, dispirited, and alienated, strangers to the dominant culture and without a culture of their own. Many may have supported this policy for venal motives, but many ex-abolitionists supported it from a commitment to abstract racial justice. See generally F. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 (1984). By the mid-twentieth century, a new, more realistic, policy had emerged, reaching its fullest expression during the presidency of Richard Nixon: "[T]he goal of any new national policy toward the Indian people [must be] to strengthen the Indian's sense of autonomy without threatening his sense of community." PRESIDENT OF THE UNITED STATES, RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363, 91st Cong., 2d Sess. 3 (1970).
States jurisdiction, then that people must become a part of the nation in every way. At the creation of the clause both the Sioux and the Swedes were separate nations not subject to its reach. Over a century later, no-one would argue that the clause applies to the Swedish Government. If the clause does now apply fully to the Indians, then it must be because something has changed, because Congress in its discretion has decided to subject tribal Indians to exclusive federal jurisdiction. Many awaited exactly that event with anxious hearts. But as the next section will argue, it just never happened.

C. Subsequent Developments

The argument that this Article has advanced—that Congress may treat Indians differently because they are a people—works better, the more that Indians are truly different, separate peoples. In the decades since 1866, Indians have become less separate and distinct. At some point, if they lose the status of peoples altogether, the equal protection clause will subject them to the same rights and responsibilities as every other racial group. The question emerges whether we have reached that pass. Contemporary Indian groups vary considerably in the degree of their independence, and it is difficult to make generalizations about them. Two general observations are, however, possible. First, the Constitution now has more of an extension to tribal Indians than it once did. Second, despite that fact, none of the major changes in the legal status of Indians since 1866 has destroyed Congress's ability to single out nonterminated tribes for special treatment, in recognition of their continuing peoplehood. A review of several major changes will help illustrate and defend these two claims.

1. 1871 and the End of Treaty-Making

After the war, the first large change in Indian policy occurred in 1871, with Congress's determination to use legislation rather than treaties to make Indian law. Some have ascribed great significance to this date as the end of true Indian independence. In fact, the decision involved no such profound shift in attitudes toward the Indian nations: under the Constitution, the President and the Senate alone collaborate on treaties, and the House had become discontent about its resultant exclusion from Indian policy.

Nothing of real substance changed. Treaty commissioners continued to go into the field, to draw up agreements with Indian nations; back in Washington, the agreements were enacted as statutes rather than as treaties, merely to give the House some say in the matter. Tribal sovereignty could and did survive the shift in method.\textsuperscript{286}

The 1866 debates also recognize the mere formality of the use of treaties rather than legislation. The Senators did regularly point to the use of treaties as evidence of the semisovereignty of tribes, but only as evidence. Hendricks specifically explained that in 1866 the United States sometimes made treaties with the tribes but sometimes legislated with regard to them.\textsuperscript{287} Despite their awareness of that fact, however, the Senators still concluded that tribal Indians were not "subject to the jurisdiction" of the United States in the constitutional sense. And indeed it is hard to see how they could conclude otherwise; they were discussing an eminently substantive idea, the separate peoplehood of the tribes, not a formality concerned with power politics within Congress.

2. 1924 and Citizenship

Perhaps the most profound shift in the constitutional status of Indians occurred in 1924, when all Native Americans born within the United States became citizens, regardless of membership in a tribe.\textsuperscript{288} On first consideration, this change in status suggests that the Indians are no longer a separate people, because they are now citizens. As a result, the equal protection clause should prohibit legislation singling them out. That conclusion would be inaccurate. The 1924 statute was the endpoint of over a half-century of debate, and to appreciate its significance some review of that debate is necessary.

Almost immediately after the Civil War, the federal government adopted a new Indian policy: rather than continually removing the Indians to uninhabited and increasingly unproductive lands, the government would assimilate them into the dominant culture. "Civilization" of the Indians would involve a number of steps, including education into the American values of work and Christianity, individual land ownership, and perhaps most importantly,

\textsuperscript{286} Clinton, \textit{supra} note 19, at 994.
\textsuperscript{287} \textsc{Cong. Globe}, 39th Cong., 1st Sess. 2894–95 (1866).
\textsuperscript{288} 8 U.S.C. § 1401(b) (1988).
disruption of the tribe. All assumed that at some point in this process, the Indians would achieve citizenship, and the central disagreement concerned whether citizenship could produce "civilization" or "civilization" must precede citizenship. Many of the ex-abolitionists entered the lists in favor of rapid citizenship, and much of the debate drew parallels between liberating and enfranchising blacks and liberating and enfranchising Indians. James Bradley Thayer, the prominent legal academician, occupied a central place in the discussion, calling for immediate citizenship, full legal protection for Indians, and the extension of federal civil and criminal law over the reservations.

The Dawes Act resolved the nineteenth century debate over citizenship in a compromise measure. The heart of the act was the allotment of a certain amount of tribal land, formerly held in common, to individual Indians. For a period of years, the federal government would hold the allotted land in trust for the individual Indians, so that the land could not be alienated and was immune from state taxation. At some point—the point varied as a result of subsequent legislation—the government would issue the Indians a fee simple patent on the land. At first, the Act granted Indians citizenship at the beginning of the trust period, but later Congress provided for citizenship only at the issuance of the fee simple patent.

290. See R. Mardock, supra note 254, at 36; L. Priest, Uncle Sam’s Stepchildren: The Reformation of United States Indian Policy, 1865–1887, at 199, 210–213 (1972); F. Prucha, supra note 289, at 341–42, 346–51. Before and during this debate in the late nineteenth century, Congress had extended citizenship to small groups of "civilized" Indians—members of specific tribes, see, e.g., Treaty with the Pottawatomies, 12 Stat. 1191, 1192 (1861), Indian women who married non-Indian men, see 25 U.S.C. § 182 (1988), and others, see Act of Nov. 6, 1919, Pub. L. No. 75, 41 Stat. 350 (Indians serving in World War I entitled to citizenship upon discharge). In the 1880s, however, the government entered a mood for more general legislation to deal with the "Indian problem" on a more universal basis. See L. Priest, supra, at 206–10.
293. See F. Prucha, supra note 289, at 351–52.
296. At first, the trust period lasted 25 years, but eventually the Burke Act provided for the issuance of a patent whenever the Secretary concluded that the individual Indian was competent to manage his own land. 25 U.S.C. § 349 (1988).
simple patent. 298 In addition, the Dawes Act granted citizenship to every Indian who "has voluntarily taken up . . . his residence separate and apart from any tribe of Indians . . . and has adopted the habits of civilized life." 299

After the Dawes Act, for the first time, America had a substantial number of Indian citizens, and the courts began to grapple with the significance of that fact. In particular, Indian citizenship posed two difficult questions. First, to what constitutional rights were Indians, as citizens, entitled? And second, was American citizenship compatible with tribal membership and a special relationship to the federal government? After some initial confusion, 300 the Court settled on a definite answer to both questions: they were matters for Congressional discretion. Congress made the grant of citizenship as a matter of grace, and it could condition it in any way it chose. In particular, it could allow Indians to remain tribal members; it could maintain the special fiduciary relationship with them; and it could deny them certain constitutional rights—such as the right to purchase liquor as part of the then-recognized constitutional right of contract—possessed by others. 301 The Court had little difficulty, moreover, concluding that Congress had intended to do all of these things. No elimination of the tribes, no dismantling of Title 25, accompanied the grant of citizenship. Congress could "emancipate" the Indians, but it was up to that body to decide how quickly and to what extent that process should take place. The Court summarized and capped this course of decision in United States v. Nice,

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298. Congress adopted this provision in response to the announcement of In re Heff, 197 U.S. 488 (1905), that citizenship was incompatible with a continuing federal guardianship. See F. Hoxie, supra note 283, at 220.


300. In re Heff, 197 U.S. 488 (1905), held that citizenship was incompatible with Congress's continued fiduciary obligation, as exemplified in federal liquor laws: "[W]hen the United States grants the privileges of citizenship to an Indian, . . . it places him outside the reach of police regulations on the part of Congress." Id. at 509. United States v. Nice, 241 U.S. 591 (1916), overruled Heff on this point. Even Heff, however, held merely that if Congress meant to grant the Indians full citizenship rights, it could not then rescind that protection; it never considered the question of whether Congress could grant some but not all constitutional rights.

301. See United States v. Celestine, 215 U.S. 278, 287 (1909) (quoting with approval Eells v. Ross, 64 F. 417 (9th Cir. 1948): "Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain."); Hallowell v. United States, 221 U.S. 317, 324 (1911) ("[T]he mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people."); Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911).
decided in 1916: "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."302 Even as citizens, then, the Indians may be a separate people, organized into tribes, and with only such rights as are consistent with tribalism. Indian-specific statutes still pose no problems under the equal protection clause.

Because of doctrinal changes, the Court's old opinions may be of suspect authority today. The decisions drew on the language of plenary power, then still current: because the Indians were a backward and dependent people, Congress had the moral duty and therefore the right to exercise a nearly unjusticiable power over them. At the time, moreover, the Court had interpreted the equal protection clause in a very restrictive manner, and none of the litigants even raised the possibility that Title 25 might constitute unconstitutional racial discrimination. Nonetheless, the core of the Court's reasoning seems to be still accurate. Even in 1924, the fourteenth amendment did not require Congress to grant the Indians citizenship. Consistently with the equal protection clause, Congress could grant the Indians citizenship and many of the rights appurtenant to that status, and at the same time it could allow them to survive as peoples. That is exactly what Congress meant to do.

The two questions—to what rights are Indian citizens entitled, and whether tribalism is consistent with citizenship—are intimately related. To begin with the first, a famous article by Alexander Bickel has largely dictated the terms of the academic discussion of the rights appurtenant to citizenship. Bickel argued that the framers of the fourteenth amendment gave "privileges and immunities" to citizens, rather than to all persons, merely as a rhetorical flourish; the provision's drafter, John Bingham, liked the sound of the phrase.304 In the years since the adoption of the amendment, however, the Court has ascribed little substantive significance to citizenship, after the Slaughter-House Cases leached the concept of most constitutional significance.305 Instead, the equal protection and due process clauses, which guarantee rights to all persons and not just to citizens, have emerged as the significant guarantees of individual liberty. In addition, the Supreme Court has announced

303. Bickel, supra note 264.
304. See id. at 373–74.
305. See id. at 375–80.
that alienage is a suspect classification, so that states may not in
general single out aliens for special treatment. 306 Bickel praises this
constitutional protection of persons rather than citizens, because it
is easier to strip someone of citizenship than of personhood and be-
cause the framers never meant to ascribe any substantive signif-
cance to citizenship anyway. 307

Even if Bickel's claim that few substantive rights attach to citi-
zenship is true in general, it is not true in the special case of the
Indians. Bickel's analysis divides the persons within America at
any given time into two categories: citizens, and aliens living here,
 apart from their home country. Based on this division, Bickel ar-

gues that aliens ought to receive as much protection as citizens, be-
cause as individuals away from their nation they need and deserve
that protection. But Bickel entirely overlooks the fact that the four-
teenth amendment rests on a different and particular view of tribal
Indians: like aliens, they owe allegiance to a foreign polity, but un-
like aliens, those polities exist within the United States. 308 Indians
are not mere sojourners while here; they have their own govern-
ments in place, governments which determine much of the protec-
tion accorded Indians on Indian Country. This view emerges, not
out of the due process or equal protection clauses, but out of the
citizenship clause, with its deliberate restriction to those under the
jurisdiction of the United States. Bickel, wholly ignoring the Indi-
ans, asserts that this restriction "may exclude the children of for-
egn ambassadors, and means little, if anything, more than that." 309

Unlike aliens, then, Indians live in permanent political bodies
within the United States. As this Article suggested, the conceptual-
ization of tribes as separate polities must have at least some substan-
tive implications, even for Indians' rights as "persons" under the

306. See id. at 380–87.
307. See id. at 387. Other commentators seem to agree that citizenship has little
substantive significance. See, e.g., Aleinikoff, Theories of Loss of Citizenship, 84 Mich.
L. Rev. 1471, 1486–87 (1986). Those who take issue with Bickel do so on the grounds
that citizenship may have some "metaphysical" or "rhetorical" importance. See John-
son, Sovereignty, Citizenship and the Indian, 15 Ariz. L. Rev. 973, 990–92 (1973); see
 also K. Karst, supra note 47, at 43–49 (symbolic importance of citizenship in pre- and
post-Civil War debate). As a practical matter, the only significance of alienage is that
the federal government is subject to a lower standard under the fifth amendment in
setting immigration policy than it would be in dealing with citizens. As this Article has
already argued, however, Indians are not comparable to aliens in this regard. See supra
text accompanying notes 183–191.
308. Late nineteenth century commentators sometimes explicitly drew this distinc-
tion. See, e.g., L. Priest, supra note 290, at 205.
309. Bickel, supra note 264, at 374.
equal protection and due process clauses. At a minimum, it means that Congress may single out the racial-ethnic-cultural group Indians for special treatment, so that the racial discrimination component of the equal protection clause does not apply in the same way. Those who adopted the amendment clearly believed that it meant more than that, although their exact expectation is less than clear. Tribal Indians may have had the most protection when away from the reservation; then, perhaps, their situation was identical to that of aliens. But on the reservation, they were subject to a tribal government, which would presumably create and protect most of their rights, much as states were supposed to do before the Civil War.

Inevitably, this situation must complicate the exact constitutional status of Indian rights. The drafters of the amendment may have contemplated that, even while on the reservation, Indians retained rights to personal security and to redress in federal courts. They may also have anticipated, however, that Indians would not possess the rights of contract and property, and "political" rights. And at the time, those restrictions may have made good sense, precisely because Indians were a separate people for whom at least some Anglo-American rights would have seemed alien intrusions.310 In order to respect tribal culture, the United States might have to limit constitutional protection.311 Before citizenship, then, Indians did not receive all the rights that other "persons"—even aliens—did.

With the extension of citizenship, however, we seem to have entered a new world. Suddenly, the whole basis for excluding Indians from constitutional rights seems to have evaporated, because they have become citizens, apparently ending their separate peoplehood. But if that analysis is accurate, the grant of citizenship

310. The Court and Congress have recognized the incompatibility of some Anglo-American rights and Native American culture in other ways as well. In particular, the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), statutorily extends most of the Bill of Rights to tribal governments, but the Court has construed the Act narrowly so as to limit its effect on traditional Indian culture. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

311. Perhaps the clearest example are federal laws limiting the sale of liquor on the reservations. Many tribes had condemned the sale of liquor, implicitly or explicitly, and many tribes today continue to prohibit it. But federal laws banning the sale arguably interfered with then-accepted constitutional rights of contract. The citizenship clause implicitly recognizes the difference between peoples, and so presumably would allow the federal government to restrict the rights of contract of Indian "persons" when it might protect fully the contractual rights of an alien. Cf. United States v. Nice, 241 U.S. 591 (1916) (upholding against constitutional challenge a federal law banning sale of liquor to tribal Indians).
also removed the justification for treating Indians separately under the equal protection clause: they are no longer a people, as they have become fully a part of the nation around them. In effect, this argument asserts that citizenship and tribal membership are incompatible. Thus, to answer the first question—which rights did the Indians gain with citizenship?—we must consider the second question—can the Indians retain tribal affiliation after citizenship?

The central fact in analyzing the compatibility of tribalism and citizenship is that the fourteenth amendment did not mandate that tribal Indians become citizens, because they are not and never have been “subject to the jurisdiction of the United States” in the constitutional sense. Rather, Indians received citizenship only because Congress chose to give it to them, under its naturalization power, as an act of legislative discretion. Unlike other naturalized citizens, then, Indians became citizens by operation of statute alone, not also by operation of the citizenship clause. To determine the meaning of citizenship for the Indians, we must consult the intent of Congress in 1924, not the fourteenth amendment. Constitutional citizenship may have a particular meaning, but legislative citizenship means whatever Congress wants it to mean. “Citizen” is, after all, only a word, and Congress sometimes uses words loosely. The exact significance of Indian citizenship is thus exclusively a matter of legislative intent—as long as the Constitution allows Congress this discretion.

Nothing in the Constitution requires Congress to force new citizens to abandon ties to a different government. As a general matter, the Constitution does not forbid dual citizenship, although United States policy has done so. In the particular case of the Indians under the fourteenth amendment, the citizenship clause merely sets a floor; all Indians who are fully subject to the jurisdiction of the United States must be citizens, but others may be so as well. The clause places only one real limit on a grant of citizenship: it may not eliminate the separate peoplehood of Indian tribes, if Congress means to continue legislating separately for Indians. This limit is somewhat circular: Indian separate status can survive the grant of citizenship as long as Congress did not intend that grant to destroy their separate status.

314. Any sensible use of the term “citizenship” may, at a minimum, imply some kind of allegiance, but the drafters of the amendment believed that even in 1866 tribal Indians owed the United States some kind of allegiance, and that fact did not interfere
Citizenship for the Indians is thus a legislative term, not a constitutional one. To discern its exact meaning, we must look to the course of federal Indian policy during the twentieth century. Any summary of the complexities of that policy would take too long, but it is possible to advance two general observations. First, citizenship for the Indians should mean something close to what citizenship for everyone else means. Congress did, after all, use the same word, and so the background presumption should be one of identical treatment. In 1887, moreover, the Dawes Act granted to those Indians to whom it gave citizenship "all the rights, privileges, and immunities of such citizens [of the United States]." 315 Nothing about the 1924 Act suggests that it was intended to grant a more limited citizenship than the Dawes Act. Second, Congress at the same time did not intend entirely to eliminate the special status of the Indians either. No wholesale overhaul of Indian law accompanied the 1924 statute. Indeed, in the years since the grant, Congress has broadened and entrenched the powers of tribes. During the modern "era of self-determination," the pattern has been to allow individual Indians the maximum participation in national life consistent with tribal self-determination. 316 It is, perhaps, safe to assume that Congress means to grant Indians as many constitutional rights as possible without invading the preserve of tribal sovereignty. Apart from a general review of Indian policy, there is another reason to reach this conclusion: if Congress meant to force tribal Indians wholly into the national life by the grant of citizenship, most of Title 25 would be invalid because Indians would no longer be separate peoples. By the established maxim that statutes should be read so as to avoid constitutional invalidations, the Court should read the citizenship statute to grant no rights in conflict with tribal autonomy. For present purposes, it is enough to note that the citizenship statute does not apply the equal protection clause to the Indians in the same way that the clause applies to everyone else.

A last observation is in order: this Article has argued that Indian citizenship and the constitutional rights attending it originated in an act of legislative grace. It is reasonable, therefore, to wonder	

with their tribal status. See supra notes 257–263. They plainly assumed that over time Congress would gradually internalize the Indians, but they at no point hinted that Congress could do so only in set ways. Citizenship by the Constitution would signal the elimination of tribalism, because by definition it could only follow the cessation of tribal jurisdiction. But citizenship by statute is not subject to any such restrictions.


316. See, e.g., 1982 HANDBOOK, supra note 6, at 180–206.
whether Congress could take away those rights as easily as it gave them. The answer, it seems, is no. Many citizens receive their citizenship as a matter of legislative grace, but after becoming citizens their constitutional rights are no longer a matter of grace, unless they lose their citizenship again. And the Court has made clear that, constitutionally, Congress may denationalize a citizen only if he chooses expatriation. In *Afroyim v. Rusk*, 317 the Court explained the two bases for this rule. First, Congress has no power, express or implied, “to take away an American citizen’s citizenship without his assent” 318; the whole theory of government on which the United States is based is that only the individual may sever that bond, not the legislature. Second, the fourteenth amendment, with its definition of citizenship, permanently removed from Congress the power to strip an individual of his citizenship, by mandating citizenship under particular circumstances. 319

In this regard, Indians are in exactly the position of other citizens, with one exception: their citizenship is, in a sense, “partial,” in that they gain many but not all the constitutional rights that others possess. As to the first basis of *Afroyim*—the absence of a Congressional power to denationalize—the partial nature of Indian citizenship would seem to be irrelevant. Tribal affiliation may produce divided allegiance, but the *Afroyim* Court made plain that Congress lacked the power to denationalize a citizen even if he accepted a foreign office. 320 The rationale for this part of the holding and for the opinion as a whole is the contractarian nature of government: “In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship” 321; “[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.” 322 Even though they are also members of tribes, Indians are now constituent members of the republic; they determine the future path of the country, in the ballot box and in office. If they lack certain rights in recognition of their separate status—such as equal protection and establishment clause rights—that fact does not diminish the fundamental tie between citizen and

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318. *Id.* at 257.
319. *Id.* at 261–62.
320. *Id.* at 259.
321. *Id.* at 257.
322. *Id.* at 268.
government; it merely restricts the scope of protection accorded this particular group of citizens.

The second basis for Afroyim—the fourteenth amendment—less clearly supports the unconstitutionality of Indian denationalization. The Court explained that part of the purpose of the citizenship clause was to define citizenship so that Congress could not exercise the power of denationalization. All persons born within the United States or naturalized by Congress, and subject to the jurisdiction of the United States, must be citizens. Thus, Congress may decide to naturalize citizens as a matter of grace, but at that point the fourteenth amendment enters to give that status constitutional stature. But Indians—unlike other naturalized citizens—do not fit the fourteenth amendment definition, because although naturalized they are not "subject to the jurisdiction of the United States" in the constitutional sense. As a result, the fourteenth amendment does not, on its face, provide any protection for Indian citizenship.

Even under the fourteenth amendment, however, one should hesitate long before deciding that Congress may denationalize one class of citizens but not another. The problem is not limited to the Indians. Conceivably, Congress might grant citizenship to an indefinite number of persons not subject exclusively to the jurisdiction of the United States. The resulting situation would be even worse than the picture painted in Afroyim: not only could one group of citizens temporarily in office denationalize another group, they could do so secure in the knowledge that the same could never be done to them. And if the Indians could be so denationalized, the result would be that direly predicted by Black: "In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country." If Indians were to lose their United States citizenship, they would still retain their tribal citizenship, and in that sense they

323. A later case applying Afroyim also supports this conclusion. Vance v. Terrazas, 444 U.S. 252 (1980), struck down a statute denationalizing citizens for taking an oath of allegiance to a foreign country. The Court made its bright-line rule very clear: because of the fourteenth amendment’s citizenship clause, even a citizen with severely divided allegiance may lose his citizenship only by his specific intent to relinquish it. Although the Court did not note the fact, the citizenship clause would not require individuals with divided allegiance to be citizens any more than it would require the Indians to be citizens, because they are not exclusively subject to the jurisdiction of the United States. And yet, once such individuals become citizens, Congress may not take their citizenship away; presumably the same should be true of the Indians.

324. Afroyim, 387 U.S. at 268.
would have a national identity. But for better or worse, a tribe is not a truly independent nation; the United States exerts jurisdiction over it in significant and dangerous ways. Without citizenship, Indians would be what a Dred Scott-era report of the Attorney General called them—mere subjects, persons without the protection of citizenship in a nation in the company of nations. In a sense, then, Indians receive constitutional protection simply because they need it. The United States partially determines the fabric of their lives, and so the Indians must have a hand in shaping American government. And that idea—that the need for protection evokes the protection—brings us to the last of the major changes in Indian legal status.

3. Increased Federal Jurisdiction

The last major change in the status of the Indians since 1866 is the great increase in federal and state jurisdiction, legislative and judicial, over Indian Country. In 1888, Congress enacted the Major Crimes Act, giving the federal courts jurisdiction over major crimes committed by Indians on Indian Country. In 1887 came the Dawes Act governing Indian land tenure. Shortly thereafter, Congress began enacting a series of statutes regulating Indian use of natural resources. Then in 1934, the Indian Reorganization Act, while recognizing tribal sovereignty and guaranteeing all the tribes' "pre-existing" powers, nonetheless created an organizational scheme for exercise of those powers. In 1953, Congress passed Public Law 280, which surrendered to certain states a substantial measure of civil and criminal jurisdiction over the Indians. And, in more recent years, the Court has taken a hand in allocating jurisdiction where the statutes are unclear. The tribe has jurisdiction, according to the Court, over its own members, and over nonmem-

327. See supra notes 297–299 and accompanying text.
bers in exceptional circumstances; the state has jurisdiction when it has a "substantial interest" in such jurisdiction.

So the status of the Indians is clearly not what it once was when Lyman Trumbull could speak of "wild Indians" roaming the plains. But the differences are those of degree, not of kind. The central fact of Indian legal status remains unchanged: they are subject to two sovereignties, however diminished tribal power and however increased federal power may be. While the Indian Reorganization Act may have instituted a scheme for expressing tribal sovereignty, it also recognized the fact of that sovereignty. Many tribes, moreover, chose to reject the IRA structure entirely and remain under their traditional governments. And the Court continues to recognize that much of the jurisdiction exercised by tribes, at least over their own members, is aboriginal, not delegated by the federal government.

The extent of that jurisdiction has shriveled, but that fact does not lead to the conclusion that the Indians are no longer a separate people. As a matter of positive law, the drafters of the equal protection clause recognized that even then the United States exercised some jurisdiction over the tribes. They did not deem the presence or absence of federal jurisdiction to be the relevant fact; rather, the critical issue was the presence or absence of tribal jurisdiction. So long as the tribe has not been essentially eliminated, regardless of the extent of federal jurisdiction, then the Indians are a separate people. As Senator Howard put it, as long as Indians owed allegiance to a tribe, they could never become subject to the "same jurisdiction in extent and quality as applies to every citizen of the United States now."

The normative argument offers no such cut-and-dried analysis, but it does still support Indian separatism even today. Peoplehood is consistent with a certain amount of internalization within a larger, protecting country. The only necessity for separate treat-

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334. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

ment under the equal protection clause is that the tribe continue to weave the basic fabric of life on Indian Country, and that that fabric continue to reflect the existence of the Indians as a distinct people. At some point, federal jurisdiction may become so overwhelming that tribal government is only a sham. At that point the Indians may become an ethnic minority, but there is no reason to conclude in advance of particular cases that we have reached that state of affairs. Many Indians still feel a tremendous loyalty toward and identification with their tribe. Many still feel that they are a separate and distinct people. Perhaps in particular cases, those feelings are federally induced delusions or the lingering dreams of past realities, but perhaps they are the genuine product of a tribal unity not yet wholly destroyed.

Thus, the extension of more federal jurisdiction does not necessarily deny the legitimacy of separate treatment for the Indians. It does, however, lead to a different conclusion: even without the legislative grant of citizenship, Indians should receive more constitutional protection because they are more subject to federal jurisdiction. As already outlined, at and around the adoption of the fourteenth amendment, it was a widely shared belief that Indians enjoyed some constitutional protection because they were subject to some federal jurisdiction—despite the fact that they were separate peoples. Perhaps they enjoyed the greatest protection off-reservation, because they were there subject to a greater degree of federal jurisdiction, without the buffer of the tribe. The general underlying principle was clear: Indians enjoyed such protection precisely because they were somewhat vulnerable to the federal government. Even without such specific historical evidence, one would expect and hope that the Court would find such a principle inherent in the Constitution. It is the principle underlying the Court’s extension of constitutional protections to aliens, Bickel’s minimalization of the significance of citizenship.

With the extension of federal jurisdiction, the tribe now acts as less of a buffer than it once did, and the Indians are more vulnerable to federal power. As a result, they should receive greater constitutional protection. As the federal government now exercises more jurisdiction on the reservations, those constitutional protections should reach onto them as well as off them. Because the federal courts now try Indians for a variety of crimes,336 Native Americans must now receive the full panoply of protections accorded criminal

defendants. Since the federal government is now in the habit of relatively routinely passing statutes that affect life on Indian Country, Indians should have some hand in that process—enfranchisement and the associated "procedural" rights, such as rights of expression and association. Finally, because federal policy does, to some extent, affect the lives of Indians, they should receive many if not all of the substantive constitutional rights that others enjoy.

There is, on the other hand, an outer limit on these protections: as long as the Indians are to exist as a separate people, they may not receive rights that are inconsistent with that status. The general analysis is thus the same as that accompanying the significance of Indian citizenship. As a result, Indians exist in a difficult and muddy middle ground, somewhat internalized but still a people: at some point, the degree of their internalization may become inconsistent with their peoplehood, but that point is not easy to determine. Unhappily, this answer is neither simple nor straightforward, because it perpetuates the ambiguity and tension that has characterized Indian law for so long. But to adopt a simple answer—Indians are just like everyone else or completely different from everyone else—would be to deny the moral complexity of the Indian condition.

Unlike every other group, Indians maintain traces of self-government that do not derive their legitimacy from the same sources as the federal and state governments. To some extent, Indians are "a part of our population" and thus must receive constitutional protection. But to some extent, they are a separate people, and their constitutional treatment should reflect that fact. This reality may be a difficult one for constitutional discourse to accommodate, premised as much of it is on a unified polity. Many Americans—perhaps also many constitutional scholars—tend to think of aboriginal peoples as something that other, "colonial" (somehow we are not colonial in this definition) nations have. But that attitude rests on a fantasy of American sinlessness in the conquest of the continent: Americans brought western civilization to the Indians, and after some wars that were prompted only by their savage natures, the Red Men saw the light and joined with us in the greatest nation on earth. It did not happen that way. Many of them are still holding out to some extent. And the equal protection clause allows Congress to recognize the fact both of their internalization and their independence.
D. The Powers and Role of the States

This Article has suggested that one of the difficulties of the Court’s position is its claim that the federal government may single out Indians, but states may not, except under delegation from the federal government. This differentiation presents an analytical difficulty: if “Indian” is merely a political category, then the state should be able to use that category as well as the federal government. And it presents a practical difficulty by calling into question many state practices that are based on the same general view of Indians as those underlying Title 25, practices designed to recognize and shore up tribal independence. States may, for example, give Indian tribes tax exemptions beyond those required by federal law, or allow tribal officers to arrest members off the reservation. As these schemes single out Indians for special treatment, they are presumably at least suspect. The concern of the Court in holding that states may not single out Indians is presumably its traditional fear that states will mistreat the Indians for racist reasons. But in holding that states may never single out Indians, absent federal authorization, the court rules out the possibility for meaningful tribal-state cooperation. Given the history of state oppression, perhaps the Court should view state legislation singling out Indians with special suspicion. But it makes little sense to hold that the federal government may use the category “Indian” in a benign political sense, but states never may.

Recognition of the Indians as peoples, on the other hand, does offer a more unified standard for state and federal actions. Like the federal government, the states may treat Indians either as peoples or as ethnic minorities. States may not single Indians out for special treatment if the legislation rests on a view inconsistent with peoplehood. Nor may states single out Indian tribes if, cumulatively, state and federal legislation too severely restricts the self-determination of a particular tribe. On the other hand, only the federal government may bring about the “tipping point”: as noted earlier, when the cumulative effect of nontribal jurisdiction is such as to

337. One response to this claim is based on a preemption analysis: even for states, “Indian” could be a political category, but the federal government has simply preempted the states from legislating about the Indians absent explicit delegation. See supra note 123. There are two problems with this argument. First, Yakima did not use a preemption analysis to distinguish between state and federal uses of the term “Indian.” Second, the federal government has not completely preempted the states from legislating about Indians absent express permission. See Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989).
make peoplehood a sham, the federal government has a choice. It may either retract its jurisdiction, leaving the tribe in place, or else it may tip the tribe over into being an ethnic minority, simultaneously wiping from the statute books all legislation singling out those Indians. States do not have that choice, as a matter of federal preemption. If states could constitutionally bring about the "tip," they could effectively rewrite Title 25 as to a particular tribe by compelling the elimination of Indian-specific statutes. Such a course would be inconsistent with one of the most basic aspects of federal Indian policy, the centralization of essential decisions.

The proposed standard thus recognizes what has always been the case, although has often been overlooked: there are three types of sovereign governments in this country, not two. When the other two, states and the federal government, regard the third, the tribes, they may see one of two pictures. In the first, they see only a private association of Americans with a particular color; when painting policy within that canvas, they must use the careful, delicate brush strokes imposed by the equal protection clause on the government's use of racial classifications. But in the second picture, they see a still-existing, semi-independent people, defined in part, but only in part, by race. And when painting within this canvas, the clause allows them to recognize one of the truths about peoples: sometimes they need their own polity. Again, the clause does not necessarily require this policy; the federal government may dismantle the tribes if it so chooses, although the states may not. But as soon as the government does so, it will have deprived itself of the second canvas and sharply limited its policy options. At that point the Indians must receive the same treatment as every other minority, because the government will have taken from them the protection that most of them have always most desired, membership in a meaningful tribal community.

E. Modern Application and Differences from the Court's Standard

This Article's proposed standard is in some ways similar to the Mancari Court's as a practical matter. It maintains that the critical reason that tribes can be treated differently is the fact of their political status, and it asserts that if Indian-specific statutes are tied to that status, they are legitimate. But the standard is also significantly different from the Court's in both conceptual and practical ways.
Conceptually, the Court has held that tribes are not racial bodies under the equal protection component of the fifth amendment, and this Article has sought to deny that claim. Tribes are racial bodies and normally would be subject to strict scrutiny. Ignoring that fact risks devaluing strict scrutiny for non-Indian racial groups and does not offer a sound basis for Indian self-determination. Instead, this Article has sought to establish that the equal protection clause itself suggests that Indians are in a unique position: because they are separate peoples, the clause's norm of racial equality simply does not apply to them.

This proposal is also different from the Court's standard in important practical ways. For one thing, the Court's standard has become essentially toothless, imposing only minimal rational basis review. As long as the legislation reflects any nonracist state interest, it is valid, no matter how it singles out the Indians. This Article has argued instead that Indian-specific legislation is free of equal protection strictures only to the extent that it is consistent with tribal self-determination, in effect and in intent. For example, as to the effect prong, if the federal government should declare a tribal government terminated in all respects, then Congress may not thereafter enact special legislation for the tribe, unless it first restored the tribal government. Similarly, special benefits for non-tribal Indians would be subject to the Court's normal affirmative action standards. By the same token, Congress may not nominally set up a tribal government but then vest all the managerial power for that government in a federal administrator.

As to the intent prong: Congress may not enact legislation that proceeds from the assumption that the Indians may not or cannot govern themselves. Much but not all of the nineteenth century legislation may be vulnerable to this charge, resting as it does on racist assumptions. The Removal treaties, on the one hand, may rest on a view of the Indians as separate governments: they required the tribes to move across the Mississippi, but they recognized that tribal

338. See supra Introduction.
339. See supra text accompanying notes 122–123.
340. In recent years, Congress has come closest to doing this in some of the termination statutes passed in the 1950s, by dismantling Indian reservations and allowing the transfer of the real property to some other owner. On the other hand, Congress did not expressly terminate tribal self-government in those cases, see Wilkinson & Briggs, The Evolution of the Termination Policy, 5 AM. IND. L. REV. 139, 154 (1977), and so the question that the Court would have to face is whether the tribe survived as a practical matter to protect Indian peoplehood.
341. See supra notes 136, 145, 277.
government would continue.\textsuperscript{342} The Major Crimes Act, on the other hand, seems to rest on a conviction that Indians as “savages” are unable to govern themselves and so might fall.\textsuperscript{343}

For the same reason, the \textit{Antelope} case might come out the other way. Remember that under the major Crimes Act, an Indian killing a non-Indian on Indian Country is tried under the Major Crimes Act in federal court, which applies a felony murder statute. But a non-Indian killing a non-Indian on Indian Country is tried in a state court, which might not have a felony murder statute.\textsuperscript{344} This arrangement should be subject to the full requirements of equal protection, not because Indians are treated differently from non-Indians, but because that difference in no plausible way reflects a view of the tribes as separate peoples. The problem is not that non-Indians are tried in state court but that Indians are tried in federal court, as if unable to try themselves. If non-Indians went to state court, which did not have a felony murder statute, and Indians went to tribal court, which did, Indians would receive harsher treatment but only because they were members of a people that chose to order its affairs differently.

Finally, the Court’s standard adopts toothless review for the federal government but strict scrutiny for the states. My proposed alternative would apply the same standard for both, allowing tribal-specific standards if consistent with tribal self-government. For example, states and tribes might want to create special tribunals made up of Indian and non-Indian judges to handle cases involving interracial contracts or torts, on-or off-reservation. Under extant law, absent compelling justification or federal authorization, such an arrangement might fall, as it rests on express racial lines. Under the proposed standard, however, it would simply reflect government-to-government arrangements for the handling of judicial matters in which each has an interest.

These examples are of course only suggestive of the differences, but may offer some indication of the way the standard would be applied. As with any broad constitutional standard, there will inevitably be gray areas, in which it is not clear whether the federal government is offering assistance to tribal government or seeking to extend its own control. For example, after Congress enacted the Indian Reorganization Act, the tribes began to formulate and adopt constitutions for their tribal governments; on the face of it, this pro-

\textsuperscript{342} See Clinton, \textit{supra} note 19, at 1028.
\textsuperscript{343} See \textit{supra} note 181.
\textsuperscript{344} See \textit{supra} text accompanying notes 108–111.
cess would seem to promote self-determination. On the other hand, the federal government so dominated this process on some reservations—writing the constitutions, including non-Indian forms of governance, and then pushing them through to approval—that the constitutions might seem to many to be merely a way to extend federal influence on Indian country. Resolution of such in-between cases could only proceed on a careful case-by-case analysis, sensitive to nuance and context.

CONCLUSION

The promise of America, for many people, has been that it holds a light to all the huddled masses of the world, offering them a home where they can all exist together. We want to believe that, given sufficient generosity and good will, all can become a part of the same polity and be the better for it. Every day, the experience of America requires that hope. In the middle of racial conflict or sectarian contentiousness or ethnic struggles for power, we need to believe in the possibility of a nation that can encompass and welcome all. The reason that Indian law may stir so much anxiety may be that it tends to place limits on the promise. And so it is an understandable impulse to claim that the Constitution applies to Indians in the same way as it does to every other group. Yet at the same time, many, including the Court, clearly believe that forced assimilation is not a healthy future for the Indians. Seeking to reconcile these two beliefs, the Court has insisted that the equal protection clause applies fully to Indians; but it just so happens that Indians are not racial groups, so Congress may give them utterly different treatment. Others might argue that the clause fully applies, but Indians are different because they were here first, the United States stole the continent from them, or they have been uniquely subjected to abuse. None of these rationales, this Article has argued, is convincing, because they all get the order of their terms wrong; they all maintain that the clause applies, but Indians are different.

This Article has argued instead that Indians are different, and therefore the clause does not apply to them, at least not in the same way. This argument rests on a central claim that Indians have been making for a long time: they are a separate people with rights to develop in their own way. In a sense, then, it is difference itself that makes the difference. And perhaps that conclusion does contain a

rebuke to the more extravagant hopes of evangelical Americans: America may be a fine place for its citizens, but it is not for everyone, at least not at full strength. It is even possible that Indians may be exposed to American civilization, as Jews were to medieval Christianity, and yet decide that they need and want to go their own way. As an exercise of raw power, Congress may be able to compel their assimilation; the Constitution may not forbid the mindset of empire. But the Constitution does not compel that mindset either. It might be one of the appropriate ironies of American history if the equal protection clause, in the hands of twentieth century militarists, became the inspiration for indefinite expansion. Under the banner of antidiscrimination, the United States would conquer nation after nation, because they all are based on racial or ethnic ties to some extent. And thus the promise of the clause would be fulfilled when everyone the whole world 'round found a home beneath the Red, White, and Blue.

That irony should not lead us to abandon the hope of universal acceptance, merely to revise its contours. The United States could extend a home to different peoples not by absorbing and converting them all, but by allowing them to coexist without harassment. The Native Americans offer perhaps the best candidates for such treatment, as the original victims of the nation that prides itself on toleration for all. And in the case of the Indians, the equal protection clause should remind us that if a home is a place where they have to take you in, a place from which you cannot escape is a prison.