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Using the New Equal Protection to Challenge Federal Control over Tribal Lands

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I. INTRODUCTION

Currently on the books are dozens of laws mandating approval by federal officials every time Indian tribes make certain management decisions concerning their "trust" lands, such as leasing,[1] sale,[2] or other real estate transactions.[3] While there has been a recent trend to free tribes from this federal yoke,[4] we are still a long way from true tribal autonomy in this area.[5] Why can Congress give these federal officials, most of them working for the Bureau of Indian Affairs ("BIA") within the Department of the Interior, the authority to veto tribal actions relating to the management of tribal lands and natural resources? The more accepted understanding is that the political relationship existing between the Indian tribes and the United States is said to be a trust

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1. *See, e.g.*, Indian Long Term Leasing Act of 1955, 25 U.S.C. § 415(a) (2013); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (2013); American Indian Agricultural Resources Management Act of 1990, 25 U.S.C. § 3715(a) (2013).

2. *See* Indian Trade and Intercourse Act, 25 U.S.C. § 177 (2013).

3. *See* 25 U.S.C. § 81 (2013). Before the 2000 amendments to this statute, the section mandated Secretarial approval for all transactions made with Indians "relative to their lands." The 2000 amendments narrowed the need for Secretarial approval only for those contracts or agreements "encumbering" Indian lands for 7 years or more.

4. *See, e.g.*, The Helping Expedite and Advance Responsible Tribal Home Ownership Act, popularly known as the HEARTH Act, (amending the Indian Leasing Statute, 25 U.S.C. § 415 (2013)) and the Indian Tribal Energy Development and Self Determination Act of 2005 ("TERA"), Pub. L. No. 109-58, § 119, Stat. 594, 763-79 (codified at 25 U.S.C. §§ 3501-06 (2013)); *see also supra* note 3, the amendment to 25 U.S.C. § 81.

5. *See* Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, But Collectively Deficient Option*, 55 ARIZ. L. REV. 1031 (2013); Judith V. Royster, *Tribal Energy Development: Renewables and the Problems of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91 (2012).

relationship. Under this relationship, the United States is said to hold tribal lands in trust for the benefit of the tribes. As the trustee, Congress is said to have plenary power to manage the property of its beneficiary, the Indian tribes.[6]

Some scholars have recently argued that the massive amount of federal regulations, as well as the myriad of Secretarial approval requirements, mandated in the name of the Indian Trust doctrine is not only the by-product of paternalistic and racist attitudes towards Indians, but is also a major impediment to efficient economic development on Indian lands.[7] Thus, there have been suggestions from established federal Indian law scholars such as Kevin Gover,[8] and Stacy Leads,[9] that the trust doctrine has been a failure,[10] and should be abandoned, or at least severely modified, especially when it comes to control of Indian natural resources. At least one commentator argued that recent changes in the law make it ripe to revisit the legality of legislation such as the General Allotment Act,[11] originally enacted in 1887.[12] These scholars take the position that when it comes to management of Tribally owned lands and control of tribal natural resources, the trust doctrine is anachronistic and a serious impediment to both tribal self-government and economic development.

While I generally agree with these scholars, in this article I focus on providing legal arguments for challenging the validity of

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6. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

7. *See* Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290 (2009).

8. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 217 (2006).

9. Stacy Leeds, *Moving Towards Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439 (2006).

10. *See generally* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1185–89 (2014) (pointing to the Indian Trust Doctrine as just one example of many where the notion of governance by a fiduciary has failed).

11. Indian General Allotment Act, 24 Stat. 388 (1887).

12. *See* Mary K. Nagle, *Nothing to Trust: The Unconstitutional Origins of the Post Dawes Act Trust Doctrine,* 48 TULSA L. REV. 63 (2012) (hereinafter *Nothing to Trust*).

many of the statutes allegedly enacted by Congress pursuant to the Indian Trust Doctrine. Many of the laws imposing federal control over tribal land management decisions have their roots in the late 1800's and early 1900's. Congress was said to have absolute power to manage tribal lands because such land was said to be held in trust by the United States, and efforts to challenge such authority were rejected based on the political question doctrine.[13] In this article, I argue that it is a mistake to think that the United States has actual "trust" title to much of the 56 million acres comprising the tribal land base.[14] I also argue that it is wrong to take the position Congress still has plenary, in the sense of being absolute, authority over the land management decisions of Indian tribes.[15] Furthermore, starting in 1974 with *Morton v. Mancari*,[16] the Court began to allow substantial judicial review under the Equal Protection Clause to challenge Indian-specific legislation and eventually rejected application of the political question doctrine to block challenges to Federal Indian legislation.[17]

At issue in the landmark *Mancari* decision was whether a law giving preference in employment to Indians applying for jobs within the BIA was unconstitutional as a violation of the equal protection principle derived from the Fifth Amendment's Due Process clause. The Supreme Court held that it was not. Crucial to its holding was the finding that this preference does not constitute racial discrimination because "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."[18] Since strict scrutiny was not applicable, the *Mancari* Court concluded by holding that

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13. Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

14. *See infra* notes 238-60. I first heard of such an argument from Professor Robert Clinton during a presentation he made at Arizona State University Sandra Day O'Connor School of Law in April 2011. S*ee also* INDIAN LAW RESOURCE CENTER, NATIVE LAND LAW, GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES (Thomson Reuters, 2013-2014 Lawyers Ed.) [hereinafter Native Land Law].

15. *See infra* notes 135-43.

16. 417 U.S. 535 (1974).

17. *See* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

18. *Mancari*, 417 U.S. at 554.

because the preference was "reasonably and directly related to a legitimate, nonracially based goal,"[19] promoting tribal self-government, it would survive the equal protection challenge. As to why the classification was not racial, the Court offered two alternative explanations. First, it stated that the Indian Commerce Clause authorized Congress "to regulate Commerce . . . with the Indian Tribes,"[20] and "to this extent, [it] singles Indians out as a proper subject for separate legislation."[21] However, the Court also explained in a footnote that "[t]he 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 classified as 'Indians.' In this sense, the preference is political rather than racial in nature."[22]

Early on, scholars such as Professor David Williams attacked the *Mancari* methodology as being unsound.[23] The gist of his criticism was that since Indian tribes require their members to be of "Indian" ancestry by proving that they are direct descendants from some biological Indian ancestors, *Mancari* was wrong in asserting that the classification could not be racial. Invoking the proverbial law requiring Indians to sit in the back of the bus, Professor Williams insisted that *Mancari* did not offer Indians

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19. *Id.*

20. U.S. CONST. art. I, § 9, cl. 3.

21. *Mancari*, 417 U.S. 535 at 551–52.

22. *Id.* at 553 n.24. Interestingly, before 1924, the year the Indian Citizenship Act became law, most Indians were not United States citizens and any classification based on membership in an Indian tribe could have been held as being based on alienage and therefore be considered a suspect one for the purpose of strict scrutiny. However, since at issue in *Mancari* was the validity of a federal statute, heightened scrutiny would still not have been required. *See* Mathews v. Diaz, 426 U.S. 67 (1976). In *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (1998), the Ninth Circuit held that a tribal law giving preference to members of the Navajo Nation discriminated based on national origin and therefore was in violation of Title VII of the 1964 Civil Rights Act prohibiting such discrimination. *Id.* (discussing 42 U.S.C. § 2000e-2(a) (2013)).

23. *See* David Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

enough protection from laws that discriminated *against* them and that there should be a presumption that most classifications of Indians were, in effect, made on racial grounds. Others, notably Professor Carole Goldberg, disagreed. Professor Goldberg noted that Professor Williams' approach would jeopardize most of Title 25, the Title of the United States Code containing most laws enacted specifically for the benefit of Indians. As stated by the *Mancari* Court, "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased."[24] Rather than focusing and relying on the *Mancari* footnote, Professor Goldberg argued that the better response to the argument that any classification of Indians is primarily "racial" is to argue that the special treatment of Indians cannot be considered racial because Article I of the Constitution set Indians for special treatment by authorizing Congress to regulate Commerce with the Indian Tribes.[25] Furthermore, Professor Goldberg added that Indians could protect themselves from classifications harming them by relying on the statement the Court made in *Mancari* that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgment will not be disturbed."[26]

In this article, while I agree with Professor Goldberg that most classifications of Indians are not racial as long as they were enacted into law pursuant to Congress's power under the Indian

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24. *Mancari*, 417 U.S. at 552; *see also* Carole Goldberg, *Not Strictly Racial: A Response to Indians as People*, 39 UCLA L. REV. 169 (1991).

25. Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA. L. REV. 943 (2002). Article I, section 8, clause 3 states that Congress is given the power to "regulate Commerce among the states, and with Indian Tribes and Foreign Nations."

26. *Mancari*, 417 U.S. at 555.

Commerce Clause of Article I, I disagree with the notion that Indians can successfully protect themselves from classifications harming them by arguing that such classifications are not rationally related to Congress's unique obligations towards Indians. This does not mean that Indians are left without any recourse to fight laws that discriminate against them. This Article argues that the Supreme Court's new equal protection jurisprudence, as reflected in cases such as *United States v. Windsor*,[27] *Romer v. Evans*,[28] *United States Department of Agriculture v. Moreno*,[29] and C*ity of Cleburne v. Cleburne Living Center*,[30] can be applied to Indian legislation and protect Indians from laws enacted to their disadvantage. While the Court in those four cases did not formerly acknowledge that it was dealing with suspect or quasi-suspect classes, it developed a jurisprudence under which laws denying equal treatment to some groups can be more easily held unconstitutional.[31] Some scholars interpret these cases as creating a heightened level of scrutiny,[32] what some have called Second Order Rational Basis Review,[33] or Rational Basis with Bite ("RBB"). [34] Others have argued that these cases all involve legislation driven by unconstitutional animus towards unpopular groups.[35] Here, I will argue that under either of those two theories, Federal Indian

27. 133 S. Ct. 2675 (2013).

28. 517 U.S. 620 (1996).

29. 413 U.S. 528 (1973).

30. 473 U.S. 432 (1985).

31. *See* Suzanne N. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (noting weak and strong strands in the Court's approach to rational basis review. *Id.* at 512–18).

32. In some way, this heightened level of review mirrors what Justice Blackmun was trying to do in *Mancari* with his "uniquely tied to the trust " test but unlike his, my test does not restrict Indians to make arguments related to the Indian Trust Doctrine.

33. *See* Justice Marshall's Opinion concurring in part dissenting in part in *Cleburne*, 473 U.S. at 458.

34. *See* Gale Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by any Other Name*, 62 IND. L. J. 779 (1987).

35. *See* Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2013); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

legislation imposing restrictions on tribal land management can be successfully challenged as a denial of equal protection.

The Article will proceed as follows: Part II summarizes the case law which has used equal protection to challenge Indian legislation and set forth the various arguments that have been made concerning when Indian legislation amounts to a racial or a political classification; Part III explains why *Mancari*'s "rational tied to the trust standard" is inadequate to protect Indians from laws discriminating against them; and finally, Part IV explores the level of scrutiny which should be used to challenge laws that are not considered to involve racial classifications but nevertheless were enacted based on a view that Indians were racially inferior, or were based on other improper motives, such as animus towards Indian people.

I. DISTINGUISHING BETWEEN RACIAL AND POLITICAL CLASSIFICATIONS

A. The Case Law at the Supreme Court

*1. The Pre-*Mancari *Cases*

Not surprisingly, cases challenging Federal Control of tribal land and property before 1954[36] did not invoke the Equal Protection Clause. These challenges usually failed because Congress, as the trustee for the Tribes, was held to have absolute power over Indian property.[37] For instance, in *Tiger v. Western Investment Co.*,[38] Congress imposed more restrictions on the alienation of lands by full-blooded members of a tribe than it did on lands held by non-full-blood Indians. While the full-blooded

36. 1954 was the year *Bolling v. Sharpe*, 347 U.S. 497 (1954), was decided. In *Bolling*, the Court for the first time held that the Equal Protection Clause applied to the Federal government because even though it is not mentioned in the Fifth Amendment, it is incorporated through its Due Process Clause.

37. *See*, *e.g.*, Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).

38. 221 U.S. 286 (1911).

members challenged the restrictions, they never alleged discrimination based on race. The Court held that as long as the Indians were the wards of the federal government and under its tutelage, it was for Congress, and not the courts, to decide what was in the best interest of the Indians.

Whether cases like *Tiger v. Western Investment* should still be considered good law after *Bolling* and *Mancari* is the subject of this article. My argument is that they should not, although the one case decided between *Bolling* and *Mancari*, *Simmons v. Eagle Seelatsee*,[39] shows the issue is not free from doubt. The issue in *Eagle Seelatsee* was whether an Act of Congress restricting inheritance in any part of the estate of a Yakima tribal member held under restricted or trust status to those enrolled tribal members possessing at least one fourth of Yakima Indian blood, was a violation of the Equal Protection Clause. The plaintiffs in the case were arguing that the law discriminated based on race and was a violation of the Due Process Clause because it bore no reasonable relation to the guardianship the United States has over Indians. Relying on the plenary power of Congress over Indian tribal relations and property as enunciated in *Tiger v. Western Investment*, the United States District Court upheld the law on the grounds that "Congress was doing no more than defining what constituted membership in the Yakima Tribes."[40] Interestingly, the court seemed to acknowledge that the classification was based on race when it stated, "[i]t is plain the Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentage of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.' *Indians can only be defined by their race*."[41] Nevertheless, the court still adopted the lowest level of scrutiny, the rational basis test, and stated, "[n]ecessarily, continued intermarriage with white persons would ultimately produce persons who were in no true sense Indians. At

39. 244 F. Supp. 808 (1965), *aff'd without op.*, 384 U.S. 209 (1966).
40. *Id.* at 814.
41. *Id.* (emphasis added).

some reasonable point a line must be drawn between Indians and non-Indians."[42]

In its last footnote, the court warned that a "logical application of plaintiff's position respecting the unconstitutionality of 'a criterion of race' would cast doubt on the constitutionality of all such legislation"[43] dealing specifically with Indians. Among the many statutes the court was afraid would be endangered were the following: limitations on Indians making contracts without Secretarial approval; limitations on the rights of white men marrying Indian women; limitations on sending Indian children to school out of state; and restrictions on leasing of Indian land without Secretarial approval.[44] This article argues that these statutes should today be held unconstitutional and decisions like *Eagle Seelatsee* overturned.

2. Mancari *and its Progeny*

Mancari's major innovation and its departure from the line of reasoning exemplified in *Eagle Seelatsee* was that the classification of Indians did not have to be considered racial but could be political. The Court started its analysis by announcing 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 based on a history of treaties and the assumption of a "guardian ward" status, to legislate on behalf of federally recognized Indian tribes."[45] It ended by concluding that laws rationally tied to Congress's unique obligations towards the Indians would not be disturbed.[46]

Ever since the decision, there has been a debate concerning the meaning of this last sentence. Was the Court, as some scholars were hoping, announcing a new Rational Basis "plus" test, under which the special treatment of Indians could not be tied to *any*

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42. *Id.* at 815.
43. *Id.* at 814.
44. *Id.*
45. 417 U.S. 535, 551 (1974).
46. *Id.* at 555.

legitimate federal interest, but only to Congress's fulfillment of its unique obligations towards Indians?[47] Or, was the Court stating that it was only when the legislation was tied to Congress's unique obligations towards Indians that it did not amount to a racial classification triggering a heightened level of judicial review? Finally, how did one determine when a law was "tied to Congress's unique obligations towards the Indians?" Congress's unique obligations towards Indians are hard to define because the trust doctrine has many origins. Most scholars trace its beginning to Chief Justice Marshall's famous utterance in *Cherokee Nation v. Georgia* that the relationship between the United States and the tribes resembled that of a guardian to its ward.[48] Others, like Professor Mary Wood, have argued that the trust doctrine emerged from the huge land transfers that took place between the United States and the tribes through treaties or Acts of Congress.[49] Professor Robert Miller agrees the doctrine originated from land transfers, but traces it to the land transfers that took place as a result of the doctrine of discovery according to which the United States obtained "ultimate title" to all Indian lands.[50]

Any discussion of the trust doctrine is further complicated by the lack of consistent understanding of what the doctrine actually is. According to Professor Mary Wood, the first version of the Indian Trust Doctrine, devised by Chief Justice John Marshall, was that the trust relationship between the tribes and the United States was there to protect the continuing existence of tribes as self-governing sovereign entities.[51] The second iteration of the doctrine, however, developed during the Allotment era between the 1880's and the 1920's, was not so benign to Indians.[52] Its main purpose

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47. *See* Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

48. 30 U.S. 1, 17 (1831).

49. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

50. Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*, 166 (2006).

51. *See* Wood, *The Trust Doctrine Revisited, supra* note 49.

52. *See* United States v. Sandoval, 231 U.S. 28, 39 (1913) (holding

was to give plenary power to the federal government over Indian land, natural resources, and people,[53] beyond the limits of the Indian Commerce Clause.[54] In *United States v. Kagama*,[55] the Court famously stated "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arise the duty of protection, and with it the power."[56]

In the years shortly following *Mancari,* the Supreme Court, in four cases, had a chance to further explain its *Mancari* reasoning. In all these cases, the federal laws at issue were upheld. The first case in which the Court dealt with an equal protection claim after *Mancari* was *Fisher v. District Court.*[57] The Court held that a law denying Indians access to state courts was neither racial discrimination, nor a denial of equal protection. After stating that "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe,"[58] the Court, citing *Mancari*, concluded that even if this jurisdictional holding resulted in denying Indians access to a forum to which non-Indians had access, "such disparate treatment of the Indians is justified because

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that the Pueblos of New Mexico qualified as Indians for the purposes of having a trust relationship with the federal government because they were "essentially a simple, uninformed, and inferior people.") *Id.* at 39.

53. *See* United States v. Kagama, 118 U.S. 375 (1886); *Cherokee Nation*, 187 U.S. 294.

54. *Id.* at 378-79. *See also* Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247 (2003) (arguing that in *Mancari* and other cases, the Court integrated the trust doctrine into the Constitution so as to boost legislative power under the Indian Commerce Clause and allow Congress to pass legislation for the benefit of Indians even if such legislation went beyond "Commerce" with the Indian tribes).

55. 118 U.S. 375, 378-79 (1886).

56. 118 U.S. at 383-84.

57. 424 U.S. 382 (1976).

58. *Id.* at 390.

it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."[59] That same year, the Court also used *Mancari* to set aside a state challenge to a tax immunity conferred on Indians.[60] The state argued that such immunity violated the Due Process Clause of the Fifth Amendment. Relying on *Mancari*, the Court stated, "[t]he test to be applied to these kinds of statutory preferences, which we said were neither 'invidious' nor 'racial' in character, governs here: 'As long as the special treatment can be tied rationally to Congress's unique obligation towards Indians, such legislative judgment will not be disturbed.'"[61]

In *Delaware Tribal Business Committee v. Weeks*,[62] a group of tribal descendants who had been omitted from a per capita distribution pursuant to a judgment of the Court of Claims sued claiming discrimination and denial of equal protection. After overruling previous cases that had shielded such legal challenges under the political question doctrine, the Court nevertheless upheld the law, stating that the Court of Claims' omission of the plaintiffs from the distribution list was "tied rationally to the fulfillment of Congress' [sic] unique obligation toward the Indians."[63] Although Justice Stevens, in his dissent, argued that the omission of plaintiffs from the distribution was arbitrary and more the result of a legislative oversight than "the product of an actual legislative choice,"[64] there was in fact a valid reason tied to the trust for the omission: limiting the class of beneficiaries to Indians who were still members of a federally recognized tribe having a trust relationship with the United States.[65] Although the Court used *Mancari*'s language in a manner which suggested a higher level of scrutiny, Justice Stevens' dissent indicates that the majority could not have

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59 . *Id.* at 391.

60. Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).

61. *Id.* at 480 (quoting *Mancari*, 417 U.S. at 555).

62. 430 U.S. 73 (1977).

63. *Id.* at 85 (citing *Mancari*, 417 U.S. at 555).

64. *Id.* at 98.

65. *Id.* at 85.

used more than regular rational basis review, a hallmark of which is to allow courts to come up with any kind of rational basis supporting any possible legitimate federal interest without inquiring further into the real motivations of the legislature.

In the next case, *United States v. Antelope*,[66] the Court never mentioned the '"rationally tied to Congress' [sic] unique obligations" test in upholding the law. At issue was a law that subjected Indians to a federal criminal law containing a felony murder provision which was not applicable to similar crimes committed by non-Indians being prosecuted in state courts pursuant to state laws. Unlike *Mancari*, this law was not favorable to Indians since it imposed a stiffer penalty for essentially the same crime when committed by an Indian instead of a non-Indian. Yet, the Court found that "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people with their own political institutions."[67] The case is interesting because after stating that "classifications expressly singling out Indian tribes" does not involve racial classifications because it is "expressly provided for in the Constitution,"[68] the Court seemed to adopt the position that any Federal law related to the "governance of once-sovereign political communities," cannot be "viewed as legislation of a 'racial' group consisting of 'Indians.'"[69] In other words, the *Mancari* framework seemed to have shifted to one where any legislation aimed at the governance of tribes cannot be considered "racial," irrespective of whether it only applied to members of Indian tribes rather than to all Indians. Furthermore, once the legislation is found not to make racial classifications, garden-variety rational basis seems to apply.[70]

One possible way to read *Antelope* as being consistent with

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66. 430 U.S. 641 (1977).

67. *Id.* at 646.

68. *Id.* at 645.

69. *Id.* at 646 (quoting *Mancari*, 417 U.S. at 553 n.24).

70. For instance, the Court stated "respondents do not seriously contend that application of federal law to Indian tribes is so irrational as to deny equal protection." *Id.* at 647 n.8.

Mancari is to take the position that the *Antelope* Court understood *Mancari* to have used the "tied rationally to Congress's unique obligations" test because *Mancari* involved giving preference to Indians in a non-reservation setting. The *Mancari* Court, therefore, wanted to make sure that the law was related to the governance of Indian tribes and was indeed enacted pursuant to the Indian Commerce Clause. In *Antelope*, where the law was only affecting reservation Indians, and was so clearly related to the governance of Indian tribes, it was not necessary to mention the "rationally tied to Congress' unique obligations" test.

The Court revisited this issue a couple of years later in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation.*[71] In that case, Indian plaintiffs were arguing that the State of Washington's implementation of Public Law 280, a federal law allowing states to exercise some criminal jurisdiction over Indians on Indian reservations, was so arbitrary and irrational that it denied them due process and equal protection of the laws under the Fourteenth Amendment. The case was complicated by the fact that, unlike the previous three cases, this case involved a challenge to a state law enacted pursuant to delegation of federal authority to the state, an entity not having, at least initially, a trust relationship with Indian tribes. However, the Court held that this did not matter because "[i]n enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power."[72] In upholding the law against the equal protection challenge, the Court did not dwell on why the law did not amount to a racial classification and, citing only to *Mancari,* bluntly asserted "[i]t is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."[73] Having made that decision, the Court used what it called a "conventional Equal Protection Clause criteria," and stated, "legislative classifications are valid unless they

71. 439 U.S. 463 (1979).
72. *Id.* at 501.
73. *Id.* at 500-01 (quoting *Mancari*, 417 U.S. at 551-52).

bear no rational relationship to the State's objectives."[74] That standard was easily met.

The last Supreme Court case directly evaluating the applicability of *Mancari* was *Rice v. Cayetano*.[75] At issue was whether a state law restricting voting for selection of trustees to the State's Office of Hawaiian Affairs to Native Hawaiians, violated the 15th Amendment of the Constitution, which prohibits voting restrictions based on race.[76] "Native Hawaiian" was defined to mean people who could trace their ancestry to persons living on the Islands before the arrival of the first European in 1778. The Court held the voting restrictions unconstitutional because "ancestry can be a proxy for race. It is that proxy here."[77]

The State tried to argue that under *Mancari,* the classification of Native Hawaiians was not a "racial" classification. Justice Kennedy, writing for the Court, found *Mancari* inapplicable to the case at hand. After acknowledging that "Congress may fulfill its treaty obligations and its responsibilities to Indian tribes by enacting legislation dedicated to their circumstances and needs,"[78] Justice Kennedy found that although the classification involved in *Mancari* had a racial component, "the preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather "only to members of 'federally recognized' tribes."[79] On the level of review used in *Mancari*, Justice Kennedy summarized his interpretation of the case by stating, "[b]ecause the BIA preference could be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not

74. *Id.*

75. 528 U.S. 495 (2000).

76. Section 1 of the Fifteenth Amendment states "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

77. *Rice*, 528 U.S. at 514.

78. *Id.* at 519.

79. *Id.* at 519-20 (quoting *Mancari*, 417 U.S. at 553 n.24).

offend the Constitution."[80] Justice Kennedy also stated that the reason tribal elections established by federal statutes can restrict non-tribal members from voting was because these were elections for the internal governance of quasi sovereign tribes while this case involved elections to a state office, the Office of Hawaiian Affairs.

Although there were five Justices who signed the *Rice* majority opinion, Justice Breyer wrote a concurring opinion joined by Justice Souter, which offered a very different analysis. Their concurring opinion took the position that the classification was based on race because there was no "trust" for native Hawaiians, and native Hawaiians did not "sufficiently resemble an Indian tribe."[81] In other words, it seemed that for Justices Breyer and Souter, the key element in deciding whether the classification is one based on race was whether the legislation was enacted pursuant to a "trust" relationship. Justice Stevens joined by Justice Ginsburg wrote a dissenting opinion agreeing with Justice Breyer that the existence of a trust relationship was the determinative factor in deciding whether the voting restrictions amounted to a racial classification. According to Justice Stevens, however, "[a]s the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming."[82] Among those grounds, according to Justice Stevens, was that the United States came into possession of 1.8 million acres of land expropriated from Native Hawaiians. After mentioning as another factor the 150 laws enacted by Congress to implement its trust duties that also included Native Hawaiians as Native Americans, Justice Stevens concluded, "[t]he descendants of the Native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "'guardian-ward' relationship with the Government of the United States."[83]

In conclusion, while four Justices agreed that the crucial

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80. *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555).
81. *Id.* at 525 (Breyer, J. concurring).
82. *Id.* at 532 (Stevens, J. dissenting).
83. *Id.* at 534.

factor in determining whether a classification was racial was whether the law was enacted pursuant to a trust relationship, Justice Kennedy speaking for a majority of five was ambivalent on that point. Although he mentioned that Congress does have the power to "fulfill its treaty obligations" to tribes by enacting legislation treating Indians differently,[84] he also seemed to rely on the fact that legislation dealing with Native Americans is not racial when it is not directed to Indians as a group but "only to members of 'federally recognized' tribes."[85]

Rice, along with cases such as *Adarand Constructors, Inc. v. Pena*,[86] the leading case restricting the use of race in granting preference in the acquisition of government benefits, gave hope to some that *Rice* was announcing the imminent demise of *Mancari.*[87] That did not happen, as the Court has not yet revisited *Mancari* since the 2000 decision in *Rice.* Yet, because of a lack of conclusive direction from the Supreme Court, the political versus racial classification debate has been active in the lower courts. Some commentators have recently remarked that *Mancari* and its "political not racial" methodology has been under constant attack both in the courts and by scholars.[88] In response to such attacks, some scholars have recently made the argument that the very

84. *Id.* at 519 (majority opinion).

85. *Id.* at 519–20. It is interesting to compare *Rice* with a later case, *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), which involved a group of Native Hawaiians claiming that after *Rice*, a Department of Interior regulation prohibiting Native Hawaiians from petitioning the federal government to be recognized as an Indian tribe amounted to racial discrimination since all other Native American groups in the continental United States were eligible to petition the government for recognition as Indian tribes. The Ninth Circuit disagreed, stating "the recognition of Indian tribes remains a political, rather than a racial determination. Recognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny." *Id.* at 1279.

86. 515 U.S. 200 (1995).

87. *See* Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 736–43 (2001).

88. Gregory Smith & Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari*, 60-APR FED. LAW 47 (2013) [hereinafter *Apocalypse Now*].

dichotomy the Court made in *Mancari*, between racial *or* political, was inadequate because the classification of Indians can be both racial *and* political.[89] Besides, encouraging courts to debate which laws classify Indians based on race and which ones do not may needlessly lead courts into unchartered and difficult territory with no clear answers on how such determinations should be made.[90] These scholars take the position that any laws enacted pursuant to the trust doctrine for the benefit of Indians should be upheld without the courts debating whether the classification is "racial" or "political."[91] As the next section shows, however, the case law does not endorse this view.

B. The Case Law in the Lower Courts

In the lower courts, the debate surrounding what laws involve a racial classification has not centered on whether a given law only affects members of Indian tribes or whether it affects all Indians. Instead, determining whether a law amounts to a racial classification has depended on whether it was enacted pursuant to the trust doctrine, it affected "uniquely Indian interests,"[92] or it was enacted pursuant to the Indian Commerce Clause. In all the cases, whether the law only applies to Indians on Indian reservations or extends beyond reservation borders is an important factor. Laws only applying on reservations, as was the case in *Antelope*, will in all likelihood be considered non-racial classifications, and will therefore be upheld. Laws regulating or benefiting Indian tribes or their members beyond the reservation borders, as was the case in *Mancari*, are more difficult to assess when it comes to determining if they involve racial classifications. The problem with this view is that the two sources of congressional power most frequently cited

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89. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

90. *See* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165 (2010).

91. *See* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012).

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

as granting power to Congress over Indian affairs, the Indian Commerce Clause and the Indian Trust Doctrine, do not contain any territorial limitations on the extent of congressional power. This was made clear in a couple of early cases, the first one using the Indian Commerce Clause as the source of power, the other one the Indian Trust Doctrine.

One of the first Supreme Court cases recognizing congressional power beyond the reservation's border was *United States v. Holliday*:[93]

> If Commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on.[94]

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93. 70 U.S. 407 (1865).

94. *Id.* at 418. Some States have made a concerted effort to challenge congressional power over Indian Affairs beyond the reservations' borders by invoking the Tenth Amendment which states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, except for one state court decision, *Agua Caliente Band of Cahuilla Indians v. Super. Ct.*, 148 P.3d 1126 (Cal. 2006), which involved tribal violations of state election laws, these efforts have failed. *See* Roseville v. Norton, 219 F. Supp. 2d 130, 138–39 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003); Carcieri v. Norton, 290 F. Supp. 2d 167, 180 (D.R.I. 2003), *rev'd on other grounds sub nom.*, Carcieri v. Salazar, 555 U.S. 379 (2009); Prairie Band of Potawatomi v. Wagnon, 476 F.3d 818, 829 (10th Cir. 2007). Although some courts have held that without the Existing Indian Family doctrine, some parts of ICWA would be in violation of Tenth Amendment, see *In re* Santos Y., 112 Cal. Reptr. 2d 692, 731 (Cal. Ct. App. 2001), this position has not been endorsed by the vast majority of courts that have considered the issue. *See infra* notes 122–29.

The second case, *Perrin v. United States*,[95] concerned federal power to prohibit liquor in areas once occupied, but subsequently ceded, by an Indian tribe. Although the *Perrin* Court found some limits to congressional power in areas no longer part of Indian Country, it nevertheless reaffirmed federal power in the case:

> As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis.[96]

A good example of the "on" versus "off" Indian land dichotomy is provided by contrasting two Ninth Circuit decisions, both originating from Alaska. At issue in *Alaska Chapter v. Pierce*,[97] was a regulation issued by the federal Department of Housing and Urban Development ("HUD") directing Indian housing authorities building low-income housing in remote Native American villages to give preference to Indian owned enterprises in awarding federal contracts. The lawsuit alleged that this preference violated equal protection. The district court agreed, construing *Mancari*'s political classification as applying only to laws designed to further tribal self-government.[98] After rejecting this interpretation, the Ninth Circuit Court of Appeals held that "[i]f 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."[99] Having thus defined the test to distinguish racial from political classifications, the court had no trouble concluding that the regulation was rationally related to Congress's fulfillment of its

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95. 232 U.S. 478 (1914).

96. *Id.* at 486.

97. Alaska Ch., Associated Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

98. *Id.* at 1167.

99. *Id.* at 1169.

trust responsibility since its purpose was to encourage and develop leadership skills among Indian-owned businesses to "help the Indians develop economic self-sufficiency."[100] In other words, the court seemed to agree with the district court that *Mancari*'s "rationally tied to Congress's unique obligations" test determined whether the classification was racial or political. However, while the district court took an extremely narrow view of what is or is not related to implementing the trust, the Court of Appeals adopted a much more expansive definition, stating that "[t]he Ninth Circuit has applied *Mancari* to Indian interests broader than self-government."[101] On the date of the decision, 1982, activities occurring in Native Alaskan Villages were still considered as taking place on Indian lands. This would no longer be the case after the Supreme Court's 1998 decision in *Alaska v. Native Village. of Venetie Tribal Government*, which held that lands reserved to Alaskan Native entities under the Alaska Native Claims Settlement Act (ANCSA) did not qualify as Indian Country.[102]

While pretending not to disagree with *Alaska Chapter,* Judge Kozinski adopted a much different approach a few years later in *Williams v. Babbitt*.[103] At issue in the case was the correctness of an administrative court's interpretation of the Reindeer Industry Act, which interpreted the statute as prohibiting non-Native Alaskans from entering the Reindeer industry. Relying heavily on *Adarand Constructors, Inc. v. Pena* and Justice Stevens' dissent in that case,[104] the Ninth Circuit found that because the administrative interpretation allowed a racial preference for

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100. *Id.* at 1170.

101. *Id.* at 1169.

102. 522 U.S. 520 (1998). Thus, in *Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927 (D. Alaska 1998), the court held that Alaska Native preference in employment ordinance issued by a subdivision of the State of Alaska was a racial preference subject to strict scrutiny.

103. 115 F.3d 657 (9th Cir. 1997).

104. 515 U.S. 200 (1995). After remarking that in *Adarand,* Justice Stevens had argued that the majority equated the discrimination against African Americans with the preference given to Indians, Judge Kozinski concluded, "[i]f Justice Stevens is right about the logical implications of *Adarand, Mancari*'s days are numbered." *Id.* at 244.

Indians subject to strict scrutiny, it created a serious constitutional doubt as to the validity of the statute. Therefore, invoking the constitutional avoidance rule,[105] the Circuit held that it did not have to give deference to the administrative interpretation, and opted to construe the statute as not creating such preference. In order to come to this holding, Judge Kozinski had to first find that the classification was racial and not political. While acknowledging that "*Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land,"[106] the court limited *Mancari*'s reach as "shielding only those statutes that affect uniquely Indian interests."[107]

The question after *Williams* was: what exactly is a law "affecting uniquely Indian interests?" Judge Kozinski stated, "[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[108] Attempting to normatively justify this limitation, Judge Kozinski stated that "[a]s 'a separate people,' Indians have a right to expect some special protection for their land, political institutions . . . and culture."[109] This is not much in terms of normative justifications, although one scholar has picked up the challenge, and gave a much more involved and detailed justification for this limitation on *Mancari*'s reach.[110] Judge Kozinski ended that part of the analysis by announcing, "we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on space

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105. This is the canon of statutory construction according to which statutes are supposed to be interpreted, if at all possible, so as to avoid serious doubts as to their constitutionality.

106. 115 F.3d at 665.

107. *Id.*

108. *Id.* at 664 (quoting United States v. Antelope, 430 U.S. 641, 646 (1977)).

109. *Id.*

110. *See* David Williams, *Indians as Peoples*, *supra* note 22 (making a constitutionally based argument that only statutes which regulate Indians as distinct and separate Peoples do not amount to racial classifications. All other Indian classifications do and should be subject to strict scrutiny).

shuttle contracts."[111] As examined next, two later circuit court cases, one by the Ninth Circuit, disagreed with that evaluation.

The legitimacy of casino monopoly was at play in *Artichoke Joe's v. Norton.*[112] At issue in that case was a challenge by a non-Indian casino owner to a California law granting a monopoly over certain types of casino gaming to Indian tribes. The main question was whether the classification was racial or political.[113] The Ninth Circuit had to address the different approaches in its previous decisions in *Alaska Chapter* and *Williams*. After acknowledging that the court in *Alaska Chapter* "suggested that, so long as a federal statute evinced a rational relationship to Congress's trust obligations towards Indians, it involved a political classification,"[114] it remarked that in *Williams,* it had "more recently . . . suggested that the political-versus-racial classification is not always easy to

111. *Williams*, 115 F.3d at 665.

112. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003).

113. The other main issue was whether *Mancari* controlled since this involved a state and not a federal law. The Court held that because the state law was directly enacted pursuant to a federal law, the Indian Gaming Regulatory Act ("IGRA") 25 U.S.C. §§ 2701-2721 (2013), under the previous Supreme Court decision in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), *Mancari* was applicable. *See supra* notes 56–59. A more critical perspective was recently adopted by the First Circuit in *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012), where the Court overturned the dismissal of a complaint filed by a non-Indian gaming concern arguing that the State law allowing only Indian tribes to negotiate gaming compacts with the State constituted race based preference. Distinguishing both *Artichoke Joe's* and *Washington v. Confederated Bands and Tribes* because in this case the Tribe did not, and may never, possess what IGRA defined as Indian lands, the Court stated that "[i]t would be difficult to conclude that the IGRA 'authorizes' the Massachusetts statute under these circumstances—where there are no Indian lands in Region C at present within the meaning of IGRA." *Patrick*, 693 F.3d at 21. The Court therefore concluded by stating "We simply cannot say that KG's equal protection claim as to section 91 fails to state a claim on which relief may be granted." *Id.* at 27.

114. *Artichoke Joe's*, 353 F.3d at 734.

identify."[115] The court went on to distinguish *Williams* on the grounds that here the preference was given pursuant to the federal Indian Gaming Regulatory Act ("IGRA"),[116] that the statute only affected Indian tribes, rather than individual Indians, and only pertained to activities on Indian lands. Thus, the court ended by stating that because "IGRA pertains to Indian lands and to tribal self-government and tribal status of federally recognized tribes, . . . under *Mancari,* rational-basis review applies."[117] Describing Judge Kozinski's reference to casino monopoly as dictum, the court nevertheless adopted his approach, implicitly recognizing that *William*'s "uniquely Indian interests" limitation covered any statute "relating to tribal self-government, to tribal status, or to Indian lands."[118]

One of the questions left open after the case was whether any statute covering non-reservation based activities would have to be tied to tribal self-government in order to avoid strict scrutiny. A year later, in *American Federation of Government Employees v. United States*,[119] the D.C. Circuit had to decide such a case which also involved something similar to the second example given by Judge Kozinski, government contracts involving the space shuttle. At issue was the constitutionality of a provision in the Defense Appropriations Act granting outsourcing preference to tribally owned defense contractors. The case was more difficult than previous cases because the preference extended beyond Indian activities on or near reservations, and it did not seem to involve tribal self-government, at least not directly, or for that matter, uniquely Indian interests. Nevertheless, the D.C. Circuit upheld the law stating:

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115. *Id.*

116. 25 U.S.C. §§ 2701-2721.

117. *Artichoke Joe's*, 353 F.3d at 736. *Artichoke Joe's* was followed by the Fourth Circuit in *United States v. Garrett*, 122 Fed. App'x. 628 (4th Cir. 2004).

118. *Artichoke Joe's*, 353 F.3d at 735.

119. Am. Fed'n of Gov't Emps, AFL-CIO v. United States, 330 F.3d 513 (D.C. Cir. 2003).

> The critical consideration is Congress' power to regulate commerce "with the Indian tribes." While Congress may use this power to regulate tribal members, regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here. When Congress exercises this constitutional power it necessarily must engage in classifications that deal with Indian tribes.[120]

The difference between the D.C. Circuit's approach in this case and the Ninth Circuit's is that it based its ruling strictly on the constitutional text and the power Congress derived from the Indian Commerce Clause. The court did not put any emphasis on determining whether the classification was racial or political, or based on whether it was enacted pursuant to congressional trust obligations because it affected uniquely Indian interests.

Challenges to the Indian Child Welfare Act ("ICWA") in cases involving Indian children located off Indian reservations have also involved interesting equal protection arguments.[121] ICWA is the most far-reaching congressional legislation protecting tribal interests beyond reservation borders.[122] For instance, ICWA allows for concurrent tribal and state jurisdiction for child custody proceedings involving an Indian child even when such child does not reside on the reservation. In addition, the law allows for transfer of such cases from state to tribal courts in the absence of good cause or objections by either parent. The Act also mandates an Indian placement preference even when the state court keeps jurisdiction over such cases.

Some states have fought application of ICWA in cases where there is no "Existing Indian Family," on the grounds that in the absence of such a family, the law amounts to a violation of

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120. *Id.* at 521-22.

121. 25 U.S.C. §§ 1901-1923 (2012).

122. *See generally* Patrice Kunesh, *Border Beyond Borders—Protecting Essential Tribal Relations off Reservations Under the Indian Child Welfare Act*, 42 NEW ENGLAND L. REV. 15 (2007).

substantive due process, equal protection, and is in contravention of the rights guaranteed to the States under the 10th Amendment of the Constitution.[123] The equal protection argument, as stated in *In re Bridget R.*, is based on the fact that "any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural, or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the Equal Protection Clause."[124] This line of reasoning is subject to the criticism that under the Act, an "Indian child" is defined as a child who is a tribal member or who is eligible for membership in a tribe. Therefore, the Act conforms with *Mancari*'s holding that the classification is not racial when it only affects Indians who also are tribal members. Perhaps this is the reason why a court in *In re Santos Y.*, another California case adopting *Bridget R*'s equal protection analysis, also concluded that more recent cases "have focused on the text of *Mancari*, rather than on the footnote language that characterized the BIA preference as more political than racial, and have limited application of the rational basis test to legislation involving uniquely Indian concerns."[125] Citing Judge Kozinski's analysis in *Williams v. Babbitt*,[126] the court went on to conclude, without giving any kind of explanation, that "we . . . do not find child custody or dependency proceedings to involve uniquely Native American concerns."[127] Child custody proceedings, generally speaking, are, of course, not "uniquely" an Indian concern. However, it seems disingenuous to argue that child custody proceedings involving only Indian children who are tribal members or eligible for tribal membership are not a uniquely tribal

123. The leading case advocating the requirement of an existing Indian family before ICWA can be applied is *In re Bridget R.*, 41 Cal. App. 4th 1483 (Cal Ct. App. 1996).

124. *Id.* at 1509. The court went on to find that without an existing Indian family to protect, the Act did not protect a compelling governmental interest by narrowly tailored means.

125. *In re Santos Y.*, 112 Cal. Reptr. 2d at 730.

126. 115 F.3d 657 (9th Cir. 1997).

127. *In re Santos Y.*, 112 Cal. Rptr. 2d at 730.

interest. Professor Kunesh put it well when, after observing that the unique tribal interest in its Indian children "coalesces with the essentiality of tribal governance in child welfare matters, to compose an uber-tribal interest that transcends territorially-defined jurisdictional limits,"[128] she concluded that "[t]he welfare of Indian children lies at the heart of tribal sovereignty."[129]

The debate surrounding the need for an "existing Indian family" in order for the classification not to be considered "racial" shows the difficulty in basing the level of scrutiny on whether the classification is "political" or "racial." As stated earlier, this article is arguing that the determination of whether a classification is racial or not should be based on whether the legislation containing the classification was enacted pursuant to the Indian Commerce Clause. If it was, the classification cannot be racial. Otherwise it is. In this vein, Justice Thomas' concurring opinion in the most recent Supreme Court case involving ICWA, *Adoptive Couple v. Baby Girl*,[130] while coming to the wrong conclusion, is at least more on track concerning how these equal protection challenges should be decided. While the attorneys for the Adoptive Couple made arguments relating to the fact that there was no "existing Indian family" in this case, Justice Thomas seemed to have disregarded these arguments and instead concurred in the holding that ICWA was not applicable in this case but only because he believed that Congress did not have the power under the Indian Commerce Clause to enact such legislation. Firmly asserting that Congress does not have plenary power over Indian affairs, Justice Thomas took an incredibly narrow view of the Indian Commerce Clause.[131] Quoting from other cases and scholarly articles, Thomas agreed that:

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128. Kunesh, *Borders Beyond Borders*, *supra* note 122, at 51.

129. *Id.* at 78.

130. 133 S. Ct. at 2565 (Thomas, J. concurring).

131. Justice Thomas seemed to have adopted the views espoused by Professor Robert G. Natelson in *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007), since the article is cited and quoted throughout his concurring opinion.

> At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. . . . [T]he term "commerce with Indian tribes" was invariably used during the time of the founding to mean "'trade with Indians.'" . . . [R]egulation of Indian commerce generally referred to legal structures governing "the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters."[132]

Justice Thomas concluded, therefore, that Congress had no power to enact the section of ICWA at issue in the case because first, the statute dealt with child custody proceedings, not commerce, and secondly, the Constitution gave Congress only the power to regulate Commerce with Indian tribes. Yet, according to Thomas "the portions of the ICWA at issue here do not regulate Indian tribes as tribes" since it applied to "all child proceedings involving an Indian child regardless of whether an Indian tribe is involved. This case thus does not directly implicate Congress's power to "legislate in respect to Indian *tribes*."[133] While I agree with Justice Thomas that Congress should not be considered to have "plenary power" when it comes to its assertion of power over Indian tribes, I believe that Congress has "plenary" authority over "Indian Affairs" vis-à-vis the states. I also disagree that the legislation has to directly regulate the tribes.[134]

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132. 133 S. Ct. at 2567 (Thomas, J. concurring) (quoting Natelson, *supra* note 131, at 216, 216 n.99) (internal citations omitted).

133. *Id.* at 2570 (quoting United States v. Lara, 541 U.S. 193, 200 (2004)) (emphasis in original).

134. For an eloquent argument that Congress does have the power to enact the Indian Child Welfare Act, *see* MATTHEW L.M. FLETCHER, *ICWA and The Commerce Clause*, *in* FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 (Matthew L.M. Fletcher, Wenona F. Singel & Kathryn E. Fort eds., 2008).

C. The Indian Commerce Clause Power as the Determinant Factor on Whether the Classification is Racial or Political

This article takes the position that whether the classification is racial or political should be based on whether, in enacting the legislation containing the classification, Congress has legislated under its Indian Commerce Clause power. This argument, however, presupposes some limits on this Congressional power. The problem with the majority of current Supreme Court Justices' understanding of Congress's power to regulate commerce with Indian tribes is that they take the complete opposite position as that of Justice Thomas. They do not see the Indian Commerce Clause as having any internal limitations. Instead, other provisions of the Constitution impose such limits externally. Thus, the Court continues to insist that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs."[135] So, applying the Court's current view to my thesis, as long as the legislation concerns the "field of Indian Affairs," such legislation cannot be considered "racial." Such position sweeps too broadly and would shield too much legislation from strict scrutiny.

Under the Court's current view, "plenary" does not mean "absolute" power over tribal resources in that Congress cannot deny tribes their constitutional rights to vested property rights *unless* the law is enacted pursuant to the trust doctrine and is truly for the benefit of the Tribes. Thus, the Court in *United States v. Sioux Nation* had to decide whether the taking of the Black Hills from the Sioux in 1877 was done pursuant to the trust relationship, or pursuant to Congress's power of eminent domain in which case the Sioux were owed just compensation within the meaning of the Fifth Amendment. While acknowledging that Congress can act beyond normal constitutional restrictions if acting as a trustee for the tribes, the Court also held that when Congress is not acting as a trustee, legislation should be subject to constitutional restrictions.[136]

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

136. 448 U.S. 371, 415 (1980) ("[T]his power to control and manage

In other words, under the modern view, the Court may still decide to uphold congressional legislation violating other parts of the Constitution if such legislation is truly for the benefit of the tribes.

Professor Clinton once wrote that the Commerce Clause gives Congress the "power to regulate commerce *with* the tribes, not the commerce *of* the tribes."[137] Once we accept that neither Congressional power under the Indian Commerce Clause nor power emanating from the treaties previously entered with Indian tribes is plenary in the sense of absolute, we must still determine the extent of this power.[138] Regulating "Commerce" with Indian tribes goes beyond regulation of commercial trade with the tribes. As Chief Justice Marshall once stated, Commerce is "intercourse,"[139] and as some scholars have noted, the original 1790 Trade and Intercourse Acts regulated much more than just "trade" with the Indians.[140] Professor Matthew Fletcher recently argued that the Indian Commerce Clause "should be interpreted broadly to include subject matters beyond the narrow meaning (whatever it may be) of Commerce."[141] Professor Fletcher has also argued that the Indian Commerce power was in fact conceived as extending to every interaction, social or commercial, between Indians and non-

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[is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *Id.* (citing United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)).

137. Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 259 (2002) (emphasis added).

138. *See* Philip P. Frickey, *Native American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 473-75 (2005) (arguing that abandoning plenary power would still leave a great amount of power to Congress under the Indian Commerce Clause and the spending clause).

139. Gibbons v. Ogden, 22 U.S. 1 (1824).

140. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24 (2010). Balkin also noted that the constitutional convention originally voted to give Congress power to regulate "affairs" with the Indians and there is no evidence "that the shift from 'affairs' to 'commerce' was thought to change the meaning or the scope of the powers granted." *Id.* at 23 n.82.

141. *See* Fletcher, *ICWA and the Commerce Clause*, *supra* note 134.

Indians.[142] This does not mean, however, that the power is unlimited. In subsequent writings, Professor Fletcher drew a distinction between congressional power over the tribes' external affairs, which he acknowledged as plenary, and power over the tribes' internal affairs, which he argued should not be.[143]

In conclusion, while Congress may enact legislation regulating commerce, relations, and interactions between Indians and non-Indians, it should not be able to enact laws regulating Indian tribes or their lands in areas having nothing to do with such interactions. In other words, Congress should not be able to regulate internal tribal commerce. Under my thesis, all such congressional regulations should be considered racial classifications and strict scrutiny should be applicable. Unfortunately, the Supreme Court has never endorsed such internal limits on the Indian Commerce Clause. As previously stated, Professor Carole Goldberg argued that even if one adopted a broad view of the Indian Commerce power, not classifying any such law as making racial classifications was inconsequential because Indians could protect themselves from laws negatively affecting them by invoking the *Mancari*'s trust standard. Under that standard, the legislation in question would only be upheld if it was tied to Congress's unique

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142. Other scholars are agree, noting the early Indian Trade and Intercourse Act regulated much more than commercial trade between non-Indians and the Indian tribes, *See* Balkin, *Commerce*, *supra* note 140, at 24. Others disagree. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010) (arguing that the Trade and Intercourse Acts were mostly enacted pursuant to the Treaty Power and not the Commerce Power).

143. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN J. CIV. RTS. & CIV. LIB 45, 75–78 (2012). In his upcoming article, Gregory Ablavsky argues that the drafters of the Constitution never understood the Commerce Clause as being a large part of the total power given to Congress over Indian affairs, let alone the exclusive one. Instead, the Indian Commerce Clause was just a component of a broad Indian Affairs power resting on multiple constitutional provisions. However, even though the constitutional power of the United States over Native nations was broad, it was not considered plenary by the drafters or other federal officials. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015).

trust responsibilities towards Indians. In the next Part, I argue that the "tied to the trust obligations" standard is not workable, and that tribal advocates should therefore look elsewhere for protection.

II. THE INADEQUACY OF THE TRUST DOCTRINE AS A LIMIT ON FEDERAL POWER OVER INDIAN TRIBES

Although the Court in the modern era seemed to have taken the position that the Commerce Clause more than the trust doctrine gives Congress plenary authority over Indian Affairs,[144] the Indian Trust Doctrine is still cited as a source of plenary power for Congress. Through the years, Congress has used this power extensively to control and manage the tribes' natural resources.[145] Under this version of the doctrine, the trust arose out of necessity because Indian tribes and people were weak and defenseless. Indians as individuals became "wards" of the government because they were considered incompetent to manage their own personal affairs.[146] The legal reasoning in *Cherokee Nation v. Hitchcock* is typical of many cases during this period.[147] At issue in the case was an effort by the Cherokee Nation to prevent the Secretary of the Interior from leasing Cherokee lands for mineral exploitation without the Cherokees' consent. Relying on two previous cases,[148] the Court found that the Indian tribes were "in a condition of pupilage or dependency, and subject to the paramount authority of the United States."[149] The Court further held that the administration of tribal property was within the exclusive authority of Congress: "the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the

144. *See Cotton Petroleum*, 490 U.S. at 192.

145. *See* Judith Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008).

146. For a recent article explaining the racist roots of this second version of the trust doctrine, *see* Nagle, *Nothing to Trust*, *supra* note 12.

147. 187 U.S. 294 (1902).

148. *Stephens*, 174 U.S. 445; *S. Kan. Ry. Co.*, 135 U.S. 641.

149. 187 U.S. at 305.

courts."[150] Perhaps this notion of the trust doctrine is closer to the doctrine's ancient roots than Chief Justice Marshall's version.[151] In colonial times, the doctrine seemed to have been based on the notion of European superiority and the perceived duty of the colonizers to civilize and Christianize what were considered inferior people. According to one scholar, the main purpose of the trust doctrine in colonial times was to assimilate and take control of the property of the colonized.[152] Some scholars have also argued that the historic trust doctrine is full of racist baggage that cannot be unloaded.[153]

The major problem with relying on *Mancari*'s "rationally tied to the trust" test to fend off laws discriminating against Indians is that there is no judicially defined meaning for what constitutes Congress's unique obligations towards Indians. While the Court has developed standards for breach of trust by the Executive Branch and has allowed tribes to bring lawsuits against the United States for money damages in the court of claims pursuant to the Tucker Act,[154] these standards have never been applied to cases challenging the constitutionality of congressional legislation. Today, even scholars such as Professor Mary Wood, who have taken a conciliatory position towards the trust doctrine and advocate the continued use of a vigorous trust doctrine as a means to protect the reservations' environment from deleterious federal policies and actions by federal officials, concede that the trust doctrine as a limit

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150. *Id.* at 308.

151. See discussion, *supra,* at notes 48-51.

152. *See*, *e.g.*, Liam Seamus O'Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America*, 31 ARIZ. ST. L. J. 1207 (1999).

153. For a version of this argument *see* ROBERT WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

154. 28 U.S.C. §§ 1491, 1505 (2011); *see* United States v. Mitchell, 463 U.S. 206 (1983), United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); United States v. Navajo Nation, 537 U.S. 488 (2003); *see also* Judith N. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N. D. L. Rev. 327, 329-34 (1995).

on the legislative branch may be a retreating mirage.[155] Only one Supreme Court case has addressed a somewhat similar issue. In *United States v. Sioux Nation*,[156] the Court held that because the taking of the Black Hills from the Sioux by the Federal government was not related to the trust obligations of the United States, the Sioux were owed just compensation under the Fifth Amendment. According to the *Sioux Nation* Court, "[t]he question whether a particular measure was appropriate for protecting and advancing the tribe's interests, and therefore not subject to the constitutional command of the Just Compensation Clause, is factual in nature. The answer must be based on a consideration of all the evidence presented."[157] While the *Sioux Nation* principle may at first seem innocuous, scholars have criticized it.[158] The problem here is that it is not the tribes themselves who make the decision that a law was enacted truly for their benefit; it is the courts. These courts may give great deference to what Congress thought it was doing when it enacted such legislation. In one aspect, *Sioux Nation* and *Mancari* follow a similar reasoning: In *Mancari*, the Court allowed Congress to disregard the racial aspect of laws treating Indians differently, but only if that legislation was tied to the trust responsibility, while in *Sioux Nation*, the Court would have allowed Congress to disregard the Just Compensation Clause, but only if it had acted pursuant to the trust doctrine.

In retrospect, *Sioux Nation* was an easy case since it dealt with what was probably the most egregious abrogation of an Indian treaty by the United States. Other cases may be more difficult to resolve because the trust power can be both too broad, and too narrow a qualification of congressional power. The over-breadth

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155. Wood, *The Trust Doctrine Revisited*, *supra* note 49.

156. 448 U.S. 371 (1980).

157. *Id.* at 415.

158. *See* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1982); Joseph William Singer, *Lone Wolf, or How to Take Property by Calling it a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37, at 38 (2002); *see also* Comment, *Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation*, 131 U. PA. L. REV. 235 (1982).

can be seen by asking whether a law prohibiting the sale of liquor to only tribal Indians would be upheld under the trust doctrine. Pointing out to studies demonstrating a higher rate of alcoholism among tribal members, it is not unimaginable to think that some judges may find the law rationally related to the protection of Indians under the trust doctrine. On the other hand, the trust doctrine could be used to impose overly narrow restrictions on Congress. Nothing in the words of the Indian Commerce Clause mandates that Congress only enact legislation benefitting Indians pursuant to the trust. Congress can act at times as a trustee and at others as a regulator.[159] So, unless one adopts an exceedingly broad definition of the trust responsibility, many acts of Congress, which are not enacted for the benefit of Indians but for the purpose of regulating them, would ostensibly fail the *Mancari* test.

The second problem with reliance on the trust doctrine is that while the doctrine has been used to constrain the power of the Executive Branch,[160] it has been used in the past mostly to expand the power of the Legislative Branch.[161] As Dean Nell Newton once stated, the trust doctrine is "not constitutionally based and thus not enforceable against Congress."[162] The likelihood that the Court will start using the trust doctrine to control the power of Congress is, to say the least, remote. So far, it seems that only one court seriously undertook the review of legislation to see if it was enacted in violation of the Indian Trust Doctrine and, not surprisingly, found that it was not.[163]

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159. *See* Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L. J. 253, 265-69 (2010).

160. *See* Mary Christina Wood, *Protecting the Attributes of Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources,* 1995 UTAH L. REV. 109 (1995).

161. *Kagama*, 118 U.S. 375 (holding that because of the trust doctrine Congress had the power to enact the Major Crimes Act even though it exceeded its power under the Indian Commerce Clause).

162. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations,* 132 U. Pa. L. Rev. 195, 232-33 (1984).

163. *See* Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9 (D.D.C. 1990) (holding that the Indian Gaming Regulatory Act of 1988 was enacted in conformance with the Trust even though the Tribe argued

Some scholars favoring continued use of the trust doctrine, such as Reid Chambers, take the position that the major problem with the trust doctrine is that it has been misunderstood. Properly conceived, the trust doctrine should be viewed primarily as a doctrine to protect and encourage tribal self-government.[164] Unfortunately, a recent Supreme Court case, *United States v. Jicarilla Apache Nation*,[165] seems to indicate that at least the majority of the Supreme Court is stuck on the *Kagama* version of the doctrine. In *Jicarilla Apache*, the Tribe brought a breach of trust case against the United States, claiming mismanagement of tribal funds held in trust by the United States for the benefit of the Tribe. In order to make their case, the tribal attorneys wanted access to certain documents that the United States claimed were protected by the attorney-client privilege. The Tribe argued that the privilege was not available because of the "fiduciary exception." Under that exception, the attorney-client privilege does not prevent the beneficiary of a trust from having access to communications between the trustee and its lawyers concerning management of the trust funds.

The Supreme Court held that the common law "fiduciary" exception was not available to Indian tribes trying to get documents from the United States. The Court determined that the fiduciary exception is a common law exception applicable to private trustees. However, the United States was not analogous to a private trustee because, while the duties of a private trustee are defined by the common law, the duties of the United States as trustee for the tribes are uniquely defined by federal statutes.[166] In addition, the trust function the United States performed was a sovereign function subject to the plenary power of Congress, and Congress has

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that it infringed on its sovereignty and right of self-government).

164. Reid Peyton Chambers, *Compatibility of the Federal Trust Responsibility with Self Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century*, ROCKY MTN. MIN. L. FOUND. Paper No. 13A (2005).

165. 131 S. Ct. 2313 (2011).

166. *Id.* at 2323.

structured that function to pursue its own policy goals.[167] In other words, according to the Court, Congress looks mostly at its own sovereign interests and not the tribes when enacting statutes pursuant to the trust relationship.

Justice Alito's Opinion for the Court is at odds with several previous notions about the trust doctrine. The most important is the role of the common law of trust in defining the United States trust obligations towards the tribes.[168] According to Justice Alito, the United States trust obligations are solely derived from statutes and not federal common law. The previous common scholarly understanding maintained that the trust responsibility the United States has towards Indian nations flowed primarily from three sources. First, the hundreds of treaties signed between the tribes and the United States.[169] Second, the huge amount of lands the United States acquired from the tribes in those treaties or otherwise.[170] Third, that the Doctrine of Discovery, under which the territory of the Indian tribes was incorporated into the geographical limits of the United States, transformed tribal ownership of these lands into a right of occupancy to live on lands over which the United States had ultimate dominion.[171] Although the Court still stated that it did "not question the undisputed existence of a general trust relationship,"[172] that relationship seems to now be

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167. *Id.* at 2324.

168. *See* United States v. White Mountain Apache Tribe, 123 S. Ct. 1126, 1133 (2003). Finding that the existence of trust duties on behalf of the United States was confirmed because "This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." *Id.* at 1133 (internal citations omitted).

169. *See* Nagle, *Nothing to Trust, supra* note 12, at 67-68.

170. *See* Wood, *The Trust Doctrine Revisited*, *supra* note 49.

171. *See* Miller, *Native America, Discovered and Conquered*, *supra* note 50, at 166 (stating, "[t]he trust doctrine plainly had its genesis in the Discovery doctrine . . . This thinking came largely from the Eurocentric ideas of Discovery and the notion that uncivilized, infidel savages needed to be saved by Euro-Americans." *Id.*).

172. *Id.*

next to meaningless since the tribes can no longer invoke common law trust standards unless Congress specifically calls for them. The decision raises, therefore, some profound questions concerning the utility of the doctrine from a tribal perspective.

One could search for a silver lining in the decision by arguing that if the general trust relationship can no longer be used by the tribes to impose additional duties on the United States, the existence of a general trust should no longer be used by the Court to boost Congressional power over Indian tribes beyond the power to regulate Commerce with the tribes. However, the general tone of the *Jicarilla Apache* opinion seems to indicate that the majority of the Court believes that the main purpose of the trust doctrine still is to give Congress plenary authority over Indian tribes. The *Jicarilla Apache* Opinion reads as if it were written during the heart of the Allotment era, between the Court's decisions in *Kagama* and *Lonewolf*.

It is for this reason that this article takes the position that Indians should not view the trust doctrine as a source to control or regulate congressional power, even if it is for the purpose of supporting the legitimacy of laws favoring Indians, *unless* the trust duties can be tied to promises made in treaties. In other words, the only extra-constitutional sources of congressional power over Indian Affairs are the numerous treaties signed with the Indian tribes. The only general duty imposed on the United States in those treaties is to guarantee the survival of Indian tribes as self-governing entities with sovereignty over their lands and territories.[173] Therefore, the sole role of the trust doctrine in boosting congressional power beyond its Indian Commerce Clause power should be to legitimize any legislation enacted to protect the tribes' right to tribal territories and self-government. Otherwise, congressional power should be limited to the text of the Indian Commerce Clause as previously explained.[174]

While I would have nothing against using the *Mancari*

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173. *See* Wood, *The Trust Doctrine Revisited*, supra note 49, at 1496-97. This does not mean that the United States does not have specific trust duties resting on specific treaty clauses, or statutes.

174. *See supra* notes 135-43.

"related to the trust" standard if there were a consensus that laws enacted pursuant to the trust have to support tribal self-government, the recent Supreme Court decision in *Jicarilla* reveals a different understanding of the trust doctrine. So, for instance, many of these secretarial approval requirements relating to the management and lease of Indian land would pass muster under the *Jicarilla* version of the trust doctrine.

In conclusion, challenging statutes based on the fact that they treat Indians differently and are not rationally tied to the trust is an uphill battle with limited possibilities. In the next Part, however, I discuss whether restrictions on the tribes' right to manage their own lands may amount to a denial of equal protection.

III. FROM *MANCARI* TO *WINDSOR*: USING A RATIONAL BASIS WITH BITE OR UNCONSTITUTIONAL ANIMUS TO CHALLENGE FEDERAL INDIAN LAWS ON EQUAL PROTECTION GROUNDS

In this Part, I argue that federal statutes which restrict tribal self-government, such as those mandating secretarial approval of tribal land management decisions, can be successfully challenged on equal protection grounds using either an "unconstitutional animus" test,[175] or a version of the rational basis test at times called "rational basis with bite."[176]

As the Court put it, "[u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest."[177] However, under the established tiered approach to equal protection, laws involving a suspect class such as race or

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175. *See* Pollvogt, *supra* note 35.

176. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Supreme Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972); *see also* Gayle L. Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62, IND. L. J. 779 (1987).

177. *Moreno*, 413 U.S. at 533.

alienage are reviewed under strict scrutiny where the law has to be necessary or narrowly tailored to protect a compelling governmental interest.[178] Finally, laws involving a quasi-suspect class, such as gender or illegitimacy, are analyzed under intermediate scrutiny, which requires the classification to be substantially related to an important governmental interest.[179] The criteria for a suspect or quasi-suspect classification developed by the Supreme Court are (1) an immutable characteristic, such as race or gender, which is (2) irrelevant to the legitimate governmental goal, and which has (3) been historically used to the disadvantage of a group that is (4) relatively politically powerless to defend itself.

While Native Americans easily qualify as a suspect class under these criteria, classifications referring only to members of Indian tribes and not to Native Americans generally may not fit the first criterion, as it is generally understood that Indians can relinquish their tribal membership. While tribal members generally fit the third criterion, they may not fit the second, since membership in a tribe may be relevant to a legitimate governmental goal. As many have noted, however, even when dealing with a non-suspect class, the Supreme Court at times seems to be using a more aggressive form of scrutiny than the regular rational basis review, even though it has never acknowledged that fact.[180] Specifically, scholars claim that in a group of cases, the most important of which are *Moreno*,[181] *Cleburne*,[182] *Romer v. Evans*,[183] and *Windsor*,[184] the

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178. Although that standard was first used in *Korematsu v. United States*, 323 U.S. 214 (1944), its source is the famous footnote 4 in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), which stated "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities," and therefore "may call for correspondingly more searching inquiry." *Id.*

179. *See* Craig v. Boren, 429 U.S. 190 (1976) (where, for the first time, a majority of the Justices held that intermediate scrutiny was the proper level of review for classifications based on gender).

180. *See, e.g.*, Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships,* 86 WASH. L. REV. 281 (2011).

181. *Moreno*, 413 U.S. 528.

182. *Cleburne*, 473 U.S. 432.

Court has claimed to use rational basis review while in effect performing a more searching inquiry.

A. The Case Law Showing Either a "Rational Basis with Bite" Standard of Review and/or "Unconstitutional Animus"

In *Moreno*, a class action was brought challenging a provision of the Food Stamp Act providing that any household containing an individual unrelated to any other member of the household was no longer eligible for food stamps. The Court, purporting to use regular rational basis review, held that the classification (distinguishing between certain kinds of households when it came to eligibility) was not rationally related to the stated purpose of the legislation, which was to minimize fraud and maintain adequate nutrition while stimulating the agricultural economy. After scrutinizing the legislative history and finding that the different treatment was driven by the desire to prevent "hippies" and "hippie communes" from participating in the food stamp program, the Court famously declared "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[185] Answering the government's argument that the provision was nevertheless rationally related to prohibiting fraud, the Court found that other sections of the Act specifically addressed the fraud issue and did it more effectively.[186]

In *Cleburne*, a group home for mentally disabled people challenged a zoning ordinance excluding such group homes from certain zoning districts. The Court held that even though the mentally disabled did not constitute a suspect or quasi-suspect class, the zoning ordinance denied the group home the equal protection of the laws in that the exclusion from some districts was not rationally related to any legitimate governmental interest. After

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183. 517 U.S. 620 (1996).
184. 133 S. Ct. 2675.
185. *Moreno*, 413 U.S. at 534.
186. *Id.* at 536.

stating that the State "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational,"[187] the Court concluded that "the record [did] not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests."[188] The Court examined closely the reasons given by the City for the exclusion of such group homes and stated "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible basis for treating a home for the mentally retarded differently from apartment houses."[189] The Court concluded "the short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[190]

In *Romer v. Evans*, Colorado voters adopted, via statewide referendum, an amendment to the State Constitution prohibiting any governmental actions designed to protect the status of persons based on their "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."[191] Rejecting the State's principal argument that the amendment simply placed gays and lesbians in the same position as others, the Court held that the amendment went far beyond depriving homosexuals of special rights but imposed upon them, and them alone, the burden of seeking specific legal protection for injuries caused by discrimination.[192] The Court first remarked that "[e]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."[193] The Court also observed that the amendment "identifies persons by a single trait and then denies them protection across the board,"[194] by

187. *Cleburne*, 473 U.S. at 446.
188. *Id.* at 448.
189. *Id.*
190. *Id.* at 450.
191. *Romer,* 517 U.S. at 624.
192. *Id.* at 632.
193. *Id.*
194. *Id.* at 633.

denying them the right to seek specific legislative protections. According to the Court, that type of denial was unprecedented, and therefore "discrimination of an unusual character especially suggests careful consideration to determine whether they are obnoxious to the constitutional provision."[195] Finally, after stating that the "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity towards the class of persons affected," the Court concluded that the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to anyone else. This Colorado cannot do."[196]

Finally, in *Windsor*, relying mostly on *Romer*, *Moreno*, and *Lawrence v. Texas*,[197] the Court struck down the federal Defense of Marriage Act ("DOMA") on equal protection grounds. After finding that the right to marry was an important right and that the State decision to recognize and validate marriages between same-sex couples "conferred upon them a dignity and status of immense import,"[198] the Court stated that "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages."[199] Having analyzed the legislative history of DOMA, the Court found that interference with the equal dignity of same-sex marriages was the very "essence" and purpose of DOMA.[200] Therefore, DOMA violated "basic due process and equal protection principles,"[201] because "a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group."[202]

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195. *Id.* (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 322, 337-38 (1928)).

196. *Id.* at 634-35.

197. 539 U.S. 558 (2003).

198. *Windsor*, 133 S. Ct. at 2692.

199. *Id.* at 2693.

200. *Id.*

201. *Id.*

202. *Id.* Although Justice Kennedy, writing for the majority, spent a considerable part of the opinion on the fact that regulations of domestic relation is a traditional functions of the state governments, it is hard to

"The decision," as one scholar put it, "is peripatetic. It heads down a path toward federalism, but suddenly veers off in the direction of 'liberty,' looking back over its shoulder towards states' authority. Then it pivots toward equal protection, with darts toward dignity, before finally settling on animus as a destination. When we arrive . . . we may ask ourselves, 'Well, how did [we] get here?'"[203] No wonder some see the decision as an equal protection case involving a heightened version of rational basis review,[204] while others see it as a liberty and fundamental right case,[205] and still others as being based on the anti-animus doctrine.[206]

B. The Four Cases as Representing Unconstitutional Animus

Some scholars have identified these four cases and others like them as establishing the principle that anytime the classification is driven by "unconstitutional animus," the law is automatically a denial of equal protection.[207] In other words, once "unconstitutional animus" is identified there is no reason to perform either rational basis or rational basis with bite review. The two major questions relating to animus is first defining what it is, and secondly determining what evidence can be used and is needed to establish the presence of animus.

In an insightful article written before *Windsor*, after first establishing that many rational basis with bite cases are better explained as "animus" cases, Professor Pollvogt defined animus as "a type of impermissible objective function. Specifically, animus is

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determine how important a role federalism concerns played in the decision since the Court also stated "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Id.* at 2692.

203. Carpenter, *supra*, note 35 at 192-93.

204. *See* Kenji Yoshino, *Why the Court can Strike Down Marriage Restrictions Under Traditional Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331 (2013).

205. *See* Douglas Nejaime, *Windsor's Right to Marry*, 123 YALE L.J. 219 (2013).

206. *See* Carpenter, *supra* note 35, at 225.

207. *See* Pollvogt, *supra* note 35; Carpenter, *supra* note 35.

present where the public laws are harnessed to create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct."[208] In a post *Windsor* article, Professor Dale Carpenter provided his own definition of animus:

> The government acts on animus when, to a material degree, it aims "*to disparage and to injure*" *a person or group of people*. The injury may be tangible, as in the denial of benefits and protections a group would have in the absence of animus against them. Or the injury may be intangible, as in the affront to their dignity and the respect they deserve as equal citizens.[209]

After stating that, "[i]n animus cases, the impermissible purpose is the purpose to inflict injury or indignity,"[210] Professor Carpenter argued that such purpose does not have to be the sole or even the dominant purpose, but need only be a "'motivating factor in the decision' to support the conclusion that the act is unconstitutional."[211] After stating that such a "motivating factor can be inferred from such circumstantial and direct evidence of intent as may be available," Professor Carpenter set out the evidence needed to establish animus. For indirect or circumstantial evidence needed to raise such an inference, Professor Carpenter listed factors such as the impact of the decision, the historical background, the specific sequences of events leading to the decision, and whether there was departure from normal procedures in making the decision or departure from substantial considerations that would normally drive the result.[212] As for direct evidence,

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208. Pollvogt, *supra* note 35, at 926.

209. Carpenter, *supra* note 35, at 186 (quoting *Windsor*, 133 S. Ct. at 2696) (emphasis in original).

210. *Id.* at 243.

211. *Id.* at 244 (citing Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 (1977)).

212. *Id.* at 245.

Professor Carpenter enumerates five factors as establishing direct evidence that animus was a "material influence" in the passage of the statute: (1) statutory text, (2) political and legal context, (3) legislative proceedings, (4) real world impact or effect, and (5) the utter failure of alternative explanations for the legislation. Importantly, Carpenter notes that "[t]he Court's animus cases show that no single one of these factors must be present in order to make the inference" of improper animus.[213]

Professor Pollvogt agrees that unconstitutional animus can be established by direct evidence of bias in the legislative record but also argues that an "inference of animus" can be "based on the structure of the law."[214] Discussing *Cleburne* as a prime example of animus based on the structure of the law, Pollvogt posits that the Court performed a "micro" suspect classification analysis not for the purpose of establishing a suspect or quasi-suspect class but rather to examine "the validity of the classification in light of the interests at stake in that particular case."[215]

Evaluating which Federal Indian law statutes were enacted with animus as a motivating factor is beyond the scope of this article. Further, not all the statutes mandating federal approval concerning land management decisions were enacted with animus towards Indians. However, many such statues were doubtlessly enacted out of prejudice and bias towards Native Americans.

Claims that Indian tribes and their members were in need of federal supervision because they were not sophisticated enough to manage their own affairs, or were incompetent and inferior, should no longer be considered valid legislative purposes. A search of the legislative history should produce evidence on which laws were enacted with these stereotypes in mind. As the Court stated in *Mississippi University for Women v. Hogan*, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypical notions. Thus if the statutory objective is to exclude or 'protect' members of one gender because they are

213. *Id.* at 245-46.
214. Pollvogt, *supra* at note 35, at 926-27.
215. *Id.* at 927.

presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[216] Although *Hogan* dealt with gender classifications, a quasi-suspect class, the same reasoning should follow in evaluating whether laws imposing restrictions on Indian tribes and their members were enacted with these biases in mind.

C. The Four Cases as Creating a Rational Basis with Bite Standard

As stated previously, the four cases can be interpreted as creating a higher level of rational basis review. There are two major questions concerning implementation of the review with bite standard. First, how different is this form of judicial review from the regular rational basis review? Secondly, what groups should be covered by this more intensive form of judicial review? In other words, what are the characteristics a group has to possess in order to qualify for this form of judicial review?

1. How is Rational Basis with Bite Different than Regular Rational Basis Review?

Regular rational basis review requires courts to perform essentially three tasks. First, the reviewing court has to determine that the group being classified or discriminated against is similarly situated with others not included in the classification. Second, it has to determine that the governmental purpose is legitimate. Finally the court has to determine that the classification is rationally related to accomplishing the purpose. The first basic difference between regular rational basis review and review with bite is in determining the purpose. In regular review, courts will come up with almost any purpose they can think of that will suit or fit the classification. Courts do not try to determine what purposes the legislature actually had in mind when it enacted the statute. In review with bite, the exact opposite happens. Courts will sift through the legislative record to find the true motives of the legislature. This was very evident in *Moreno* and *Windsor* where

216. 458 U.S. 718, 725 (1982).

the Court found animus towards hippies and homosexuals, respectively.[217] It was harder to determine in *Romer* since the law was the product of a referendum and therefore lacked a legislative record.[218] However, the unusualness of the law in that case raised an inference that the purpose was indeed inappropriate.

A second basic difference between the two levels of review is in questioning the legitimacy of purported governmental interests. While the Court has not devised a test for determining what constitutes an improper purpose, the four cases analyzed above reveal that treating a group differently because of irrational fear or prejudice, as well as a mere desire to harm politically unpopular groups or vulnerable minorities, can never justify legislation putting such groups at a disadvantage to everyone else.

Finally, a third difference is that once the real purpose has been established, courts using the review with bite approach will look at all the evidence available in the record to determine if the mean chosen (treating the group differently) is in fact rationally related to achieving the purpose of the legislation. In other words, the approach not only puts the burden on the state to produce evidence justifying the classification, but also looks more closely at whether the mean chosen is adequately tailored to achieving the purpose. In regular rational basis review, courts usually assume that there is a correlation between the classification and the purpose, or at least that the legislature could have rationally believed that such correlation existed. This assumption is not made in review with bite analysis.

2. Should Tribal Members and Indian Tribes Be Included Among Groups Qualifying for Rational Basis With Bite Review?

Since the Court has never acknowledged the use of rational basis with bite, it has of course not described how to determine what groups or situations would trigger such approach. After looking for similarities among the groups who have benefitted from such review, one scholar wondered if heightened review could be

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217. *See Moreno*, 413 U.S. at 534; *Windsor*, 133 S. Ct. at 2693.

218. 517 U.S. at 634-35.

triggered every time the Court dealt with the denial of significant governmental benefits. Discounting such possibility and finding no common bonds among the groups, that scholar concluded that, "[t]here does not seem to be any consistent principle that explains why the U.S. Supreme Court chooses one version of rationality in one case but not in another with a very similar factual setting."[219] Others have also attempted to find a common strain among the cases. Finding that, "*Lawrence* mandates heightened protection for autonomy interests central to personhood while *Moreno* and its progeny requires judicial sensitivity to regulations that burden vulnerable minorities." One commentator concluded that "[w]hen a statute impinges crucial personal autonomy interests or targets a group on the basis of mere animus,"[220] rational basis with bite applies. In this article, I suggest that the case law reflects that rational basis with bite is appropriate every time a disfavored group lacking political clout makes an equal protection claim involving the denial of important, albeit not fundamental, liberty interests.[221] In other words, rational basis with bite is applicable anytime the legislation is aimed at a vulnerable or unpopular minority and restricts an important liberty interest.

An example of a case with similar arguments as the four analyzed above is *Plyler v. Doe*,[222] where the Court reviewed a Texas law preventing undocumented children from getting the free education available to other children under what seemed a

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219. Robert C. Farrell, *The Two Versions of Rational Basis Review and Same-Sex Relationship*, 86 WASH. L. REV. 281, 305-06 (2011); *see also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans,* 32 IND. L. REV. 357, 373-82 (1999) (discounting the viability of rational basis with bite as a standalone form of judicial review).

220. Austin Raynor, *Economic Liberty and the Second-Order Rational Basis*, 99 VA. L. REV. 1065, 1075 (2013).

221. *See*, *e.g.,* David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L. J. 51 (2013) (arguing that restrictions on the freedom to contract when imposed discriminatorily based on status, rather than capacity, should be subject to additional scrutiny).

222. 457 U.S. 202 (1982).

somewhat heightened form of review. While undocumented status was not a suspect or quasi-suspect class, and the right to a free education was not considered a fundamental right, the Court struck down the law even though the classification seemed to have been rationally related to the legitimate governmental interest of preserving scarce financial resources.[223] In other words, one possible explanation for the result is that it is the combination of denying an important benefit (education) to a vulnerable minority (undocumented children) that generated a higher level of scrutiny. Examples of a combination of rights raising the level of judicial review can be found in other areas of constitutional law. According to Justice Scalia, this combination of rights explained the Court's invalidation of laws of general applicability under the Free Exercise Clause.[224] In *Employment Division v. Smith*, holding that the Free Exercise Clause alone was not available as a defense against a criminal law of general applicability, he stated, "[t]he only decisions in which we have held that the First Amendment bars application of neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[225] Drawing an analogy with laws discriminating against tribes by restricting their right to solely manage their land and natural resources, one could argue that Indian tribes, like undocumented children, are a vulnerable minority and that the right to contract, while no longer a fundamental right,[226] is still an important right as reflected by the inclusion of the Contract Clause in the United States Constitution.[227]

In conclusion, for the following reasons, this article takes the position that rational basis with bite should apply to federal

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223. *See Id.* at 249-51 (Burger, C.J. dissenting).

224. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990).

225. *Id.*

226. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

227. U.S. Const. art. I, § 10, cl. 1 reads in part: "No State shall . . . pass any . . . Law impairing the Obligations of Contracts."

laws and regulations burdening the tribes' management of their land and natural resources. First, even though as described previously the classification is not a racial one, there is no doubt that the classification, tribes and their members, involves a vulnerable group lacking political power. Secondly, while managing one's own land does not involve the same kind of autonomy interest that was at stake in *Lawrence*, an argument can be made that important economic liberties are involved when making crucial managerial decisions concerning one's own lands.[228] As stated by one scholar, "[t]he argument that these restrictions exist for the benefit of the American Indians is not dissimilar from earlier arguments regarding the faculties of blacks, slaves, or women. As with gender, race, and servitude, the law has partially restricted a fundamental right to contract based on an involuntary characteristic of a group who has suffered substantial discrimination."[229]

D. Making the Case for Denial of Equal Protection

Once the rational basis with bite test is found applicable, the case still has to be made that these land management regulations amount to a denial of equal protection. Two obstacles have to be overcome: First, the Indians have to show that they are similarly situated with other individuals or groups not subject to the restriction. Secondly, they have to demonstrate that the actual purpose of the law is inappropriate or that the substance of the regulation is not rationally tied to that purpose.

1. Overcoming the "Not Similarly Situated" Argument

As the Court stated in *Cleburne*, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."[230] The "similarly situated" concept is not

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228. A similar argument concerning all restrictions on economic freedoms was made in Raynor, *Economic Liberty*, *supra* note 220.

229. Weber, *supra* note 221, at 80.

230. *Cleburne*, 473 U.S. at 439.

new; it has been around since 1885.[231] It was used successfully to deny equal protection to women before the advent of intermediate scrutiny and the classification of gender as a quasi- suspect class.[232] Currently, it is used by anti-marriage equality advocates to argue that homosexual couples are not similarly situated to heterosexual couples.[233] Perhaps the more important debate surrounding the "similarly situated" doctrine concerns whether this determination should be a threshold inquiry or be included as part of an integrated approach.[234] As argued by one scholar advocating the integrated approach,

> In cases regarding express categories, no matter the level of equal protection applied, the focus of the "similarly situated" analysis is substantially the same as the key inquiry of equal protection review. Does the legislative classification bear a close enough relationship to the purpose of the statute . . . the analysis, properly understood, is another way of describing the substantive equal protection inquiry.[235]

Courts have questioned the 'similarly situated' doctrine arguing that if part of the threshold inquiry required plaintiffs to bear the burden of finding others with the same classifying trait as them, but not part of the class being discriminated against, that burden would never be met.[236] The same-sex marriage cases provide a good example of how circular the similarly situated requirement can become. If the law discriminates against all same-sex couples and the argument is that heterosexual couples are not similarly situated to heterosexual ones, the same-sex advocates

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231. *See* Barbier v. Connolly, 113 U.S. 27 (1885).

232. *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 607-08 (2011).

233. *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

234. *See* Shay, *supra* note 231.

235. *Id.* at 588.

236. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

have lost the battle before it has started. This is why most courts have stated that the central inquiry is not whether all these couples are similarly situated to each other, but whether they are similarly situated when it comes to the purpose of the law.[237]

When it comes to challenging federal statutes imposing restrictions on tribally owned land, how one describes the purpose of the statute could be crucial in establishing the similarly situated requirement. This is why applying rational basis with bite is very important to such cases. That is because under such more intense review, courts will look for the real purpose behind the classification. For instance, if the purpose of the legislation is to protect "all tribes with land held in trust," or "protecting the tribal land base," as the Federal government will no doubt argue, one could probably successfully assert that there is no one else similarly situated since no one else owns land in trust. That would be an example of a circular argument similar to the argument being made by the anti-marriage equality advocates. On the other hand, if one can argue that the purpose of the statute is protecting certain people or entities owning land from predators or poor decision-making, the universe of similarly situated people expands dramatically.

One argument sure to be made by federal officials is that Indian tribes are not similarly situated to anyone else because the United States has a general trust relationship with the Indian tribes. In addition, the United States holds over 56 million acres of Indian land in trust for the benefit of Indian tribes and their members.[238] In other words, it is the United States that has the trust or legal title to the land while the Indians only have the beneficial title to such lands. As explained later, the existence of a "general" trust relationship should be irrelevant unless the trustee can be held financially liable for breaching its duties under that relationship.[239]

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237. *Id.* at 435 n.54.

238. *See* Bureau of Indian Affairs, *Performance and Accountability Report: Fiscal Year 2005*, UNITED STATES DEPARTMENT OF THE INTERIOR, *available at*, http://www.bia.gov.cs/groups/public/ documents/text/idc-001922.pdf (last visited May 7, 2015).

239. *See infra* notes 248-80.

Concerning the fact that the United States has trust title to tribal land, it is true that language in many cases indicates that since the United States owns the legal or trust title to all Indian lands, it naturally has plenary power to manage such lands.[240] While it is generally accepted that over 56 million acres of Indian land is owned in trust by the United States for the benefit of Indian tribes and individual tribal members, scholars have recently begun to challenge this general assumption.[241] According to these scholars, there are only two legitimate sources giving trust title for the United States.[242] They are first, the statutes specifying that land was being taken into trust by the United States for the benefit of Indians. Statutes such as the General Allotment Act,[243] the Indian Reorganization Act,[244] and other tribal specific legislation, contain such authorizations. Secondly, some of the treaties signed with specific tribes may contain such trust language. The overwhelming majority of treaties, however, do not provide for treaty lands to be held in trust.[245] The Indian Land Tenure Foundation has estimated that 15.7 million acres of allotted land remained in trust as of 1934, and that another 6.7 million acres have been taken into trust under section 5 of the Indian Reorganization Act since 1934.[246] This is about 34 million acres short of the 56 million claimed to be held in trust by the United States. Most of these 34 million acres are tribal treaty land and became seen as being held into trust just because at some undesignated point during the 20th Century, the Bureau of Indian Affairs by administrative fiat began to treat these lands as if

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240. *See Hitchcock*, 187 U.S. 294 (1902).

241. *See* INDIAN LAW RESOURCE CENTER, NATIVE LAND LAW, *supra* note 14.

242. *Id.* at 66-70.

243. 25 U.S.C. § 331 (1887) (repealed in 1934).

244. Pub. L. 73-383, 49 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479).

245. Coulter, *supra* note 248, at 81-82 ("The evidence seems to suggest that the United States generally did no gain trust title to Indian lands through treaty. Rather in a limited set of treaties, the United States gained trust title over the proceeds of lands sold for the Indian nation or to lands held by individual Indians." *Id.*)

246. *Id.* at 75.

they were held in trust. I agree with scholars such as Robert Coulter who have argued that the United States should not be considered as holding trust title to these lands.[247]

Robert Coulter argued that the only possible non statutory or non-treaty sources for such legal title are the Doctrine of Discovery, the general trust relationship, and the notion that because Indians are incompetent, they should be considered the wards of the federal government;[248] in other words, doctrines of federal common law. Coulter dismissed them all as illegitimate sources of trust title.[249] Needless to say, federal common law should no longer be based on racist notions treating Indians as incompetent wards in order to justify trust title in the United States as was done in *Cherokee Nation v. Hitchcock*.[250] Furthermore, the existence of a general trust relationship is not a valid legal reason to vest trust "title" in the United States. Although this does not mean that the United States does not have a general duty to protect these lands from being taken from the tribes, implying from this limited duty a general plenary authority to manage and control such lands is wrong. This leaves the Doctrine of Discovery as the only possible reason for holding land into trust. Under the doctrine, the discovering colonial power was considered to have the exclusive right to acquire lands in the discovered country from the aboriginal people living there.[251] This exclusivity has also been called a right of preemption.[252] However, in *Johnson v. M'Intosh*,[253] Justice Marshall modified or Americanized the doctrine when he held that under the doctrine, once discovered by a European power, the Indian tribes' right or title to their territory was transformed into a "right of occupancy" and, "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those

247. *Id.* at 76-83.
248. *Id.*
249. *Id.*
250. 187 U.S. 294 (1902); *see supra* notes 145-49.
251. *See* Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).
252. *See* Miller, *supra* note 50.
253. 21 U.S. 543.

who made it."[254]

The European nations were not in agreement concerning the exact ramifications of the Doctrine of Discovery when it came to its effect on the rights of the Indians.[255] As argued by Professor Robert Williams, the European nations only agreed that the Doctrine of Discovery vested in the discoverer "an exclusive or 'preemptive' entitlement to deal with the natives as against other Europeans crowns."[256] It seems that no other nation took the position that the discovering nation immediately acquired full title to Indian land.[257] In a recent article, Professor Michael Blumm has argued that *Johnson v. M'Intosh* really stands for the proposition that the Indians had fee title to their land subject to a restriction against alienation and that "[c]onsequently, Marshall's references to 'exclusive title' and 'absolute title' must have meant sovereignty . . . [s]imilarly, references to 'ultimate title' and 'seisin' in his opinion had to do with sovereign authority, not proprietorship."[258]

Whatever the true intent of Justice Marshall in *Johnson v. M'Intosh*, federal common law can and has evolved. To still hang on to the colonial Doctrine of Discovery with all its racist baggage and argue that the federal government today has ultimate, exclusive, or absolute title to Indian land is profoundly wrong, at least from a moral standpoint. For instance, some 125 years after *Johnson v. M'Intosh* Chief Justice Marshall's understanding of the doctrine was relied upon by the Court to hold that the Indian Right

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254. *Id.* at 574.

255. *See* Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 498-40 (discussing Spanish, French, Dutch, Swedish and English versions).

256. Robert A. Williams, Jr., *The Medieval and Renaissance Origins and Status of the American Indian in Western Legal Thought*, 57 S. Cal. L. Rev. 1, 70, n.300 (1983).

257. *See* Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" to the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 498-540 (Discussing Spanish, French, Dutch, Swedish, and English versions of the Doctrine).

258. *See* Michael C. Blumm, *Why Aboriginal Title is a Fee Simple Title Absolute*, 15 LEWIS & CLARK L. REV. 975, 984 (2011).

of Occupancy amounted to a non-vested property right and therefore, aboriginal Indian lands held under such title could be taken by the United States without having to give the Indians fair compensation as mandated under the Fifth Amendment of the Constitution.[259] By today's standards, there is something not quite right with this result.[260]

2. Arguing the Real (or Improper) Governmental Purpose

Rational basis with bite allows courts to investigate the real purpose behind a law. Although it is beyond the scope of this paper to investigate the real motivations that have guided Congress throughout history to impose federal restrictions on tribal land management decisions, one thing is for sure: the real purpose is not always the claimed purpose. Claims that Congress always acts out of compassion towards the Indians or is, as a good trustee, always looking out for the best interest of the tribes are unfounded, at least most of the time. In this respect, *United States v. Sioux Nation* is relevant.[261] This case upheld the Sioux Nation's claim that when the United States unilaterally abrogated many of the treaties made with the Sioux and took the Black Hills,[262] Congress had not been acting as a trustee, but more as a conqueror pursuant to its power of eminent domain. Therefore, the Just Compensation Clause of the Fifth Amendment was applicable and the federal government was liable to the Sioux Nation for the taking of this vested property right.[263] In the process of deciding the case, the Court quoted with approval the following from an older case:

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

260. *See generally* ROBERT J. MILLER, NATIVE AMERICAN DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 173-78 (2006).

261. 448 U.S. 371 (1980).

262. *See supra* notes 166-68.

263. The Just Compensation clause of the Fifth Amendment states "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 7.

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary power over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians property . . . In any given situation in which Congress has acted with regard to Indian people, it must have acted in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.[264]

In proceeding to determine which hat Congress was wearing when it abrogated the Sioux Treaty and took the Black Hills, the *Sioux Nation* Court held that courts no longer could presume that Congress always acted for the benefit of the Indians pursuant to its role as trustee. Therefore, the Court stated that it was now requiring "courts, in considering whether a particular congressional action was taken in pursuance to Congress's power to manage and control tribal lands for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record."[265]

In making this inquiry, another Supreme Court case, *United States v. Navajo Nation*,[266] is instructive. This case involved a claim for breach of trust by the Navajo Nation against the United States. Although involving a series of extensive and complicated facts, the Navajo Nation's case boiled down to a claim that the Secretary of the Interior should not have approved a mining lease between the Navajo Nation and the Peabody Coal Corporation.[267] The Navajo Nation claimed that the Secretary of the Interior concealed key information, putting it at a major disadvantage in the ensuing lease negotiations with Peabody Coal.[268] The Navajo Nation sued the

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264. *Sioux Nation*, 448 U.S. at 408 (quoting Three Affiliated Tribes of Ft. Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)).

265. *Id.* at 415-16.

266. 537 U.S. 488 (2003).

267. *Id.* at 500.

268. *Id.* at 501 (summarizing the Court of Appeals' finding that the

United States for breach of fiduciary duties, arguing that a reasonable trustee would not have approved the lease because it was detrimental to the interests of the Navajo Nation.[269] The Supreme Court denied the claim holding that when Secretary Hodel approved the lease pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"),[270] he was not in breach of any specific statutory trust duty. Under previous decisions, in order to make a credible claim for money damages under the Indian Tucker Act,[271] the Navajo Nation had to find a source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[272] However, in this case, besides the lease approval requirement, IMLA did not assign any managerial duties to the Secretary over coal leasing.[273] As the Court put it, the Act did not even create a limited or bare trust relationship as IMLA contained no trust language whatsoever obligating the Secretary to act as a trustee for the benefit of the tribe. Implicit in this holding is that the Secretary was not, in effect, acting as a trustee for the tribe when he approved the lease.[274] The case is meaningful because it tells us that the lease approval statute, imposing on the Navajo Nation and other Indian tribes, a Secretarial approval requirement not mandated on any other owner of mineral resources was not enacted solely, if at all, for the benefit of the tribes.

Interior Secretary had suppressed and concealed information. *See* Navajo Nation v. United States, 263 F.3d 1325, 1332 (Fed. Cir. 2001)).

269. *Id.* at 506-07.

270. 25 U.S.C. §§ 396a-396g (1938).

271. 28 U.S.C. § 1505 (1949).

272. United States v. Mitchell, 463 U.S. 206, 218 (1983) [hereinafter *Mitchell II*].

273. 537 U.S. at 507.

274. In summarizing (and affirming) the holding of the Court of Federal Claims, the Supreme Court stated that even though the Claims Court had found that Secretary had acted in the best interest of Peabody rather than the Tribe, it held that the Tribe had failed to make its case and the United States was entitle to judgment as a matter of law. *Id.* at 501 (citing Navajo Nation v. United States, 46 Fed. Cl. 217, 236 (Fed. Cl. 2000)).

In the scenario presented in *Navajo Nation*, there are two arguments that could be made that the lease approval requirement was a denial of equal protection. The first one is that since the requirement of federal approval for all Navajo leases was not enacted uniquely for the benefit of the Indians pursuant to the trust relationship, under the *Mancari* standard, that discrimination or different treatment cannot possibly be rationally tied to Congress's unique obligations towards the Indians. As such, the classification is a violation of the Navajo Nation's right to equal protection under the laws. Claiming that Congress delegated that authority to the Secretary pursuant to the general trust relationship is a smokescreen that should be rejected. It is true that in *United States v. Jicarilla Apache Nation*,[275] the Court held that Congress could not be compared to a regular common law trustee because, in administering its trust responsibility towards Indians, it found that "the Government had established the trust relationship in order to impose its own policy on Indian lands . . . [i]n this way, Congress has designed the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes."[276] While some statutes could arguably benefit both the United States and the tribes, when the interests of the United States, as represented in the statute, are in conflict with tribal interests, one should not be able to argue that the statute was enacted pursuant to the general trust relationship in order to escape judicial scrutiny. This is especially true since the Court in both *Navajo Nation* and *Jicarilla Apache* took the position that trust duties are only created by specific statutes and the United States can only be liable for a breach of such specific statutory tasks.[277]

I have argued earlier, however, that Congress can impose regulations under the Indian Commerce Clause that are not related to the trust.[278] The second argument for invalidating the statutory requirement then becomes whether the non-trust purposes of the

275. 131 S. Ct. 2313.
276. *Id.* at 2326-27.
277. *See supra* notes 165-72.
278. *See supra* note 159.

statute is tied rationally to the restriction being imposed on the Navajos.

In *Navajo Nation*, the Court found that IMLA did not create any specific trust responsibilities.[279] But if not pursuant to the trust, in what capacity was Secretary Hodel acting? Why was he given the power to approve the lease in the first place if not pursuant to his powers as trustee? The Court did not dwell on this question. In a long footnote it stated,

> [b]eyond doubt, the IMLA was designed "to provide Indian tribes with a profitable source of revenue." But Congress had as a concrete objective in that regard the removal of certain impediments that had applied particularly to mineral leases on Indian land. . . . That impediment-removing objective is discrete from the Secretary's lease approval role under the IMLA.[280]

In other words, while parts of the statute may have been enacted for the benefit of the Indians, the lease approval requirement may have been there for a totally different reason. Therefore, it seems that the Secretary in *Navajo Nation* was acting as a mere regulator, implementing Congress's power to regulate commerce between Indian tribes and non-Indian entities such as Peabody Coal.

3. Arguing That the Classification Is Not Rationally Related to the Purpose of the Law

Under rational basis review, with or without bite, the statute can survive judicial review if the special classification, requiring only Indian tribes to get secretarial approval in such instances, is rationally tied to the actual purpose behind the legislation. In the Navajo case referred to above, the question would be whether imposing the approval requirement only in leases involving Navajo

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279. 537 U.S. at 507, 511.

280. *Id.* at 511 n.16 (quoting *Cotton Petroleum*, 490 U.S. at 179) (internal citation omitted).

land is rationally tied to the real purpose behind the requirement. While analyzing whether restrictions on tribal land management decisions are rationally related to the real purposes of such statutes is beyond the scope of this paper, one should bear in mind that what may have been a legitimate governmental interest may become illegitimate over the years. Furthermore, it may be that while special treatment of Indians may have been at one time rationally tied to the government's effort to protect them, changed circumstances may mean what was once considered appropriate and rational is now no longer so. As the Court stated in *Shelby County, Alabama v. Holder*,[281] in considering the legitimacy of the formula for determining which areas were covered by certain sections of the Voting Rights Act:

> When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." . . . By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." As we explained, a statute's "current burdens" must be justified by "current needs." . . . The coverage formula met that test in 1965, but no longer does so.[282]

There are a number of precedents involving discrimination against women before the Court in 1976 officially adopted intermediate scrutiny for discrimination based on gender.[283] For instance, cases have upheld laws prohibiting women from practicing law,[284] from voting,[285] from being employed in restaurants after 10

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281. 133 S. Ct. 2612 (2013).

282. *Id.* at 2627 (quoting *Katzenbach*, 383 U.S. at 330; Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203-04 (2009) (internal citations omitted).

283. Craig v. Boren, 429 U.S. 190 (1976).

284. *In re* Lockwood, 154 U.S. 116 (1894).

285. Minor v. Happersett, 88 U.S. 162 (1874).

PM,[286] or from being bartenders.[287] Although most of these cases used rational basis review and upheld such discriminatory treatment as not being a denial of equal protection, there is no doubt that even under rational basis review, such classifications would be held unconstitutional today.

Statutes such as 25 U.S.C. § 81, which imposes federal approval requirements for tribal land management decisions, have their origins in times when the overwhelming majority of Indians were illiterate, uneducated, and did not speak English. An 1873 Congressional Report covering over 950 pages detailed both how unscrupulous white men took advantage of the Indians and why such Indians needed special protections and supervisions.[288] The sub-heading of the Report is indicative of the problems it was addressing. It reads: "Report of the Committee on Indian Affairs concerning frauds and wrongs committed against the Indians… By this investigation and Report the Committee hopes to do something to rid the Indians and the Indian Service of those heartless scoundrels who infest it, and who do so much damage to the Indian, the settler, and the Government."[289] The Report also makes it obvious that its authors had a dim view of Indian intellectual capabilities. For instance, the Report stated, "[t]he Indians seem to be like potters' clay in the hands of bad men, and are molded at their will and pleasure in the management and disposition of their property. When the Indians of any tribe have been granted individual ownership of property, they have almost invariably been induced to sell it to sharpers and heartless men."[290] It is somewhat meaningful that this report was issued in 1873, the same year that the Supreme Court, in upholding a law prohibiting women from practicing law, stated "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator . . . in view of the peculiar

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286. Radice v. New York, 264 U.S. 292 (1924).

287. Goesaert v. Cleary, 335 U.S. 464 (1948).

288. COMM. ON INDIAN AFFAIRS, INVESTIGATION OF INDIAN FRAUD, H.R Rep. No. 42-98 (3d Sess. 1873).

289. *Id.* at 1.

290. *Id.* at 23.

characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men."[291]

Just as it is the case with women, society's views of Indians have evolved since 1873. Yet unlike with women, while the statutes imposing all kinds of restrictions on Indians have been amended, they have never been overturned or repealed, and some of the old restrictions are still the law. I believe that a search of the legislative history of the various acts of Congress imposing restrictions on tribal management decisions would find that many of these restrictions have their origins in legislation with purposes that are no longer legitimate, or have restrictions which cannot be rationally tied to a legitimate governmental purpose.

IV. CONCLUSION

Indian tribes and their members are probably the only entities and people who are subject to federal restrictions on the management of their own lands because of their status. While the law prevented Indians from successfully challenging these restrictions on equal protection grounds, recent development in equal protection jurisprudence has opened new possibilities. This article has argued that while congressional restrictions imposed on Indians pursuant to the Indian Commerce Clause do not create racial classifications, these laws can be successfully challenged on equal protection grounds alleging that they were either enacted pursuant to unconstitutional animus or are not rationally tied to the true congressional purpose behind the legislation. While legislating for the benefit of the tribes pursuant to the trust relationship can provide a legitimate governmental purpose for such laws, each law should be evaluated on its own merit. Laws imposing federal restrictions without any trust obligations creating potential liability for their breach, as was the case in the Navajo Nation's breach of trust case, should not be considered as having been enacted for the benefit of the Indians pursuant to the trust relationship.

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291. Bradwell v. Illinois, 83 U.S. 130, 141-42 (1873) (Bradley, J. concurring).