NOTE

"POLITICAL RATHER THAN RACIAL IN NATURE": STRENGTHENING *MORTON V. MANCARI* USING THE INDIAN COMMERCE CLAUSE

*Allison Kim**

Federal Indian Law is under threat. In the decades since the 1974 Supreme Court case Morton v. Mancari, anti-Indian groups and extreme ideological groups have challenged important Indian tribes' rights, seeking to dismantle their political classification rather than the racial classification granted to them. It is through the political classification from Mancari that the unique tribal-federal trust relationship is harmonized with the inherent tribal sovereignty. Without this characterization, federal Indian law would cease to exist in its current form. This article examines current federal Indian law, including the Mancari decision, and two alternative legal approaches defending the constitutionality of federal Indian law. Though Mancari is considered a courtroom victory for tribal sovereignty, scholars have criticized the decision for several reasons, including the fact that the Court ignored the racial criterion in the statute and that the political classification doctrine presented a flawed view of race. Post-Mancari jurisprudence illustrates the lack of guidance provided by the Supreme Court regarding the application of the Mancari decision and reveals that the "political, not racial" rationale has reached a crossroads in the age of affirmative action, casting doubt on the stability and feasibility of the Mancari framework. Therefore, this Note proposes two alternative solutions to equal protection challenges: one that posits Indian-specific legislation capable of surviving strict scrutiny and the other that relies on a distilled version of Mancari that allows Indian-specific law to be upheld under rational basis review.

* B.A., The George Washington University, 2019; J.D., Cornell Law School, 2024. Thank you to Professor Robert Odawi Porter for his help in the development of this Note. Additionally, thank you to the staff of the *Cornell Journal of Law and Public Policy* for their tireless work in editing and publishing.

INTRODUCTION

What comes to mind when you hear the term "Indian"? It is a legal term of art, but maybe you think of reservations, gaming rights, or the U.S. Supreme Court's most recent case involving the Indian Child Welfare Act[1] Underlying these concepts are incredibly important rights—which have governed the Indian way of life for generations. They all hinge on *Morton v. Mancari*[2], a 1974 U.S. Supreme Court case that characterized Indian tribes as political classifications rather than racial classifications.[3] Without this "political rather than racial in nature" principle[4], federal courts could increase their judicial scrutiny and rule that almost the entirety of federal

[1] Haaland v. Brackeen, 599 U.S. 255, 263–64 (2023).
[2] *See* Morton v. Mancari, 417 U.S. 535, 552–53 (1974).
[3] *See id.* at n.24, 553–54.
[4] *Id.* at n.24.

Indian law is racially discriminatory under the Due Process Clause of the Fifth Amendment, which requires the federal government to practice equal protection.[5] In short, federal Indian law as a doctrine would cease to exist in its current form.[6] Fortunately, *Mancari* is still binding law, but it is under significant threat today.[7]

This Note will proceed in six parts. Part I outlines the foundational legal framework of federal Indian law and the historical context leading up to the *Mancari* decision. Part II discusses *Mancari*, its legal reasoning, and its academic criticisms. Part III covers subsequent cases that rely on *Mancari*. Part IV introduces two alternative legal approaches that defend the constitutionality of federal Indian law. Part V argues that the Indian Commerce Clause is the best way to strengthen and uphold *Mancari*'s political classification rule to defend against equal protection challenges. Lastly, Part VI carefully examines the progression of the *Haaland v. Brackeen* cases, paying particular attention to how the Indian Commerce Clause was used in those cases to bolster the political status of Indian tribes.

I. PRE-*MANCARI* HISTORY

A. *Early Political Relationship Between Indian Tribes and White European Colonists*

Western European settlement of the Americas began in 1492 when Christopher Columbus arrived there to find the land already inhabited by thriving, complex communities.[8] He made four round-trips to the Americas from 1492 to 1502, setting the course for the mass influx of western Europeans who would migrate there.[9] From there, the political relationship between the Indian tribes and European colonists developed.[10] The early history of this relationship can be divided into three broad time periods: the colonial period, the confederation period, and the Trade and Intercourse Act era.[11]

---

[5] *See id.* at 551–53.

[6] *See* ANDREW I. HUFF & ROBERT T. COULTER, INDIAN L. RES. CTR., DEFENDING *MORTON V. MANCARI* AND THE CONSTITUTIONALITY OF LEGISLATION SUPPORTING INDIANS AND TRIBES 1 (2018), https://indianlaw.org/sites/default/files/Defending%20Morton%2 0v.%20 Mancari.pdf [https://perma.cc/VR2K-HNCX].

[7] See *id.* at 1.

[8] *See* Kevin Enochs, *The Real Story: Who Discovered America*, VOICE OF AM. (Oct. 10, 2016), https://www.voanews.com/a/who-discovered-america/3541542.html [https://perma.cc/T4A8-D9F5].

[9] *Id.*

[10] *See* CAROLE E. GOLDBERG, REBECCA TSOSIE, ROBERT N. CLINTON & ANGELA R. RILEY, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 14–20 (7th Ed. 2015).

[11] *See id.*

The colonial period, lasting from 1492 to 1776, was characterized by the dispossession of indigenous land by European colonists.[12] The European nations that colonized the Americas during this time largely assumed that "discovering" a piece of land would vest certain property rights to acquire the land on behalf of the "discovering" nation.[13] This theory on the rights of discovery would manifest later in federal Indian law and serve as justification for seizing land from the sovereign that already existed there, the American Indians.[14]

In the British colonies, the daily management of Indian affairs fell mostly in the purview of each separate colony.[15] Some of the colonies, such as Massachusetts Bay, Virginia, and Connecticut, would seize lands from Indians and turn to violence and conquest if the Indians fought back.[16] These policies naturally led to mass decimations of Indian tribes on the eastern coast.[17] For example, English colonists in Virginia "became decidedly antagonistic" and "engaged in callous Indian policies" in response to the Indian Massacre of 1622 where the Powhatan tribe rejected assimilation and launched deadly attacks against English settlements in Virginia.[18] Other colonies, such as New York and Georgia, dealt with Indian tribes through diplomacy and treaties.[19] In particular, Georgia treated the Creeks and Carolinas as separate sovereign entities, relying on trade and diplomacy to maintain relations.[20] Despite some colonies' attempts at diplomacy, Indians were largely fed up with the land frauds, unauthorized intrusions into Indian land, and frauds within the Indian trade, leading to occasional disruptions in Indian affairs.[21]

In addition to dispossessing Indian lands, most colonies during this time tried to regulate Indian trade and land cessions for themselves.[22] In pursuit of maximizing their profits on Indian land and trade while keeping Indians relatively satisfied, the colonies saw the gaps created by the disjointed management of Indian affairs by each colony.[23] After more dysfunction and a series of French and Indian wars, the colonies proposed to form a union.[24] They designed the union to assure central control over

---

12 *See id.* at 15–16.

13 *Id.* at 15.

14 *See id*. at 14–16.

15 *Id.* at 16.

16 *Id.*

17 *Id.*

18 Michael Jude Kramer, *The 1622 Powhatan Uprising and Its Impact on Anglo-Indian Relations*, at 1–2 (2016) (Ph.D. dissertation, Illinois State University) (on file with the Milner Library, Illinois State University).

19 Goldberg, Tsosie, Clinton & Riley, *supra* note 10.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

Indian affairs, and beginning in 1755, the British monarchy started to centralize the management of Indian affairs, licensing and approving all land cessions east of the Appalachians.[25]

The confederation period, lasting from 1776 to around 1789, largely coincided with the American Revolutionary War, during which the United States sought to secure the neutrality of the Indian tribes during the conflict, even though they still saw tribes as a "conquered" group.[26] After the War, the United States attempted to impose a "colonial federalism" relationship, which Indians resisted, and the federal government pivoted to a self-determination model.[27]

In 1781, the colonies approved their first frame of government, the Articles of Confederation, vesting the power to regulate Indian affairs to the Continental Congress, though in ambiguous language.[28] Simply put, the Articles of Confederation failed in terms of Indian affairs, with multiple states protesting federal initiative regarding tribes within their borders.[29] This conflict between the federal government and state governments under the Articles reached a boiling point when Georgia participated in unauthorized negotiations with the Creek Indians, triggering an Indian war.[30]

The Trade and Intercourse Act era, lasting from 1789 to about 1835, was defined by the adoption of the new U.S. Constitution and a new focus on the federal government.[31] Most relevantly, the Indian Commerce Clause of Article I authorized Congress to regulate commerce with the Indian tribes, along with two other sovereign entities, foreign nations and states.[32] Congress quickly asserted exclusive federal control over Indian affairs by enacting the Trade and Intercourse Act of 1790, which prohibited the sale of Indian lands without express authorization by the United States.[33] After new versions of the statute were finalized in 1802 and 1834, the Trade and Intercourse Acts established geographical boundaries for Indian country that attempted to emulate treaty boundaries, prohibiting private or state-negotiated Indian land sales without congressional approval.[34] It also regulated non-Indians who participated in Indian trade or entered Indian country, and encouraged the "civilization and education" of Indians to assimilate them into the larger American society.[35] Thus began the delicate

---

25 *Id.*
26 *Id.* at 17.
27 *Id.*
28 *See id.*
29 *Id.*
30 *Id.* at 17–18.
31 *Id.* at 18.
32 *Id.*
33 *Id.* at 18.
34 *Id.* at 19.
35 *Id.*

balance between tribal self-determination and congressional power.[36] During this era, Congress passed the first statute applying to individual Indians in Indian country, departing from its commitment to honor tribal self-determination.[37]

The trends and patterns illustrated above, especially the swinging pendulum between tribal autonomy and congressional control, also manifest themselves in the legal relationship between the Indian tribes and federal government.[38] The following section explores the earliest cases in federal Indian law and how they laid foundation for the unique status of Indian tribes in U.S. law.

B. Establishing the Relationship Between Tribes and the Federal Government

The legal relationship between the Indian tribes and the federal government began with a series of U.S. Supreme Court cases commonly known as the "*Marshall Trilogy*", all primarily written by Chief Justice John Marshall.[39] Written almost two-hundred years after the violent dispossession of indigenous land by the Western Euro-American colonists first began, the *Marshall Trilogy* laid the foundational framework for federal Indian law.[40] It established federal control over Indian affairs, excluded state laws from Indian country, and recognized tribal sovereignty, all while describing Indian tribes as "domestic dependent nations."[41]

The first case, *Johnson v. M'Intosh*[42], involved a land title dispute between two non-Indians, both of whom argued that they had rightfully bought the land from Indian nations.[43] The Court held that Indian nations could not sell their lands to anyone outside their sovereign, voiding Indian land sales to any individuals or states prior to *Johnson*.[44] By controlling how Indian tribes manage their land, the Court established federal supremacy in Indian affairs over states and individuals, and the Doctrine of Discovery, which gave European colonizers a "right" to the land they discovered and conquered, leaving native Indians with only a "right of occupancy" in their ancestral homelands.[45]

---

36 *See id.* at 19–20.

37 *See id.* at 20.

38 *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 01, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol—40—no—1—tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/8CB8-EQVM].

39 *Id.*

40 *See id.*; *see also* Goldberg, Tsosie, Clinton & Riley, *supra* note 10, at 14–20.

41 Fletcher, *supra* note 38.

42 Johnson v. M'Intsoh, 21 U.S. 543 (1823).

43 Fletcher, *supra* note 38.

44 *See id.*

45 *See Johnson*, 21 U.S. at 587–90.

The remaining two cases, *Cherokee Nation v. Georgia*[46] and *Worcester v. Georgia*[47], stemmed from the state of Georgia's attempt to legislate the Cherokee Nation out of existence in order to seize their land and natural resources.[48] In *Cherokee Nation*, the Court used the Indian Commerce Clause to famously characterize the Indian tribe as a "domestic dependent nation," analogizing the relationship between the tribes and the federal government to that of a "ward to his guardian."[49] This framing placed tribes in a grey area that is neither a foreign nation nor a state.[50] In *Worcester*, the Court similarly affirmed tribal self-government and emphasized the federal government's "duty of protection" to safeguard the Indian treaty rights, holding that the "laws of Georgia can have no force" in Indian country when the state of Georgia attempted to assert criminal jurisdiction there.[51] The Court explained that state jurisdiction was barred in Indian country by the Supremacy Clause and the Cherokee Nation's 1791 Treaty of Holston with the federal government.[52] Through these cases, Justice Marshall developed the core principles that established the unique relationship between the Indian tribes and the federal government: (1) tribes are quasi-sovereign entities; (2) thus, tribes have a right to govern themselves on their own lands; and (3) the federal government has a "duty of protection" to safeguard Indian treaty rights and tribal self-government.[53]

After the *Marshall Trilogy*, the Court developed two contradicting lines of jurisprudence.[54] In one line of cases, the Court honored tribal sovereignty and prioritized the federal duty to protect tribal self-government.[55] In *Ex Parte Crow Dog*[56], the Court ceded federal power and looked to treaty provisions and tribal court systems to uphold tribal criminal jurisdiction, reasoning that "*self-government*, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs" was the government's "highest and best" goal for entering into treaties with the tribes.[57]

The second line of cases, often called the "plenary power" line, emphasized total federal control over Indian affairs.[58] In *United States v.*

---

46 Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
47 Worcester v. Georgia, 31 U.S. 515 (1832).
48 Fletcher, *supra* note 38.
49 *Cherokee Nation,* 30 U.S. at 2.
50 Fletcher, *supra* note 38.
51 *See Worcester*, 31 U.S. at 520.
52 *See id.* at 519.
53 *See id.*
54 *See* Fletcher, *supra* note 38.
55 *See id.*
56 *Ex parte* Crow Dog, 109 U.S. 556 (1883).
57 *See id.* at 568–69.
58 *See* Fletcher, *supra* note 38.

Kagama[59], the Court essentially reversed *Ex Parte Crow Dog* by upholding Congress's authority to adopt and implement the Major Crimes Act, a federal statute that grants federal criminal jurisdiction over certain crimes committed by an Indian even if the crime took place in Indian country.[60] The Court reasoned that because the Indian tribes are "wards of the nation," implementing this far-reaching criminal law was simply a part of the federal government's "duty of protection" to the tribes.[61] The Court further construed the "duty of protection" as protection from intrusions by the states, empowering the government to extend federal laws over Indians in the pursuit of preserving tribal self-government while simultaneously encroaching on it.[62] The *Kagama* Court rejected the argument that the Indian Commerce Clause is the source of this plenary power because it construed "commerce" as only economic activity; however, the Court has long abandoned this narrow reading and firmly established that the Indian Commerce Clause affords Congress broad powers to regulate Indian affairs, including those beyond the scope of "commerce."[63] Ultimately, *Kagama*, along with the later case *Lone Wolf v. Hitchcock*[64], judicially solidified Congress' plenary power over Indian affairs and established statutes as the primary vehicle for carrying out the federal government's obligations derived from treaties with the Indian tribes.[65]

The "plenary power" framework of the government's "unique obligations" to the tribes predominated from the late 1800s to about 1934.[66] During this time, Congress passed the Dawes Act (also called the General Allotment Act), which broke up tribal lands into smaller allotments and granted them to individual Indians to encourage adoption of agriculture.[67] Though the Act's stated governmental purpose was to preserve tribal land rights, the true reason behind the law was troubling for it was believed that if Indians took up traditional agriculture, they would fully assimilate to the white American way of life, thus gradually diminishing the need for the federal government to continue its paternalistic relationship with

---

59 U.S. v. Kagama, 118 U.S. 375 (1886).

60 *See* Fletcher, *supra* note 38; *see also* Major Crimes Act, 18 U.S.C. § 1153 (providing exclusive federal jurisdiction over certain serious crimes (e.g., murder, most sexual offenses, manslaughter, kidnapping, burglary) when the crime was committed by an Indian within Indian country).

61 *See Kagama*, 118 U.S. at 382–84.

62 *See id.* at 384–85.

63 *See id.* at 378–79; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan. L.R. 979, 998 (1981).

64 187 U.S. 553 (1903).

65 *See* Fletcher, *supra* note 38.

66 Huff & Coulter, *supra* note 6, at 4.

67 *Id.*; *Dawes Act (1887)*, Nat'l Archives (Feb. 8, 2022), https://www.archives.gov/milestone-documents/dawes-act [https://perma.cc/6Q4L-MG3P].

the tribes.[68] As it had done before, Congress tried to legislate tribes out of existence.[69]

In 1934, Congress passed the Indian Reorganization Act (IRA), which effectively ended the Allotment era and sought to partially repair its damages to Indian reservations and revive tribal self-government.[70] To achieve these goals, the IRA provided financial subsidies for tribes to adopt constitutions similar to that of the United States and replace their tribal governments with city council-style governments, encouraging tribes to regroup and re-establish themselves after decades of allotment policies.[71] Despite the potential of the IRA, Congress returned to the "plenary powers" approach in the 1950s, passing multiple laws that terminated 109 Indian tribes.[72]

As illustrated above, the earliest cases of federal Indian law contemplated tribes as sovereign and separate political entities.[73] Despite categorizing tribes as "domestic dependent nations," the government's primary goal has always been to preserve tribal sovereignty and the tribes' right to self-determination.[74] Though the "plenary powers" cases such as *Kagama* and the allotment/termination policies of the late nineteenth and early twentieth centuries departed from this goal, the government has consistently returned to its unique obligations to the tribes and has created a legal identity for Indians that is firmly rooted in their tribal enrollment and political sovereignty.[75] Even before *Mancari*, being an "Indian" was always defined politically in terms of their membership in a sovereign Indian tribe.[76]

C. Historical Context Leading Up to Mancari

By the time the Supreme Court decided *Mancari* in 1974, the modern civil rights movement had been underway for over two decades.[77] Buoyed by the changing times and recent civil rights successes such as *Brown v. Board of Education*, Indian tribal members from various tribes mobilized

---

68 *See Dawes Act (1887)*, *supra* note 67.

69 *Id.*

70 *See* HUFF & COULTER, *supra* note 6, at 4; *see also* 25 U.S.C. § 461.

71 *1934: President Franklin Roosevelt Signs the Indian Reorganization Act*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/452.html [https://perma.cc/28Y6-SV4R].

72 *See* HUFF & COULTER, *supra* note 6, at 6. The IRA was a progressive development that came under the leadership of President Franklin Roosevelt. *See id.* at 4.

73 *See* Fletcher, *supra* note 38.

74 *See id.*; *Cherokee Nation,* 30 U.S. at 2.

75 *See* Fletcher, *supra* note38.

76 *Id.*; *see* HUFF & COULTER, *supra* note 6, at 4–7.

77 HUFF & COULTER, *supra* note 6, at 7.

to form the Red Power Movement.[78] Unlike other civil rights movements of the time, which generally sought acceptance into the greater "white" society, the Red Power Movement demanded autonomy from white society and sought to preserve their treaty rights.[79] A significant part of the Red Power Movement involved urban Indians, many of whom left their rural reservations through the relocation and employment assistance programs of the Bureau of Indian Affairs (BIA).[80] Despite the BIA's promises of better employment opportunities and financial security, many urban Indians found that their expectations were not met, creating a generation of disillusioned and frustrated Indian families who saw political activism as a way to voice their grievances with the BIA.[81] The Red Power Movement shed light on the BIA's flaws and served as an important precursor to *Mancari*, as activists protested against the discriminatory hiring, promotion, and training policies within the BIA, leading non-Indians to hold higher-paid, more-senior positions within the agency.[82] Empowered by this renewed attention on Indian self-government, Red Power activists and Indian BIA employees across the country, long before *Mancari*, called out these policies for hindering Indian self-determination at an agency intended to oversee all Indian affairs.[83] Most importantly, the Red Power Movement succeeded in establishing a precedent in Indian activism and galvanizing public support behind tribal sovereignty.[84]

Also during this period, Congress responded to the civil rights movement by passing numerous legislation that sought to remove racial discrimination from the law.[85] Starting in 1957, Congress began passing laws to remove racial discrimination in housing, public accommodations, voting, employment practices, and more.[86] Among these, the Civil Rights Act of 1968[87] was particularly significant to Indian rights as it codified several Indian-specific legislation, commonly known as the Indian Civil Rights Act.[88] The Act (1) extended equal protection and due process principles to tribal governments, (2) prepared a model tribal court code, and (3) amended Public Law 280, a 1953 statute granting certain states criminal jurisdiction over Indian reservation, to prevent any further

---

78 *See id.*; *The Red Power Movement*, Univ. of Mass. Lowell Libr. (Oct. 13, 2022), https://libguides.uml.edu/c.php?g=945022&p=6820187 [https://perma.cc/TLL3-PHQ9].

79 *See The Red Power Movement*, *supra* note 78.

80 Azusa Ono, *The Fight for Indian Employment Preference in the Bureau of Indian Affairs: Red Power Activism in Denver, Colorado, and Morton v. Mancari*, 22 Japanese J. of Am. Stud. 171, 172 (2011).

81 *Id.*

82 *Id.* at 176.

83 *See id.* at 179–82.

84 *See The Red Power Movement*, *supra* note 78.

85 *See* Huff & Coulter, *supra* note 6, at 7.

86 *See id.*

87 Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73.

88 Huff & Coulter, *supra* note 6, at 7.

extension of state jurisdiction over tribes without tribal consent.[89] As a whole, the Indian Civil Rights Act illustrated Congress's understanding that the tribes would continue to self-govern, though they would now be subject to the rules of the Civil Rights Act as applied to their own members.[90] More importantly, it turned a new leaf in federal Indian law by refocusing legislative priorities on supporting tribal self-government.[91]

The focus on Indian liberation and sovereignty continued after the Civil Rights Act.[92] In 1970, President Nixon condemned all forced termination policies in a special message to Congress, urging for a "new era in which the Indian future is determined by Indian acts and Indian decisions."[93] Taking the cue from the administration, Congress began passing laws that more reflected Justice Marshall's original articulation of the federal government's unique obligations.[94] For example, Congress passed the Indian Education Act of 1972, providing federal funds for programs designed for Indian students and empowering Indian parents to form advisory boards at schools that have Indian-specific programs.[95]

This landscape of Indian activism, policy, and legislation provided fertile ground for a case like *Mancari*, which exposed the tensions between congressional policies supporting tribal self-government and those prohibiting discrimination in federal employment practices.[96] Especially during a time of anti-discrimination policies and racial equality, *Mancari* faced the challenge of upholding both policy goals.[97]

II. *MORTON V. MANCARI* (1974)

A. The Decision

Morton v. Mancari involved an employment dispute between the BIA and the BIA's non-Indian employees.[98] The dispute arose because a provision of the Indian Reorganization Act provided a hiring preference for "qualified Indians" for positions within the Bureau.[99] Under the BIA's rules, such qualified Indians must have been one-fourth degree Indian

---

89 *Id.*

90 *Id.*

91 *See id.* at 7–8.

92 *See id.* at 6–7.

93 *See* Richard Nixon, *Special Message to the Congress on Indian Affairs*, *reprinted in* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds.), https://www.presidency.ucsb.edu/node/240040 [https://perma.cc/J78F-TBZ3].

94 *See* HUFF & COULTER, *supra* note 6, at 6–7.

95 *1972: The Indian Education Act Empowers Parents; Funds Student Programs*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/530.html [https://perma.cc/3LGF-FYJP].

96 *See* HUFF & COULTER, *supra* note 6, at 7–9.

97 *See id.*

98 417 U.S. 535, 537–40.

99 *See id.* at 538.

blood and have been a member of a federally recognized tribe.[100] In 1972, the Commissioner of Indian Affairs ordered that the hiring preference also apply when Indians and non-Indians compete for promotions within the Bureau, in addition to applying the preference during the initial hiring process.[101] Non-Indian BIA employees in the Albuquerque office sued, arguing that this hiring preference was repealed by the Equal Employment Opportunity Act of 1972, which prohibited all racial discrimination in federal hiring.[102] The appellees further argued that the hiring preference constituted racial discrimination in violation of the Due Process Clause of the Fifth Amendment because the preference looked partly into Indian descent.[103]

The Court unanimously upheld the BIA hiring preference and rejected the argument that the preference constituted racial discrimination.[104] The Court first noted that the Civil Rights Act of 1964, the first major piece of federal legislation barring racial discrimination in private employment, "explicitly exempted from its coverage the preferential employment of Indians by Indian tribes . . . ," indicating Congress's awareness of the special legal status of Indian tribal members.[105] The Court continued that even without this intent, the Indian hiring preference did not qualify as racial discrimination because it was "political rather than racial in nature," as the preference only applied to members of federally recognized tribes rather than a "discrete racial group" consisting of Indians.[106] In a footnote, the Court explained that because the hiring preference would exclude those who are racially Indian but not enrolled in a federally recognized

---

100 *Id.* at n.24.

The eligibility criteria appear in 44 BIAM 335, 3.1:

> "1. Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.["]
>
> "This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment."

Id. (citing App. 92).

101 *See id.* at 538.

102 *Id.* at 539.

103 *Id.* at n.23, 540–41. In fact, the provision at issue in *Mancari* only considered "Indians who are one-fourth or more Indian blood." *Id.* at n.23.

104 *See id.* at 554–55.

105 *Id.* at 545–46.

106 *See id.* at n.24, 553–54.

tribe, the preference was a political one for members of "quasi-sovereign tribal entities."[107] By doing so, the Court drew a sharp, mutually exclusive line between political and racial classifications, framing American Indians as a racial group and members of Indian tribes as a political group.[108]

> Contrary to the characterization made by appellees, this preference *does not constitute 'racial discrimination.'* Indeed, it is not even a 'racial' preference. 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. . . . As long as the special treatment can be *tied rationally to the fulfillment of Congress' unique obligation toward the Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[109]

Because of the tribe's political classification, *Mancari* avoided the restrictive standard of strict scrutiny and faced a slightly modified version of rational basis review: the legislation must have a legitimate government interest, and it must be tied rationally to the unique obligation that the federal government has towards Indians.[110] *Mancari* easily satisfied this test, as hiring more Indian employees in a Bureau that governs Indian affairs is clearly rationally related to the fulfillment of Congress' unique obligations toward Indians.[111] By invoking the "unique obligations" language, the *Mancari* court emphasized Justice Marshall's concept of the "duty of protection" for tribal self-government while still recognizing Indian tribes' unique place in American history and jurisprudence.[112]

B. Academic Criticisms of Mancari

Though *Mancari* is considered a courtroom victory for tribal sovereignty, scholars have criticized the decision for several reasons.[113] First, common sense begs the question: since most Indian tribes require

---

107 *See id.*
108 *See id.*
109 *Id.* at 553–55.
110 *See id.* at 555.
111 *See id.*
112 *See id.*; HUFF & COULTER, *supra* note 6, at 2–3.
113 *See e.g.*, Frank Shockey, *"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 AM. INDIAN L. REV. 275 (2001); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights As Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

at least partial Indian blood or ancestry to become an enrolled member of that tribe, aren't political affiliation and race irreversibly intertwined in *Mancari*?[114] The hiring preference in *Mancari* required the Indian employee to be at least a quarter degree Indian blood, albeit in addition to being an enrolled tribal member.[115] However, the *Mancari* court chose to ignore this racial criterion and provided no explanation why the tribal enrollment component neutralized the racial component in the statute.[116]

Race law scholars have also criticized *Mancari*'s political classification doctrine as presenting a flawed view of race.[117] First, the political classification doctrine has unintentionally reduced "Indianness" to a matter of voluntary civic participation.[118] Under this framework, to belong and identify as an Indian individual, one must be enrolled in a federally recognized tribe, leaving behind those who are not formally enrolled and those who are enrolled in tribes that are not federally recognized.[119] Second, race law scholars argue that this doctrine reinforces the flawed idea that race is a "politically meaningless classification based on ancestry," divorced from "political, historical, or identity significance."[120] Additionally, this framework views race as an unchanging, immutable fact without exploring how race is a fluid and intersectional concept.[121]

As the Note explains in the next Part, the subsequent cases that rely on *Mancari* underscore these scholarly concerns, and touch on the Court's areas of discord that confuse this doctrine.

III. THE AFTERMATH AND INTERPRETATIONS OF *MANCARI*

A. *Post-Mancari Jurisprudence: Antelope and Rice*

Since *Mancari*, federal courts have largely upheld the political classification of Indian tribes and applied rational basis review to federal legislation that benefit Indian tribes and their members.[122] However, several post-*Mancari* cases demonstrate that the decision provided little guidance to lower courts on how rational basis should actually be applied, and reveals the "political not racial" rationale at a crossroads in the age

---

114 *See* Shockey, *supra* note 113, at 293–94.
115 *Mancari*, 417 U.S. at n.24.
116 *See* Shockey, *supra* note 113, at 307–08.
117 *See* Rolnick, *supra* note 113, at 1024.
118 *Id.* at 1001.
119 *See id.* at 1001–02.
120 *Id.* at 1001.
121 *See id.,* at 1001–02.
122 *See e.g.,* Fisher v. U.S. Dist. Ct. of the Sixteenth Jud. Dist. of Mont., 424 U.S. 382 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

of affirmative action, casting doubt on the stability and feasibility of the *Mancari* framework.[123]

Courts have struggled to decide how narrowly or broadly to apply *Mancari* in subsequent equal protection challenges.[124] An expansive application of *Mancari* came in *United States v. Antelope*, where the Court upheld the constitutionality of a federal criminal statute that extended the felony murder rule into Indian country.[125] The defendants argued that under this rule, Indians living on reservations would receive more severe criminal penalties than non-Indians for the same crime, constituting racial discrimination.[126] Ultimately, the Court rejected their argument, citing *Mancari* to explain that the felony murder rule applied to Indians not because of their race but their political classification.[127] The Court distinguished *Mancari* as *Mancari* involved preferences "directly promoting Indian interests in self-government," while *Antelope* did not.[128] This distinction would seem crucial, as it was the core of the federal government's "unique obligations" arising from the federal-tribal relationship as stipulated in *Mancari*.[129] However, the *Antelope* Court largely ignored this distinction, explaining that the principles of *Mancari* "point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications."[130] By jumping to this conclusion, *Antelope* largely skipped *Mancari*'s modified rational basis test and demonstrated that the "political not racial" framework cut both ways, as the law in question disadvantaged Indians.[131]

Conversely, more recent cases have sought to limit the scope of *Mancari*, namely *Rice v. Cayetano*.[132] *Rice* involved a challenge to a Hawaiian statute that allowed only descendants of Native Hawaiians to vote for a state agency that oversees Native Hawaiian affairs.[133] Despite striking similarities between the facts of *Rice* and *Mancari*, the Court interpreted *Mancari* so narrowly that the outcomes could only align if *Rice* also involved the BIA.[134] To avoid disturbing the *Mancari* framework, the *Rice* Court explained that because the statute in question involved a

---

123 *See e.g.*, United States v. Antelope, 430 U.S. 641 (1977); Rice v. Cayetano, 528 U.S. 495 (2000).

124 *See e.g.*, *Antelope*, 430 U.S.; *Rice*, 528 U.S..

125 *See Antelope,* 430 U.S. at 646–70.

126 *See id.* at 643–44.

127 *Id.* at 646.

128 *See id.*

129 *See* Morton v. Mancari, 417 U.S. 535, 555.

130 *See Antelope*, 430 U.S. at 646–47.

131 *See id.* at 646–48; *Mancari*, 417 U.S. at 555.

132 *See* Rice v. Cayetano, 528 U.S. 495, 522 (2000).

133 Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 9 (2002).

134 *See id.* at 10.

state election, *Mancari* did not apply.[135] However, the Court neglected to answer whether *Mancari*'s political classification rule applied, as native Hawaiians are technically not a federally recognized tribe.[136] Instead, the Court ignored the entire Hawaiian sovereignty movement, stating "The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii."[137]

The contrast between Antelope and Rice demonstrates how the Court has fundamentally disagreed on how narrowly or broadly to apply the Mancari decision to other equal protection challenges.[138] Clearly many post-Mancari cases have heavily relied on the decision, but the Court has not elaborated or clarified its reasoning.[139] Though neither of these decisions necessarily violate Mancari, Antelope undermined its scrutiny of any tie between the classification of Indians and the obligations arising from the federal-tribal relationship. Similarly, Rice failed to further develop Mancari's reasoning to tackle equal protection challenges regarding Native Hawaiians, a group that scholars increasingly argue should have a similar trust relationship with the United States.[140]

B. Adarand and Williams, and Challenges of Mancari

The post-*Mancari* jurisprudence also highlights the inherent tensions between the federal government's special relationship with Indian tribes and legal hostility to any and all racial classifications.[141] However, there are many examples of statutes and cases that considered Indians as a racial class, further complicating *Mancari*'s place in federal Indian law.[142] For example, *United States v. Rogers*[143] held that non-Indians adopted into Indian tribes through marriage were still considered to be non-Indian for legal purposes; the Court emphasized that race, not tribal enrollment, was the defining factor in determining who is Indian or not.[144] *Simmons v. Eagle Seelatsee,* a district court case cited in *Mancari*, acknowledged that racial criteria were essential to the federal government's relationship with Indians, stating that "the very reference to them [Indians] implies the use of "a criterion of race."[145] Lastly, just two years after *Mancari*, Congress passed the 1976 Indian Health Care Improvement Act, whose definition of "Indian" specifically covered an Indian person who "is a descendant, in

135 *See id.*
136 *See id.*
137 *Rice*, 528 U.S. at 524.
138 *See* Shockey, *supra* note 113, at 307–10.
139 *See id.* at 297–310.
140 *See id.* at 305–06.
141 *See id.* at 297–310.
142 *See id.* at 279–89.
143 United States v. Rogers, 45 U.S. 567 (1846).
144 *See* Shockey, *supra* note 110, at 284–86, 296.
145 *Id.* at 291; Simmons v. Chief Eagle Seelatsee, 244 F. Supp. 808, 811 (E.D. Wash. 1965).

the first or second degree, of any such [tribal] member . . . ."[146] It is against this conflicting backdrop of race-based federal Indian law and *Mancari* that the Court decided *Adarand Constructors, Inc. v. Peña*.[147] Though its mention of *Mancari* was brief, *Adarand* has arguably posed the greatest threat to *Mancari*'s precedential value because of how *Adarand* was interpreted in *Williams*.[148]

Adarand uniquely challenged *Mancari* by applying strict scrutiny to a federal program designed to benefit "socially and economically disadvantaged individuals," including Indians.[149] The case involved an equal protection challenge to the government's practice of financially incentivizing its contractors to hire minority-owned subcontractors, including Indian-owned ones.[150] The Court held that all racial classifications, regardless of their intent, are subject to strict scrutiny, the highest standard of judicial review.[151] The Court applied the principles of skepticism, consistency, and congruence to reach its holding, explaining that when combined, the propositions lead to the conclusion that any racial classification that leads to "unequal treatment" must be subject to the strictest judicial scrutiny.[152] However, the Court neglected to explain why strict scrutiny should apply in the specific circumstances of *Adarand*, leaving scholars to speculate and debate.[153]

Though the Court distinguished *Adarand* from *Mancari* because the statute in *Adarand* defined Indians in terms of race rather than of members of a sovereign entity, *Adarand* has caused trouble for federal Indian law, particularly because of Justice Stevens's dissenting opinion.[154] Justice Stevens used *Mancari* to distinguish policies that benefit minority groups from policies that burden them, arguing that the majority should abandon their narrow concept of consistency that would "view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African-Americans . . . ."[155] Because of this dissonance, he argued that "benign" programs that "seek to eradicate racial subordination" should be treated differently from racially discriminatory policies that "perpetuate a caste system."[156]

---

146 25 U.S.C. § 1603(13).
147 *See* Shockey, *supra* note 113, at 276–78.
148 *See id.* at 297.
149 *See* Adarand Constructors v. Pena, 515 U.S. 200, 205, 227 (1995).
150 *Id.* at 204–05.
151 *See id.* at 227–28.
152 *See id.* at 223–24.
153 *See* Shockey, *supra* note 110, at 311–12.
154 *See id.* at 300–06.
155 *Id.* at 301–02.
156 *Id.* at 301.

Just two years later in *Williams v. Babbitt*[157], a non-Indian challenged the Interior Department's interpretation of the Reindeer Industry Act of 1937, a law that gave certain advantages to Native Alaskan Indians to herd reindeer.[158] Though the law did not expressly prohibit non-Indians from herding reindeer, the Interior Department interpreted it as such.[159] Ruling in favor of the non-Indians, the Ninth Circuit characterized the Act as a "de facto monopoly" over reindeer herding that violated equal protection principles.[160] Similar to *Rice*, the court narrowly construed *Mancari* to apply only to the BIA, and held that the case at hand presented a blanket preference for Indians that was unrelated to the government's unique obligations to the tribes.[161] Significantly, the petitioner argued that *Mancari* was overruled by *Adarand*.[162] Though the court rejected that argument, Judge Kozinski focused on Justice Stevens's "consistency" argument in *Adarand*, speculating that "[i]f Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered."[163]

When read in context, Justice Stevens's dissent did not intend to argue that *Adarand* should overturn *Mancari*, but simply that he disagreed with the Court's concept of consistency that could lead to inequitable consequences in the future.[164] However, Judge Kozinski's statement about *Mancari*'s days being numbered at the very least strongly implies his uncertainty about *Mancari.*[165] Whether or not Judge Kozinski actually intended to question the stability of *Mancari* is unclear, but it is clear that he sought a more logical formulation of *Mancari* from the Court.[166] So far, the Court has not applied its reasoning in *Adarand* to Indian-specific law and policy.[167] However, along with *Wiliams*, it demonstrates the need for a reformulation of *Mancari*, or a different approach to harmonize the core principles in *Mancari* with equal protection principles and federal Indian law as a whole.[168]

---

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

158 Shockey, *supra* note 110, at 302–03.

159 *Id.*

160 *See Williams*, 115 F.3d at 661.

161 *See id.* at 663–64.

162 *Id.* at 663.

163 *Id.* at 665.

164 *See* Shockey, *supra* note 113, at 304.

165 *See id.* at 304–05.

166 *See id.* In his majority opinion in *Williams*, Judge Kozinski states in a footnote that subjecting Indian law to strict scrutiny would not "gut Title 25" and says that he has little doubt that the government has compelling interests when it comes to the Indians. *Id.* at n.8. "In fact, *Mancari*'s lenient standard may reflect the Court's instinct that most laws favoring Indians serve compelling interests." *Id.* Considering the context of the footnote, it is unclear whether Judge Kozinski genuinely intended to question the validity of *Mancari*.

167 *See* Shockey, *supra* note 113, at 300.

168 *See id.* at 276–77.

IV. ALTERNATIVE DEFENSES AGAINST EQUAL PROTECTION CHALLENGES

As both subsequent case law and scholarly concerns indicate, *Mancari* sits on a tenuous foundation.[169] The case has been extensively questioned and challenged in courts, contradicted by statutes and government agencies, and criticized by scholars.[170] In light of this fraught legal landscape, combined with the dynamic nature of modern Indian tribes, this Note provides an overview of two alternative responses to such equal protection challenges. Though the two alternatives are creative responses to modify and/or bypass the *Mancari* framework, Part V of this Note argues that grounding *Mancari*'s rule within the Indian Commerce Clause remains our best solution. This approach is supported by the Constitution and strengthens *Mancari*'s political classification rule, harmonizing its principles with equal protection doctrine. Despite criticisms against the decision, *Mancari* remains the best approach in upholding a tribe's status as a separate nation while honoring the unique obligations that make up the federal-tribal relationship.[171] Especially considering *Haaland*'s recent challenge to the political status of tribes, the need to defend *Mancari* is stronger than ever.[172]

A. The "Strict Scrutiny Survival" Response

The "strict scrutiny survival" response, as coined by Professor Carole Goldberg, posits that Indian-specific legislation can survive strict scrutiny under equal protection analysis.[173] Though *Mancari* expressly stated that subjecting Indian-specific laws to strict scrutiny would "effectively erase" the entire doctrine of federal Indian law, supporters of this approach argue that the federal government's "unique obligation" to the Indian tribes is sufficient to satisfy the "compelling government interest" prong of strict scrutiny analysis.[174] In *Williams*, Judge Kozinski quietly backs this approach, stating in a footnote that "[w]e have little doubt that the government has compelling interests when it comes to dealing with Indians; in fact, *Mancari*'s lenient standard may reflect the Court's instinct that most laws favoring Indians serve compelling interests."[175] Though strict scrutiny sets a high bar to meet, this approach finds some support in case law.[176] In *American Federation of Government Employees v. United States*,

169 *See* HUFF & COULTER, *supra* note 6, at 9–16.
170 *See id*.
171 *See id*. at 9–18.
172 *See* Haaland v. Brackeen, 599 U.S. 255, 295–96 (2023).
173 Goldberg, *supra* note 133, at 13.
174 *See* Goldberg, *supra* note 133, at 7, 13–14.
175 Williams v. Babbitt, 115 F.3d 657, n.8 (9th Cir. 1997).
176 Goldberg, *supra* note 133, at 15.

the District of Columbia Circuit upheld a contracting preference for Indian-owned businesses based on a strict scrutiny analysis, arguing that the preference "furthers the federal government's compelling interest in fulfilling its trust obligations to the Alaska Native-American tribes . . . ."[177] However, with its inherent inconsistency with *Mancari* and many practicality problems, this approach leaves much to be desired.[178] First, this approach fully abandons the *Mancari* framework, as it presupposes that Indians are a racial group rather than a political group, subjecting them to strict scrutiny.[179] Though this approach may become helpful if *Mancari* is entirely overturned, it is unnecessary at this time to deep-dive into the other side of the spectrum.[180] Second, the "narrow tailoring" prong of strict scrutiny would present major issues in this context.[181] Courts often rely on their own biases to determine the importance of certain government objectives and the most narrowly tailored way to achieve that particular goal.[182] Having federal courts narrowly tailor an Indian-specific law is troubling, as most federal judges know little about the everyday realities of modern Indian life.[183] Consequently, this approach grants excessive, unilateral authority to federal judges who are not subject matter experts and who cannot negotiate or consult with the Indian tribes themselves to develop the best plan.[184]

B. The "Purely 'Political Rather Than Racial'" Response

The "purely 'political rather than racial'" approach is a heavily distilled version of *Mancari*, one that disregards the "unique obligations" rationale and solely focuses on the "political rather than racial in nature" rationale.[185] Under this approach, Indians belong in political and not racial classifications as long as their classification depends on tribal citizenship rather than race or ancestry.[186] In this sense, Indian classifications are the same as any other permissible classification, such as distinguishing "U.S. citizens from aliens or Californians from out-of-state citizens."[187] By applying this most basic version of rational basis review this theory would allow any Indian-specific legislation as long as it serves a legitimate government interest that interest is rationally connected to the law.[188]

---

177 *Id.*
178 *See* Shockey, *supra* note 113, at 308.
179 Goldberg, *supra* note 133, at 15.
180 *See id.* at 14.
181 *Id.* at 14–15.
182 *See id.* at 14.
183 *See id.* at 15.
184 *See id.*
185 *See id.* at 16.
186 *Id.*
187 *See id.*
188 *See id.* at 17.

Though this approach honors the special legal status of Indian nations, it nevertheless faces many of the same problems as the "strict scrutiny survival" approach.[189] First, it is inherently inconsistent with *Mancari* because its broader scope allows some classifications that are prohibited under *Mancari*.[190] For example, if the only question is about tribal citizenship, then states could also make classifications and laws regarding Indians even though states do not have the same unique relationship with the tribes that the federal government has.[191] Even though *Mancari* does not explicitly say that the political classification of Indians depends on the government that makes the classification, federal control was held through the "unique obligations" language.[192] States have long been described as Indians' "deadliest enemies" because of "local ill feeling," making it especially problematic to hand off such legislative power to states as well.[193] Second, this approach assumes that the process of determining tribal citizenship is easy and definitive.[194] Issues with tribal enrollment are well-documented and have even resulted in long-standing members being ousted from their tribes after discrepancies in ancestry documents were discovered generations later.[195] This theory would exclude the approximately four-hundred federally unrecognized Indian tribes from federal Indian legislation.[196] Its last flaw is potentially the most damaging because without the "unique obligations" language this approach equally encourages legislation that disadvantages Indian tribes and legislation that benefits them.[197] For example, under this theory a state could impose higher off-reservation sales taxes on tribal members who live on reservations to compensate for the sales tax exemption given to those tribal members, simply because collecting state sales taxes serves a legitimate government.[198]

V. THE CASE FOR THE INDIAN COMMERCE CLAUSE APPROACH

This Note's final approach, and arguably the strongest approach, derives authority from the Indian Commerce Clause in Article I of the

---

189 *See id.*

190 *Id.*

191 *See id.* at 17–18.

192 *See id.*

193 United States v. Kagama, 118 U.S. 357, 384 (1886).

194 Goldberg, *supra* note 133, at 17.

195 Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html [https://perma.cc/W6GT-AUHG].

196 U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-348, REPORT TO THE HONORABLE DAN BOREN, HOUSE OF REPRESENTATIVES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES (2012).

197 *See* Goldberg, *supra* note 133, at 26.

198 *Id.* at 24.

Constitution. This approach posits that the Indian Commerce Clause's historical context and authorization of congressional plenary powers over Indian affairs indicate the Framers' intent to consider tribes as a political group defined by their sovereignty rather than a group defined by ancestry or race.

The argument is threefold. First, the Equal Protection Clause does not apply to tribal Indians in the same way it does to non-Indians because the historical context of the Indian Commerce Clause first considered tribal Indians to be a separate people governed by another sovereign entity. Second, Congress's plenary powers over Indian tribes granted by the Indian Commerce Clause prohibit the application of strict scrutiny on Indian legislation. Therefore, within the racial-political dichotomy that *Mancari* provided, Indians and Indian tribes must be a political classification because they do not fit the strict scrutiny paradigm, resulting in rational basis review. Third, it is the best defense against challenges to *Mancari*'s political classification rule, as it grounds *Mancari* within a constitutional framework that aligns with how the Indian Commerce Clause has long been interpreted. By using the Indian Commerce Clause to ground the *Mancari* framework, this Part attempts to provide a more constitutionally solid response to the equal protection concerns present in *Haaland*.

A. Brief History of the Indian Commerce Clause

The historical context of the Indian Commerce Clause establishes that tribes have been considered political entities since the beginning days of our nation.[199] The Indian Commerce Clause reads:

> [The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .[200]

Originating as part of the Articles of Confederation, the Indian Commerce Clause was the product of a vigorous debate between state and national authority.[201] When the Clause was drafted at the Constitutional Convention in 1787, records demonstrate that it was haphazardly put together, the language changing many times.[202] Towards the end of the Convention, the Committee on Postponed Parts suddenly decided on "and

---

199 *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1030 (2015).

200 *Id.* at 1022 (citing U.S. CONST. art. 1, § 8).

201 *Id.* at 1021.

202 *See id.* at 1022.

with the Indian tribes," and this change remained unchallenged through the final draft.[203]

Despite their rather careless treatment of the Indian Commerce Clause, the Framers generally regarded the Indian tribes as sovereign nations at the time the Constitution was drafted.[204] This view is textually reflected through the Indian Commerce Clause in two ways. First, the tribes' intentional placement in the Commerce Clause with "foreign nations" and "states," two other sovereigns, provides textual support for the conclusion that the Framers also recognized Indian tribes as sovereign entities.[205] Second, the Indian Commerce Clause uses the same language that is used in the Foreign Commerce Clause, "Commerce . . . with the Indian tribes."[206] By using the same language and grouping all three groups within the same clause, the Framers likely intended to place the same meaning on Indian commerce as foreign commerce, again urging the conclusion that the Framers viewed tribes as separate nations.[207]

The timing of when the Indian Commerce Clause was drafted also supports this argument.[208] Though the Clause is silent on federal power over Indians, it was drafted during a time when the country was backtracking from a failed attempt to aggressively assert authority over the Indian tribes, particularly into their lands.[209] In this context, the Clause is more accurately read as a part of the federal government's return to diplomatic methods for negotiating with Indian tribes as separate, sovereign entities.[210]

Lastly, the exclusion of the "Indians not taxed" clause from the Census Clause of Article I and Section 2 of the Fourteenth Amendment indicate that the Framers did not intend nor design the Indian tribes and their members to be citizens of the United States.[211] Though this exclusion does not directly regard the Indian Commerce Clause, the same sentiment would later implicate the Indian Commerce Clause during the Reconstruction Era debates surrounding the Citizenship Clause of the Fourteenth Amendment, demonstrating that legislators continued to interpret the Indian Commerce Clause as creating a sovereign status for Indian tribes.[212] During this time, advocates of Reconstruction relied on the Indian Commerce Clause to argue that the federally protected sovereignty of tribes prevented them

---

203 *Id.*

204 Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 147 (2002).

205 *Id.* at 130.

206 *Id.* at 130–31.

207 *Id.*

208 Ablavsky, *supra* note 199, at 1054.

209 *Id.*

210 Clinton, *supra* note 204, at 147.

211 *Id.*

212 Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1175 (2010).

from becoming citizens.[213] In particular, Senator Jacob Howard argued that because the Indian Commerce Clause gave Congress the power to regulate commerce "not only with foreign nations and among the States, but also with the Indian tribes", the Clause implied a "recognition of the national character . . . in which they [tribes] have been recognized ever since the discovery of the continent . . . ."[214]

B. Congressional Plenary Powers Granted by the Indian Commerce Clause

In addition to its historical context demonstrating the Framers' understanding of tribes as sovereigns, the Indian Commerce Clause also commands the political status of Indian tribes under the law because it vests plenary powers over Indian affairs to Congress.[215] Under a literal reading of the Indian Commerce Clause, it simply permits Congress to regulate "commerce," largely defined as economic activity, with the Indian tribes.[216] However, the Indian Commerce Clause doctrine after *Kagama* has established that the Clause vests plenary powers to Congress to legislate with respect to tribal Indians when the legislation is directed at tribal interests or when there is a sufficient connection between benefitting Indian individuals and benefitting a tribe.[217] Though scholars continue to debate whether the Indian Commerce Clause is the true source of this congressional plenary power,[218] the Court has clearly stated that this is its view, stating that the "central function" of the Indian Commerce Clause was "provid[ing] Congress with plenary power to legislate in the field of Indian affairs."[219]

From a logical standpoint, this vesting of congressional plenary power over Indians and Indian tribes necessarily points to the conclusion that Indian tribes are separate, political entities.[220] The Court cannot simultaneously recognize the congressional plenary power over Indians and Indian tribes, and also demand that Congress use that power without drawing a bright line between Indians and non-Indians.[221] Additionally, this line must hinge on political classification, as the congressional plenary power must be used to uphold the unique federal-tribe trust relationship and fulfill the government's duty of protection to preserve tribal sovereignty

---

213 *Id.* at 1174.

214 Congressional Globe, 39th Cong., 1st Sess., 2894–95 (1866).

215 *See* Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. Pa. J.L. & Pub. Affairs 3 (2020).

216 *See id.* at 13.

217 *Id.* at 44.

218 *Id.* at 16.

219 Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

220 Doran, *supra* note 215, at 32.

221 *Id.* at 32–33.

and self-determination.[222] If Congress used its plenary powers to classify and legislate on Indians as a racial class, it would not fulfill the unique sovereign-to-sovereign relationship that exists between the tribes and the federal government.[223] Essentially, requiring Congress to exercise its plenary power over Indians without using a political classification for them prohibits Congress from exercising that power at all.[224]

From a legal standpoint, the Indian Commerce Clause clearly prohibits the use of strict scrutiny on Indian legislation, barring any arguments that Indians are a racial classification, as racial classifications trigger strict scrutiny.[225] Thus, it follows that Indians are a political classification subject to rational basis review because though Indian tribes are defined as "quasi-sovereign," the core of their existence is founded upon their tribal membership.[226] Without the tribes' ability to determine who is a member and who is not, they have no sovereignty.[227]

The Indian Commerce Clause bars the use of strict scrutiny on Indian legislation because the plenary powers granted by the Clause are inherently inconsistent with strict scrutiny.[228] Under the Court's standard approach to equal protection issues, strict scrutiny requires that the legislation or regulation in question be "narrowly tailored" to achieve a "compelling government interest."[229] The exercise of plenary powers and achieving a "compelling government interest" cannot co-exist because the plenary power over Indian affairs is so extensive that it displaces any other authority over them.[230] As granted by the Indian Commerce Clause, the plenary powers of Congress have empowered it to regulate almost every aspect of modern Indian life, from child welfare, natural resources, education, tribal gaming, healthcare, employment, and more.[231] If it so desired, Congress could regulate even the most mundane matters for Indians, such as the requirements for obtaining a hunting license.[232] Simply put, the vast majority of federal Indian law, by design of the Indian Commerce Clause, does not serve the compelling governmental interests required to pass strict scrutiny.[233] Because federal Indian law necessitates

---

222 *See id.* at 32–33.
223 *See id.* at 50–51.
224 *Id.* at 33.
225 Adarand Constructors v. Pena, 515 U.S. 200, 201 (1995).
226 *See* Doran, *supra* note 215, at 21.
227 *Id.* at 33.
228 *Id.*
229 *Id.*
230 *Id.*
231 *See id.* at 32–33.
232 *Id.* at 33.
233 *See id.* at 8.

the use of rational basis review, the Court must conclude that they are a political classification rather than a racial one.[234]

Mancari itself recognizes this inconsistency but fails to address the Indian Commerce Clause directly and narrows its focus to the BIA hiring preference to support its "political rather than racial" argument.[235] Despite its avoidance, *Mancari* reached the right conclusion on the inherent conflict between the congressional plenary powers over Indians and strict scrutiny by allowing over a century of the Court's plenary power doctrine to outweigh the use of strict scrutiny on Indians.[236]

Some scholars have criticized this approach for its support of *Mancari*'s mutually exclusive dichotomy between racial and political classifications.[237] Matthew L.M. Fletcher, a leading contemporary scholar on federal Indian law, also supports this "either-or" assumption in *Mancari*, arguing that "The text of the Constitution itself demands that Congress determine who is an 'Indian' for the purposes of regulating commerce and apportionment."[238] Classifications of Indian status, thus, are not impermissible race-based classifications but rather constitutionally mandated political determinations."[239] However, others disagree with Fletcher, arguing that a person's status can be both political and racial, just as it can be both political and religious.[240] There is no perfect response to this criticism, as it is impossible to argue that Indians and Indian tribes are *solely* political entities, as they are not currently nor have been historically.[241] However, what may be true in reality may not be true under the law. *Mancari* implied in a footnote that it would be sufficient to show that Indians were at least partially something other than a racial group by upholding the BIA hiring preference because it would exclude those who are Indian only by race or ancestry.[242] This distinction indicates that the *Mancari* Court contemplated Indian tribal members as *both* racially and politically Indian, but ultimately categorized the policy as a political preference because the political status of tribes outweighed the racial criteria.[243] In this context, the political-racial dichotomy of *Mancari* is not as rigid and leaves room for the Court to contemplate Indian tribal members as normatively belonging in both racial and political classifications.[244] However, in terms of equal protection doctrine, the *Mancari* Court correctly

---

234 *See id.*
235 *See id.* at 22.
236 *Id.* at 33.
237 *Id.* at 61.
238 *Id.*
239 *Id.*
240 *Id.*
241 Shockey, *supra* note 113, at 291.
242 *See id.*, at 290; *see also* Morton v. Mancari, 417 U.S. 535, n.24 (1974).
243 *See* Shockey, *supra* note 113, at 290.
244 *See id.* at 290–91.

held that Indian tribes and their members are political entities under the law.[245] Categorizing them as both racial and political classifications would lead to a logistical and doctrinal nightmare, considering that the Indian Commerce Clause bars the use of strict scrutiny on Indian legislation.[246]

VI. *HAALAND V. BRACKEEN* AND THE INDIAN COMMERCE CLAUSE

One of the greatest threats to *Mancari* and the sovereign status of Indian tribes has been *Haaland v. Brackeen*, a U.S. Supreme Court case challenging the constitutionality of the Indian Child Welfare Act (ICWA) on equal protection grounds.[247] Though the Court ultimately rejected the equal protection challenges to the ICWA, unpacking the *Brackeen* cases' full breadth and evolution through the judicial system is important for drawing out a constitutionally solid defense against future equal protection challenges.[248] The three *Brackeen* cases touch on numerous issues such as standing and the anti-commandeering doctrine, but this Note specifically focuses on the equal protection challenges to the political status of Indians and Indian tribes.

A. Brief Discussion of the Indian Child Welfare Act

As a preliminary matter, the Indian Child Welfare Act is a federal law that seeks to uphold tribal sovereignty and Indian familial ties.[249] Congress enacted ICWA after observing that state child protection agencies removed Indian children from their families at unprecedented rates.[250] Even after removal, the state agencies and courts frequently placed Indian children with non-Indian families, creating a generation of Indian children removed from their tribal culture and nation.[251] To resolve these issues, ICWA contains several provisions that override state child welfare and custody laws: (1) it establishes exclusive tribal court jurisdiction over child welfare and custody proceedings involving an Indian child who lives on the tribe's reservation; (2) it provides concurrent state and tribal jurisdiction over child welfare and custody proceedings involving any other Indian child; (3) it empowers the guardian of the Indian child and the tribe a "right of intervention", even if the proceeding moved to state court; and (4) most contentiously, it creates preferences in adoption proceedings for placement of an Indian child with a member of the child's extended family, another

245 *See* Rolnick, *supra* note 113, at 995–96.
246 *See id.*
247 *See* Haaland v. Brackeen, 599 U.S. 255, 263–64 (2023).
248 *See* Doran, *supra* note 215, at 7–8.
249 *See id.* at 46–47; *see also* 25 U.S.C. § 1901.
250 *See* Doran, *supra* note 215, at 46–47.
251 *Id.*

tribal member, or another Indian family, effectively placing non-Indian families at the bottom of the preference scale.[252]

B. Brackeen v. Zinke

It is this "Indian preferences" provision of ICWA that the plaintiffs initially contested in *Brackeen v. Zinke*, a Texas district court case.[253] The plaintiffs analogized the case to *Rice* to argue that ICWA imposes "special rules" in child placement proceedings depending on the race of the child, categorizing Indians as a racial classification and requiring strict scrutiny.[254]

In an unprecedented decision that threatened the entire body of federal Indian law, the district court ruled for the plaintiffs, declaring ICWA unconstitutional.[255] To reach its holding, the court focused on ICWA's definition of "Indian child," which is a child who is a "member of an Indian tribe" *or* is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[256] The "or" is the operative word in this provision, as the court argued that unlike the BIA hiring preference in *Mancari*, ICWA's membership eligibility standard includes Indian children who are not enrolled in a federally recognized tribe but are simply eligible to, meaning that they are Indian only by ancestry.[257] In the view of the court, this distinction removed the classification of "Indian child" from *Mancari*'s "political rather than racial in nature" rationale.[258] Consequently, the court reviewed ICWA under strict scrutiny, which failed under both the "compelling interest" and "narrow tailoring" requirements.[259] By striking down ICWA as unconstitutional, the district court's decision not only threatened Indian child welfare policies, but also threatened to upend almost every single piece of legislation regarding Indians.[260] Essentially, the decision had the potential to destroy the fundamentally unique federal-tribe trust and undermine tribal sovereignty beyond repair.[261]

C. Brackeen v. Haaland and Its Use of the Indian Commerce Clause

Partially due to its potentially detrimental ramifications, the case was appealed to the Fifth Circuit under the name *Brackeen v. Haaland*, where an en banc panel reheard the case and rendered a fractured decision

---

252 *Id.*
253 *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018).
254 *Id.* at 531.
255 *Id.* at 536.
256 *See id.* at 533.
257 *Id.* at 533–34.
258 *See id.*
259 *See id.* 534–536.
260 *See* Doran, *supra* note 212, at 7–8.
261 *See id.*; Shockey, *supra* note 113, at 309.

reversing the district court and upholding the constitutionality of ICWA under equal protection principles.[262] In doing so, the Fifth Circuit rejected the district court's interpretation of "Indian child" within ICWA, arguing that although the Indian child's tribal eligibility generally turns on having a "blood relationship with a tribal ancestor", this does not equate to a proxy for race as the district court believed."[263]

Importantly, the Fifth Circuit relied on the Indian Commerce Clause to establish that the Constitution itself has always recognized the Indian tribes' political status.[264] Further supporting its political classification of tribes, the Fifth Circuit proceeded to explain that starting with the Indian Reorganization Act and its recognition of the tribes' right to self-governance, "official federal recognition of Indian tribes is 'a formal political act' that 'institutionaliz[es] the government-to-government relationship between the tribe and the federal government."[265] Thus, though the district court recognized that tribal enrollment is "inevitably tied in part to ancestry," the Fifth Circuit taking a more holistic view of *Mancari*, the Indian Commerce Clause, and Indian history, rejected the district court's contention that ICWA's definition of "Indian child", which includes children eligible for tribal membership, automatically triggers a racial classification, and thus strict scrutiny.[266] In a satisfying closing to the section, the Fifth Circuit clearly stated the importance of upholding tribal sovereignty:

> Just as the United States or any other sovereign may choose to whom it extends citizenship, so too may the Indian tribes. That tribes may use ancestry as part of their criteria for determining membership eligibility does not change that ICWA does not classify in this way; instead, ICWA's Indian child designation classifies on the basis of a child's connection to a political entity based on whatever criteria that political entity may prescribe.[267]

Though its mention of the Indian Commerce Clause is brief in this section, the Fifth Circuit demonstrates the strength of grounding the *Mancari* framework within the Indian Commerce Clause.[268] By finding constitutional support for the political status of Indian tribes, the Fifth Circuit's argument was able to proceed with that premise as a given, allowing the Fifth Circuit to smoothly transition into post-ratification

---

262 *See* Brackeen v. Haaland, 994 F.3d 249, 431–32 (5th Cir. 2021).
263 *Id.* at 336.
264 *See id.*
265 *Id.* at 337.
266 *See id.* at 392–93.
267 *Id.* at 337–39.
268 *See id.* at 300–01.

history, case law, and normative reasoning that further supported the political classification of tribes.[269] The established premise also effectively laid the groundwork for the Fifth Circuit analogy between tribes and any other sovereign who could use its own criteria to determine membership eligibility, begging the question that if the Constitution said tribes are a sovereign, political entity, then why should tribes not get to choose to whom they extend their citizenship?[270] Lastly, establishing that the Constitution compels the conclusion that tribes are a political classification, the Fifth Circuit easily argued that the Constitution trumps the district court's contention.[271] The Fifth Circuit's historically, legally, and analytically sound rejection of the district court's interpretation of the "Indian child" definition demonstrates the powerful thrust the Indian Commerce Clause can provide in defending against attacks of the Indian tribes' political classification.[272]

Despite upholding the general constitutionality of ICWA, the Fifth Circuit nevertheless found certain sections of ICWA to be unconstitutional.[273] The en banc Fifth Circuit panel was evenly split on two of the placement preference provisions, and whether or not they violate equal protection: (1) ICWA's adoptive placement preference for "other Indian families" and (2) its foster care placement preference for a licensed "Indian foster home."[274] Because it was an even split, the Fifth Circuit affirmed the district court's decision without a precedential opinion.[275]

D. Haaland v. Brackeen

The Fifth Circuit decision was successfully appealed to the Supreme Court. In a seven-to-two opinion, the Court rejected every challenge made by petitioners, decisively holding that ICWA is constitutional.[276] At this stage, after the definition of "Indian child" under ICWA has been declared constitutional by the Fifth Circuit, the only equal protection issue left for the Court to consider was the plaintiffs' argument that ICWA's "hierarchy of preferences injures them by placing them on unequal footing with Indian parents who seek to adopt or foster an Indian child."[277] The Court never reached the merits of this argument, as it ruled that the individual petitioners and the State of Texas did not have

---

269 *See id.* at 276, 306, 336, 339, 340.
270 *See id.* at 337–38.
271 *See id.* at 332.
272 *See id.* at 267–69.
273 *Id.* at 268.
274 *Id.*
275 *Id.*
276 *See* Haaland v. Brackeen, 599 U.S. 255, 263–64 (2023).
277 *Id.* at 260, 291–92.

standing to challenge the placement preferences, who both argued that the placement preferences discriminated based on race.[278] Because these issues were barred by standing, they can technically be raised again in future litigation.[279] However, *Haaland* was the closest we would get to a decisive and final rejection of all equal protection challenges against ICWA from the Court, reaffirming the foundational principles of tribal sovereignty, congressional plenary powers over Indian affairs, and the unique place that Indian tribes and its members have as political entities within American law.[280]

CONCLUSION

In a body of law that has been described as "schizophrenic," the political classification rule of *Morton v. Mancari* stands out as a relatively simple, workable, practical, and logical one which harmonizes the unique tribal-federal trust relationship with inherent tribal sovereignty.[281] Despite the longevity of this doctrine, *Mancari* has been challenged for decades by anti-Indian and extreme ideological groups seeking to dismantle the unique relationship of the tribes and the federal government under the guise of "racial equality."[282] In fact, as Indian tribes and their members gain economic and political powers, the discourse surrounding the political status of Indian tribes has become increasingly complex and contentious, as evident in *Haaland*.[283] From a policy standpoint, it is important to call out these "equal protection challenges" for what they really are: attempts to undermine tribal sovereignty and dismantle federal Indian law to exploit Indian lands, natural resources, and economic opportunities.[284] In this sense, many of what these equal protection challenges appear to defend are pawns in a game of continuous exploitation and colonialism of the Indian nations.[285]

In light of this intense landscape, attorneys Andrew I. Huff and Robert T. Coulter explained it best: "[S]upporting and defending the *Mancari* decision . . . [is] perhaps the most urgent and important Indian law issue of our time."[286] By finding strong support for *Mancari* in the Indian Commerce Clause, we can ground *Mancari*'s reasoning in a constitutional framework, imbuing the argument with the legitimacy, authority, and finality needed to withstand future equal protection challenges, especially

---

278 *Id.* at 291–92.
279 *See id.*
280 *See id*. at 263–64.
281 *See* Shockey, *supra* note 113, at 276; Ablavsky, *supra* note 199, at 1014.
282 HUFF & COULTER, *supra* note 6, at 1–2.
283 *See* Rolnick, *supra* note113, at 1035–36; *Haaland*, 599 U.S. at 263–64.
284 *See* Berger, *supra* note 212, at 1166.
285 *See id*.
286 HUFF & COULTER, *supra* note 6, at 2.

when the stakes are so high.[287] Supporting and defending *Mancari*'s political classification rule will allow the federal government to continue carrying out its unique obligations to the tribes and uphold the very thing that Indian tribes have sought to protect from the beginning: their sovereignty.[288]

[287] *See id.* at 21.
[288] *See* Rolnick, *supra* note 113, at 1039–40.