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“Indian” as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act

Allison Krause Elder

ABSTRACT

*In the summer of 2018, the Ninth Circuit will consider an appeal from the dismissal of a constitutional challenge to the Indian Child Welfare Act (ICWA). Brought by a conservative think-tank, this case frames the ICWA as race-based legislation, violating equal protection by depriving Indian children of the same procedures as non-Indian children in child custody cases. In reality, the ICWA seeks to protect the interests of tribes, Indian families, and Indian children by establishing special procedures and obligations in Indian child custody cases. On its face, the ICWA is concerned not with the race of children, but with the special status of tribes and their political membership. As discussed in this Paper, a racial understanding of the ICWA is inconsistent with both the statute itself and the historically mixed political-racial status of tribes in the United States. While the Supreme Court created an opening for a race-based view of the ICWA in *Baby Veronica*, prior precedents embraced a political understanding of “Indian” where Congress intended to support tribal sovereignty. This Paper argues that any fair reading of the ICWA must treat “Indian” as a political rather than racial classification, and that the ICWA cannot be subject to strict scrutiny under equal protection. To do otherwise is to read the tribe out of the Act, which is not just inconsistent with the statute, but dismissive of the unique history of tribes in our nation.*

I. INTRODUCTION

Congress passed the Indian Child Welfare Act of 1978 (ICWA or the Act)¹ in response to the “alarmingly high percentage” of “often unwarranted” removals of Indian² children from their homes.³ In determining this “high percentage” of removals, Congress relied on surveys conducted by the Association on American Indian Affairs indicating that

¹ 25 U.S.C. §§ 1901–1963 (2012).

² This Paper will use the term “Indian” rather than Native American or American Indian to be consistent with the statutory language of the ICWA. Furthermore, the Bureau of Indian Affairs currently recognizes 567 “Indian” tribes, which is a political recognition. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016). As this Paper argues, the use of the term “Indian” in the ICWA is political, not racial. Therefore, it is especially important to use the designated term for the political category.

³ *See* H.R. REP. NO. 95-1386, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 1978 WL 8515 (“The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”).

25% to 35% of Indian children were “placed in foster homes, adoptive homes, or institutions.”⁴ For example, in South Dakota, the number of Indian children in foster homes was almost sixteen times greater per capita than the number of non-Indian children in foster homes.⁵ While the disparity may be understandable if removals were necessary for the children’s well-being, Congress found that the removals were “often unwarranted.”⁶ To illustrate, 99% of removals of Indian children were based on the categories of “neglect” or “social deprivation” rather than physical abuse.⁷ Unlike physical abuse, Congress found these broad categories allowed social workers to exercise their discretion inappropriately by removing Indian children from safe homes.⁸

Additionally, many Indian families were unable to qualify as foster or adoptive families because they did not meet standards “based on middle-class values,”⁹ resulting in most Indian children being placed with non-Indian families.¹⁰ Not only did Indian children suffer trauma due to unwarranted separation, but they were also forced to adapt to a new culture.¹¹ At the same time, tribes themselves felt the loss of these children, as “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . .”¹² Congress could have focused solely on the damage to the individual child, but instead enacted legislation based on the “special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . .”¹³ In so doing, Congress inherently treated “Indian” as a political rather than racial category, enacting protections for Indian families, while also protecting the continued sovereignty of tribes.

Of course, the ICWA’s provisions do not only affect Indian children, families, and the tribes to which they belong. Non-Indian families wishing to serve as foster-care placements or permanent adoptive families for Indian children must also contend with the ICWA’s “active efforts”¹⁴ and “continued custody”¹⁵ provisions, as well as the possibility

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *See id.* (analyzing various cultural differences that social workers misunderstood and used against Indian families in neglect cases, including the practice of leaving children with non-nuclear family members who were considered “close, responsible members of the family,” and more permissive disciplinary tactics than those to which social workers were accustomed). Abuse of alcohol was also applied disproportionately against the Indian community, further displaying cultural bias. *Id.* For a comparison of white and Indian family structures, and a discussion of the assimilation period preceding the passing of the ICWA, *see* Linda Lacy, *The White Man’s Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327 (1986).

⁹ H.R. REP. NO. 95-1386, at 11.

¹⁰ This phenomenon is also largely the result of the Indian Adoption Project of the 1950s, and the campaign to “Kill the Indian, Save the Child.” For a discussion of the Indian Adoption Project, *see* Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. MULTICULTURAL SOC. WORK 165 (1997).

¹¹ H.R. REP. NO. 95-1386, at 11.

¹² *See* 25 U.S.C. § 1901.

¹³ H.R. REP. NO. 95-1386, at 1–2.

¹⁴ 25 U.S.C. § 1912(d). This provision is discussed *infra* in Section II.

¹⁵ *Id.* § 1912(f); *see also id.* § 1912(e). These provisions are discussed *infra* in Section II.

of tribal intervention¹⁶ and the statutory preference for an Indian family placement.¹⁷ By setting different standards for Indian children involved in child custody proceedings, the ICWA engendered resentment among certain groups and has become the subject of a modern battle in courtrooms¹⁸ and media channels¹⁹ across the country.

At the core of the disagreement is whether the term “Indian” is a racial or political classification.²⁰ Those who would repeal the ICWA view “Indian” as a racial classification, and therefore argue the ICWA is racially discriminatory and in violation of the Equal Protection Clause.²¹ To the contrary, I argue in the following that “Indian” is best interpreted as a political classification for purposes of the ICWA, as evidenced by both the historical context of Indians in the U.S. and the ICWA’s provisions, which manifest congressional intent to protect tribes as political units. Any argument against the ICWA should address “Indian” as a political classification, because to do otherwise is to ignore the major political issue at stake: tribal sovereignty.

In the following four-part analysis, I first examine the language and purpose of the ICWA, which I find treats Indians as a political category, in large part by deferring to tribal definitions of membership. Second, I explore the historical racialization of Indians, which reveals the unique nature of Indian tribes as mostly political, and to a lesser extent, racial.

¹⁶ *Id.* § 1911(c). This provision is discussed *infra* in Section II.

¹⁷ *See id.* § 1915 (a); *see also id.* § 1915 (b). These provisions are discussed *infra* in Section II.

¹⁸ For a discussion of state court resistance to the ICWA, *see* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).

¹⁹ For example, the story of Laurynn Whiteshield, an Indian child who died shortly after being placed with family on a reservation, has become a talking point for both sides. For a use of her story in a larger critique of the ICWA, *see* George F. Will, *The Blood-Stained Indian Child Welfare Act*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/opinions/the-blood-stained-indian-child-welfare-act/2015/09/02/d3aea62e-50cb-11e5-933e-7d06c647a395_story.html. For a critique of the use of her story in the anti-ICWA movement, *see* Josh Israel & Bryan Dewan, *Why a Conservative Legal Organization is Desperately Trying to Kill the Indian Child Welfare Act*, THINK PROGRESS (Apr. 8, 2016), <http://thinkprogress.org/justice/2016/04/08/3754462/indian-child-welfare-act-case-goldwater/>. For the use of Laurynn’s story in a promotional video by the same group that is bringing the case of *Carter, et. al. v. Washburn, et. al.*, No. CV-15-01259-PHX-NVW, 2017 WL 1019685, at *1 (D. Ariz. Mar. 16, 2017), discussed in Section IV *infra*, *see* Mark Flatten, *Death on a Reservation*, GOLDWATER INST. (June 10, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/government-preferences/death-on-a-reservation/>.

²⁰ For a prime example of the interpretation of Indian as racial, *see* *Helping Amend a Policy: The Indian Child Welfare Act*, HOME FOREVER, <http://www.home-4-ever.org/helping-amend-a-policy-the-indian-child-welfare-act/> (last visited Jan. 23, 2016) (“In so many of the cases impacted by ICWA, the children are multi-ethnic, with mere traces of Native-American blood and no previous connection to their tribes or customs. In one case, a tribe fought in court to prevent the adoption of a child who was 1/512 Native.”). *See also* ICWA IS HURTING FAMILIES, icwaishurtingfamilies.blogspot.com (last visited May 2, 2016) (“Scores of multi-racial children are negatively affected by the Indian Child Welfare Act (ICWA) every year. Many are deprived of child protection equal to what is provided to other children.”).

²¹ Not all vocal challengers seek to repeal the ICWA in its entirety. *See* *CERA’s Letter on the ICWA to Congress*, CITIZENS EQUAL RTS. ALLIANCE, <http://citizensalliance.org/ceras-letter-icwa-congress/> (last visited Feb. 17, 2018). Citizens Equal Rights Alliance would amend the ICWA to “require every court to consider the best interests of the children involved,” and the “intentions of the parents.” *Id.* Their proposed amendment goes further to say that usually it is in the child’s best interest to be with their parents, and, if not, then with “caring adoptive parents.” *Id.* The proposed amendment is vague, but seems to effectively nullify the ICWA by undermining the placement preferences. *See id.*

Additionally, historical analysis shows that the racial element of tribal recognition and membership largely developed for political reasons.²² Taken together, statutory interpretation and historical perspectives both suggest that the Supreme Court struck the correct balance regarding the status of Indians in *Morton v. Mancari*, outside of the ICWA context.²³ In that case, the Court upheld legislation that rationally relates to tribes' unique political status, even though the statute at issue defined Indian in part based on blood.²⁴

Third, I look to the Supreme Court's understanding of the ICWA itself, which unfortunately provides conflicting visions of the Act. While the Supreme Court seemed to follow *Morton v. Mancari* in *Mississippi Band of Choctaw Indians v. Holyfield*,²⁵ in *Adoptive Couple v. Baby Girl (Baby Veronica)*, the Court implied that provisions of the ICWA may violate the Equal Protection Clause.²⁶ In so doing, the Court misinterpreted the ICWA and imposed its own understanding of "Indian," without regard for congressional intent or principles of statutory interpretation.

Finally, I turn to a current case against the ICWA on appeal in the Ninth Circuit, *Carter, et al. v. Washburn, et al.*²⁷ This modern equal protection challenge to the ICWA depends heavily on a reading of the Act as race-based legislation, with the goal of achieving strict scrutiny review and crippling the ICWA. By reading the ICWA as race-based legislation, ICWA opponents assert their own definition of what it is to be "Indian" in a manner that, if accepted by the courts, would undermine tribal sovereignty. After *Baby Veronica*, and with an eye towards a changing Supreme Court, it seems likely that this case, or a similar constitutional challenge to the ICWA, could succeed in the nation's highest court. This moment in time may prove critical for ICWA advocates to develop their most cogent arguments in support of its continuance. As a fundamental defense of the ICWA, I argue that any legitimate constitutional challenge to its provisions must meet the statute on its own terms, and contend with "Indian" as a political, not racial, classification.

II. STATUTORY INTERPRETATION OF THE ICWA

The statutory language of the ICWA itself demonstrates a broad interest in tribal welfare and culture, recognizing Congress's special duty to protect the interests of Indian tribes.²⁸ Congress designed the ICWA to "protect the best interests of Indian children *and* to promote the stability and security of Indian tribes and families."²⁹ To meet these

²² That is not to say that other racial classifications did not develop for political reasons. The broader concept of race arguably developed to "justify the subordination of other people," which is inherently a political reason. See Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 4 (2012) (arguing that race as a biological concept first developed for this political reason, and was later "imported into the American legal system as a 'background rule' . . ." thereby becoming a legal concept). However, for purposes of this Paper I will focus narrowly on Indian tribes, whose political and racial elements have developed in a manner in many ways distinct from other minority groups.

²³ 417 U.S. 535 (1974).

²⁴ *Id.* at 553–54.

²⁵ 490 U.S. 30 (1989).

²⁶ 133 S. Ct. 2552, 2565 (2013).

²⁷ 2017 WL 1019685, at *1.

²⁸ See 25 U.S.C. § 1901(2) (stating "that Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources").

²⁹ See *id.* § 1902 (emphasis added).

interrelated goals, Congress established “minimum Federal standards” for all Indian child³⁰ custody proceedings,³¹ with “Indian child” defined based on tribal membership and eligibility.³² The minimum standards include placement preferences with extended family and tribe members³³ to ensure that placements “reflect the unique values of Indian culture”³⁴

Congress adopted placement preferences reflecting Indian culture in part because of research indicating such preferences were in the best interests of Indian children.³⁵ As found by psychiatrist Dr. Joseph Westermeyer in his studies of Indian children in non-Indian homes in the 1970s, Indian children in such settings developed the “apple syndrome”³⁶ because they did not identify as Indian, but still suffered discrimination based on their appearance.³⁷ The syndrome was intended to describe a sensation in which children identified with the white culture of their adoptive families, but suffered cultural confusion due to others’ perception of them as Indian. Dr. Westermeyer found that these children fared even worse than Indian children of the boarding school era, who at least maintained some connection to their tribe.³⁸ Notably, Congress emphasized that, according to a 1969

³⁰ For purposes of the ICWA, an Indian child is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” *Id.* § 1903(4).

³¹ *See id.* § 1902. “Child custody proceeding[s]” include “foster care placement,” “termination of parental rights,” “preadoptive placement,” and “adoptive placement.” *Id.* § 1903(1).

³² *See id.* § 1902. For a helpful module explaining the “Indian child” determination under the ICWA, *see* BUREAU OF INDIAN AFF., U.S. DEP’T OF THE INTERIOR, MODULE 2: DETERMINING WHETHER ICWA APPLIES (2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041202.pdf>.

³³ *See* 25 U.S.C. § 1915(a) (“In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”); *see also id.* § 1915(b) (listing preferences for foster or preadoptive placements as “(i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by the Indian child’s tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs”).

³⁴ *Id.* § 1902.

³⁵ *See* Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 251–52 (1992) (arguing that due to cultural differences between Indians and non-Indians, such as being “born into a kinship network, clan, or band,” a “viable Indian identity” is in the best interest of Indian children).

³⁶ Dr. Westermeyer named the “apple syndrome” to signify that the Indian youth was red on the outside but white on the inside. *See id.* at 252. While the name of the syndrome is an artifact of another era, and wrongfully relies on the racial stereotype of the Indian person as “red,” the sensation of cultural confusion for Indian children in non-Indian families was certainly relevant at the time of ICWA’s passing. Dr. Westermeyer testified about his research in front of the Subcommittee of Indian Affairs in 1974, before the passing of the ICWA. *See id.* at 252 n.119 (citing to *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearing on the Indian Child Welfare Program Before the Subcomm. on Indian Affairs, the Comm. on Interior and Insular Affairs*, 93rd Cong. 1–2 (1974) (statement of Hon. James Abourezk, Sen., S.D.)).

³⁷ *See id.* at 252–54 (citing Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCHIATRY 134 (1979), and Joseph Westermeyer, *Ethnic Identity Problems Among Ten Indian Psychiatric Patients*, 25 INT’L J. SOC. PSYCHIATRY 188 (1979)).

³⁸ Indian children placed in non-Indian homes experienced “severe identity confusion” and suffered higher rates of suicidal tendencies than “other high-risk Indian youths.” *See id.* at 253. In contrast, Indian children at boarding schools interacted with each other, and also went home for vacations. *See id.*

survey in sixteen states, 85% of Indian children in foster care were living with non-Indian families, forcing them “to cope with the problems of adjusting to a social and cultural environment much different than their own.”³⁹ Thus, Congress understood that an adoptive child’s interest was inextricably linked to the child’s Indian-ness, and therefore to the child’s tribe.

It is no surprise, then, that ICWA provisions grant Indian tribes unique powers in Indian child custody proceedings,⁴⁰ effectively making the tribe a “third party” to the case.⁴¹ First, tribes have the power to define “Indian child.”⁴² Rather than impose their own understanding of Indian identity, Congress chose to defer to tribal standards for membership eligibility.⁴³ Key to the ICWA, this definitional power reflects Indian tribes’ status as sovereign nations,⁴⁴ as well as the importance of children to tribal sovereignty.⁴⁵

Second, the ICWA makes it easier for tribes to obtain jurisdiction over custody proceedings of Indian children, further securing tribal rights.⁴⁶ Statutorily, tribes have exclusive jurisdiction in cases when the Indian child resides or is domiciled on the reservation.⁴⁷ If the child does not live on the reservation and is not domiciled there, the tribe may obtain concurrent jurisdiction “upon the petition of either parent or the Indian custodian or the Indian child’s tribe,” and absent “good cause to the contrary” or “objection by either parent.”⁴⁸ In addition to the ability to petition for concurrent jurisdiction, tribes have a general right to intervene in Indian child custody proceedings.⁴⁹ In order to make

³⁹ H.R. REP. NO. 95-1386, at 9.

⁴⁰ The ICWA has been described as “perhaps the most far reaching legislation recognizing tribal sovereign interests beyond the reservation borders,” largely because of the jurisdiction provisions. *See* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1021 (2008).

⁴¹ *See* Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 81 (1994).

⁴² *See* 25 U.S.C. § 1903(4).

⁴³ *Id.*

⁴⁴ Since the Nineteenth Century, the federal government has recognized Indian tribes’ “inherent powers of self-government in internal matters,” allowing them to self-govern “according to their tribal customs and laws.” *See* Patrice H. Kunesh, *Borders Beyond Borders: Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 18, 21 (2007) (quoting *United States v. Quiver*, 241 U.S. 602, 603–04 (1916)).

⁴⁵ Kunesh makes a strong case for exclusive tribal jurisdiction over Indian children who are wards of the tribal court, regardless of where they live. *See id.* at 16. In explaining the importance of the ICWA wardship provision, she finds that “welfare of Indian children lies at the heart of tribal sovereignty,” such that tribal authority in this area is “vital to the maintenance of its identity and self-determination.” *See id.* at 78.

⁴⁶ Non-Indian judges played a key role in separating Indian children from their tribes by accepting social workers’ culturally biased reasoning. *See* Gallagher, *supra* note 41, at 85–86.

⁴⁷ 25 U.S.C. § 1911(a) (2012).

⁴⁸ *Id.* § 1911(b).

⁴⁹ *Id.* § 1911(c) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”).

these rights effective, the ICWA requires the notification of tribes when an Indian child is involved in any custody proceeding.⁵⁰

Finally, although the ICWA establishes placement preferences, tribes may exercise their discretion to change the placement preference, so long as the placement is the “least restrictive setting appropriate to the particular needs of the child.”⁵¹ In theory, a tribe could determine that the most appropriate placement for a particular child is outside of the tribe’s community, thereby overriding the statutory preferences. This provision exemplifies the ICWA’s deference to tribal understanding of an Indian child’s best interests. The ICWA essentially presumes that it is in the Indian children’s best interest to be with family in their tribe, or with other tribal members, unless the tribe itself determines otherwise.

The ICWA also grants certain privileges to the parents and custodians⁵² of Indian children. For example, parents of an Indian child may revoke their voluntary termination of parental rights any time before the proceedings are finalized, and both parents and custodians may revoke their consent to foster care placement or adoption.⁵³ Additionally, two key provisions of the ICWA make it more difficult to remove Indian children from their parents or custodians in the first place. The first requires any party seeking to place an Indian child in foster care or to terminate the parents’ rights to show “active efforts”⁵⁴ have been made, unsuccessfully, to “provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.”⁵⁵ The second requires the party seeking termination of parental rights to prove “beyond a reasonable doubt” that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”⁵⁶ By creating additional burdens on those seeking to adopt Indian children, or to terminate parental rights, the ICWA underscores its clear policy preference that Indian children remain in the Indian

⁵⁰ *Id.* § 1912(a) (“[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe.”).

⁵¹ *Id.* § 1915(c).

⁵² Indian custodian is defined as “any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” *Id.* § 1903(6).

⁵³ *See id.* § 1913(b) (“Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.”); *see also id.* § 1913(c) (“In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.”).

⁵⁴ “Active efforts” establishes a higher bar than “reasonable efforts,” which is what is required in non-Indian cases. *See* Mark Andrews, “Active” Versus “Reasonable” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 ALASKA L. REV. 85, 86–87 (2002) (discussing how “active efforts” has been interpreted in Alaska).

⁵⁵ 25 U.S.C. § 1912(d). For ease of reading, this provision will be referred to as the “active efforts” provision.

⁵⁶ *Id.* § 1912(f); *see also id.* § 1912(e) (requiring “clear and convincing” evidence that “continued custody . . . is likely to result in serious emotional or physical damage to the child” before an Indian child can be placed in foster care). For ease of reading, these provisions will be referred to as the “continued custody” provisions.

community. In effect, the active efforts and continued custody provisions also interact with the tribal powers, buying the tribe more time to intervene in the case.

The ICWA is not just about children and families, but also about tribal sovereignty and integrity. The ICWA's provisions recognize a fundamental connection between the welfare of the Indian child and the welfare of the child's tribe. Thus, "Indian" should not be viewed as a racial classification for purposes of the ICWA, but rather as a political identification necessary for the continued self-governance of tribes. The ICWA was not written in a historical vacuum. Congress responded directly to the dire circumstances facing federally recognized Indian tribes who were losing their children, and enacted provisions to restore the tribes' political power by granting them more control over child custody proceedings. To further this goal, Congress did not invent a racial definition of what it means to be Indian, but assumed that politically recognized Indian tribes were in the best position to define their own political memberships.⁵⁷

III. THE HISTORICAL RACIALIZATION OF INDIANS AND EQUAL PROTECTION EFFECTS

As shown by the Constitution itself in the Indian Commerce Clause,⁵⁸ Indians have occupied a special status in the United States since its founding. Yet at the same time, courts and legal scholars have tried to fit Indian Law⁵⁹ into other doctrines. Professor Philip Frickey describes this tendency as the "seduction of coherence,"⁶⁰ whereby the legal community seeks to understand Indian Law by interpreting it as consistent with familiar concepts. Professor Bethany Berger makes an interesting case that the "seduction of coherence" is at its strongest, and perhaps most problematic, in the equal protection context.⁶¹ The following analysis focuses on the historical and modern reasons why Indian Law statutes do not fit neatly into the equal protection doctrine surrounding race-based legislation.

While the equal protection doctrine, as it has developed, forces courts to determine if groups are distinctly racial,⁶² Indians fit neither into nor outside of a racial category. Indian tribes have incorporated racial elements into their self-definitions, in part in response to U.S. Government pressure.⁶³ But, as will be examined, the racialization of

⁵⁷ See *supra* note 30 for a discussion of § 1903(4).

⁵⁸ See U.S. CONST. art. I, § 8, cl. 3.

⁵⁹ As explained by Felix Cohen in his seminal work, Indian Law governs issues related to the "rights, privileges, powers, or immunities of an Indian or an Indian tribe or an administrative agency set up to deal with Indian affairs, or where governing rules of law are affected by the fact that a place is under Indian ownership or devoted to Indian use." FELIX S. COHEN, U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, HANDBOOK OF FEDERAL INDIAN LAW 1 (1942). Indian Law issues can arise in cases with or without Indians or tribes as parties. *Id.*

⁶⁰ Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 435–36 (2005).

⁶¹ Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1166 (2010).

⁶² See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

⁶³ See Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012).

Indians by the federal government was a historical tool to deprive them of their special status and to eliminate them from their land.⁶⁴ At the same time, tribes remained political entities that were protected by the federal trust relationship.⁶⁵ As explained by Felix Cohen, when “Indian” is used in a legal context, the “biological question of race is generally pertinent, but not conclusive.”⁶⁶ Constitutional challenges asserting that the ICWA is race-based ignore the uniquely mixed racial and political character of Indian tribes. Consequently, such challenges improperly analyze the ICWA under the Equal Protection Clause of the Fourteenth Amendment.⁶⁷

A. *Congressional Approaches to Tribal Membership, 1830s to 1970s*

Before colonization in pre-contact societies, tribes were largely formed out of ancestry and descent, but not exclusively.⁶⁸ People without any ancestral tie to the tribe could sometimes become incorporated into the tribal structure.⁶⁹ Reducing the original kinship structures to a concept of race based solely on “ancestry, blood, and genes”⁷⁰ is therefore an oversimplification of what it means to be “Indian.”

Initially, tribes were not officially recognized in any standard way; rather, they were dealt with on an *ad hoc* basis as the government recognized their existence.⁷¹ However, that changed in the 1830s due to removal policies designed to clear Indians from their traditional lands.⁷² These policies required the government to identify tribes, but the Supreme Court did not rule on how tribes could be identified until 1866.⁷³ Removal policies were insufficient to eliminate the Indians from their lands, and 1871 harkened the

⁶⁴ *See id.* at 1064 (explaining that in order to remove tribes from their homelands, the government first had to identify tribes with “possessory interests in their lands,” and otherwise categorize them).

⁶⁵ For a discussion of the Federal Trust relationship and its enforcement, *see* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

⁶⁶ COHEN, *supra* note 59, at 2.

⁶⁷ For a discussion of how the Fourteenth Amendment was originally meant to apply or not apply to Indians, *see* Berger, *supra* note 61, at 1173–75. Berger argues that the jurisdiction provision in the Fourteenth Amendment is further evidence that the Equal Protection Clause was not meant to apply to Indians in the same way as it would to African Americans. *See id.* While this may support treating Indians differently, all Indians were made U.S. citizens by federal legislation in 1924. *Id.* at 1176. Once all Indians were U.S. citizens, the jurisdiction provision would no longer apply differently.

⁶⁸ Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1390 (2002).

⁶⁹ *Id.*

⁷⁰ *See* Desautels-Stein, *supra* note 22, at 4.

⁷¹ Krakoff, *supra* note 63, at 1048.

⁷² *Id.* at 1064.

⁷³ The Supreme Court passed on the opportunity to define tribes in both *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and in *Worcester v. Georgia*, 31 U.S. 15 (1832). Instead, the Court focused on the consequences of being a tribe. It was not until *In re Kansas Indians*, 72 U.S. 737 (1866), that the Supreme Court ruled on the tribal status of a specific group of Indians, the Shawnee. The Court relied on the following factors: the existence of Shawnee political organizations, the federal government’s recognition of said political organizations, that the Shawnee were a distinct group, their treaty-power, and their separate jurisdiction from the state in which they resided. *See id.* at 1065. These factors are somewhat circular in that to be considered a tribe, they must already have treaty power and have separate jurisdiction from the state. At the same time, the factors highlight both the political and racial elements of tribes. The Shawnee had to be politically organized to qualify as a tribe, but they also had to be a distinct people.

beginning of what has been deemed the “Assimilation Period.”⁷⁴ This period was characterized by the General Allotment Act of 1887 (the Dawes Act), which was intended to break up tribes by breaking up their land, and allotting it amongst the Indian tribe members.⁷⁵ As described by Professor Sarah Krakoff, “[t]he racialized tribe was seen as the locus of Indian backwardness and inferiority. Destruction of the tribe was therefore prerequisite to liberating the individual Indian.”⁷⁶ According to Krakoff, this period represents the height of the eliminationist policy towards Indians.⁷⁷

In 1934, Congress passed the Indian Reorganization Act⁷⁸ (IRA), which gave the Secretary of the Interior authority to approve or disapprove tribal constitutions.⁷⁹ The IRA acknowledged that the Assimilation Period had left “a considerable number of Indians . . . entirely landless.”⁸⁰ One of the goals of the IRA was “to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.”⁸¹ One hundred fifty tribes created constitutions under this Act, and the Bureau of Indian Affairs (BIA) encouraged them to establish certain membership provisions.⁸² Among these were provisions related to blood quantum, which require a minimum percentage of blood tying an individual to a tribe.⁸³ Although it provided for the tribes to define their membership, the IRA itself defined “Indian” based on descent, and alternatively based on blood quantum.⁸⁴ As discussed, the element of descendancy⁸⁵ was neither ahistorical, nor a significant departure from the practices of pre-contact tribes. More significant was the BIA’s emphasis on blood quantum for membership, which sets a clearly racial baseline for defining tribes. Thus, in attempting to reaffirm an element of tribal political sovereignty by protecting tribal lands, the Department of the Interior effectively maintained a racial element of tribal membership.

By the 1970s, litigation had brought greater attention to the struggles of Indian tribes.⁸⁶ One such struggle was that of non-recognition, or lack of acknowledgement by the

⁷⁴ *Id.* at 1066.

⁷⁵ Krakoff, *supra* note 63, at 1067 (discussing the Indian General Allotment Act, 25 U.S.C. § 331 (1887)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1069; *see also id.* at 1050 (explaining that the racialization of Indians was very different from the racialization of African Americans, because the goal for the former was to remove them from their lands by decreasing their numbers, whereas the goal for the latter was proliferation to increase the slave workforce).

⁷⁸ Indian Reorganization Act, 25 U.S.C. § 461 (1934).

⁷⁹ Krakoff, *supra* note 63, at 1075; *see also* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446 (2002).

⁸⁰ S. REP. NO. 73-1080, at 1 (1934).

⁸¹ *Id.*

⁸² Goldberg, *supra* note 79, at 446.

⁸³ *Id.*

⁸⁴ Indian Reorganization Act, 25 U.S.C. § 479 (1934) (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.”).

⁸⁵ For consistency purposes, this Paper refers to this term as “descendancy,” except when quoting a primary source with an alternate spelling. The scholarship around the issue uses different variations of the term (i.e. “decendency”).

⁸⁶ Krakoff, *supra* note 63, at 1078.

federal government.⁸⁷ Despite the IRA, many tribes were still falling through the cracks, and there was no clear administrative process for recognition.⁸⁸ In response, Congress established the American Indian Policy Review Commission, which in turn created the Task Force on Terminated and Nonfederally Recognized Indians.⁸⁹ After a report on the problems with nonrecognition, the BIA adopted clear administrative procedures for official federal recognition of tribal status.⁹⁰ These procedures were most recently amended in July of 2015.⁹¹ Despite some critics requesting the removal of descent from the criteria for tribal recognition, the BIA maintained the criteria,⁹² and responded as follows:

Some commenters stated that criterion (e) should be deleted because it is race-based, while tribal membership is a political classification.

Response: The Department recognizes descent from a political entity (tribe or tribes) as a basis from which evaluations of identification, community, and political influence/authority under criteria (a), (b), and (c) may reveal continuation of that political entity. Evidence sufficient to satisfy (e) is utilized as an approximation of tribal membership before 1900.⁹³

The BIA's response to this criticism is crucial, because it explicitly justifies what could be construed as a race-based criterion as a basis for "continuation of that political entity."⁹⁴ To the BIA, descent is not about race; it is about providing evidence of a *political* connection to a *political* entity.⁹⁵

Despite the BIA's emphasis on the political nature of tribes, many tribes currently define membership using blood quantum and descendance, among other requirements.⁹⁶

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 25 C.F.R. § 83 (2015).

⁹² The "Descent" criterion for recognition reads, in part, as follows: "The petitioner's membership consists of individuals who descend from a historical Indian tribe . . . The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendance basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate . . ." *Id.* at § 83(e). The regulation goes on to direct tribes with no tribal rolls on how to proceed in proving the element of descent. *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ The other BIA criteria for recognition reaffirm this political understanding of "Indian." Other criteria include (a) identifying "as an American Indian entity on a substantially continuous basis since 1900"; (b) comprising a "distinct community" that has existed since 1900; (c) maintaining "political influence or authority over its members" since 1900; (d) providing the "governing document" or "written statement" that explains the membership criteria; (e) having members descending from a historical tribe, as discussed *supra* note 91; (f) having members "who are not members of a federally recognized Indian tribe"; and (g) not having been "expressly terminated or forbidden." 25 C.F.R. § 83.11(a)–(g).

⁹⁶ Matthew L. M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 4 (2012); *see also Tribal Enrollment Process*, U.S. DEP'T INTERIOR, <https://www.doi.gov/tribes/enrollment> (last visited Mar. 10, 2018) ("Two common requirements for membership are lineal descendency from someone named on the tribe's base roll or relationship to a tribal member who descended from someone named on

Based on the above historical analysis, these requirements are likely consistent with both tribal traditions regarding belonging, as well as with the direction in which the federal government pushed tribes over the years. As argued by Krakoff, regardless of the racial element of tribal membership, tribes are political in two key ways: pre-contact tribes retained some political sovereignty, and the existence of tribes was used by the government to politically subordinate Indians.⁹⁷ Thus, at this point, attempting to untangle the racial from political in tribal relations would both undermine tribal sovereignty, and ignore the historical context of the subordination of Indians. Dealing with this complex history, the Supreme Court found a way to maintain equal protection of Indians without undermining tribal sovereignty in *Morton v. Mancari*.

B. *Morton v. Mancari* (1974)

In a unanimous decision in *Morton v. Mancari*, the Supreme Court upheld a provision of the Indian Reorganization Act of 1934 creating a hiring preference for Indian employees in the BIA.⁹⁸ The Court found that the Equal Employment Opportunities Act of 1972 did not implicitly repeal the provision, and that the preference did not constitute “invidious racial discrimination” under the Due Process Clause of the Fifth Amendment.⁹⁹ Writing for the Court, Justice Blackmun stated that this preference could not be racial discrimination because “it is not even a ‘racial’ preference.”¹⁰⁰ In this case, the Court created a new version of rational basis review specific to Indians, where legislation would be upheld if it was rationally related to “Congress’ unique obligation toward the Indians.”¹⁰¹

Importantly, protection for Indians under the Equal Employment Opportunities Act of 1972 did not solely require tribal membership, but also required that a person be at least one-quarter Indian, which is a blood quantum provision.¹⁰² This differs from the ICWA which defers entirely to the tribe’s own determination for membership, without imposing a blood quantum.¹⁰³ In *Mancari*, the Court stated that the preference was “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in unique fashion.”¹⁰⁴ Therefore, the case for racial discrimination is even weaker regarding the ICWA, since the legislation

the base roll Other conditions such as tribal blood quantum, tribal residency, or continued contact with the tribe are common.”).

⁹⁷ Krakoff, *supra* note 63, at 1048.

⁹⁸ *Mancari*, 417 U.S. at 535.

⁹⁹ *Id.* at 551–54.

¹⁰⁰ *Id.* at 553; *see also id.* at 553 n.24 (explaining that the preference was directed not towards a race, but rather to “members of ‘federally recognized’ tribes”).

¹⁰¹ *See id.* at 555 (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.”).

¹⁰² *See id.* at 553 n.24 (“To be eligible for preference . . . an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.”).

¹⁰³ *See* 25 U.S.C. § 1903(4) (“[A]ny unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”).

¹⁰⁴ *Mancari*, 417 U.S. at 554.

itself is silent on bloodlines. The ICWA does require that an Indian child who is eligible for membership, but not yet a tribe member, be the “biological child of a member of an Indian tribe.”¹⁰⁵ However, this provision is related to descendancy rather than bloodlines. The parent is required to be a tribe member, not to meet a specified blood quantum. If *Mancari* is correct in the context of a statute with an explicit blood quantum provision, then the ICWA certainly is an expression of “Congress’ unique obligation toward the Indians”¹⁰⁶ as tribes, rather than race-based legislation.

Although there have not been more recent equal protection cases regarding Indian Law, the Court continues to uphold tribal sovereignty in other, arguably less controversial, contexts.¹⁰⁷ The idea of sovereignty is closely tied to the consideration of tribes as political entities, rather than as racial groups. Despite small affirmations of tribal sovereignty, the Court has also opened the door to equal protection challenges in the ICWA context, presenting an inconsistent understanding of what it means to be “Indian.”

IV. SUPREME COURT INTERPRETATION OF THE ICWA

Although there is a plethora of state court decisions regarding the ICWA, the U.S. Supreme Court has interpreted its provisions on only two occasions: in *Holyfield*¹⁰⁸ and in *Baby Veronica*.¹⁰⁹ These decisions do not explicitly state whether “Indian” is racial or political, but the Court’s restatements of the legislative intent and purpose of the ICWA do provide helpful windows into how it understands the term. However, the two cases differ substantially in their interpretation of the ICWA. The two interpretations mirror the racial-political dichotomy discussed in Part I, and highlight the difficulty of treating Indian legislation under traditional equal protection doctrine.

A. *Holyfield* (1989)

The key holding of *Holyfield*¹¹⁰ is the Court’s interpretation of the word “domiciled” in § 1911 of the ICWA regarding tribal jurisdiction,¹¹¹ but the opinion has broader implications for the construction of “Indian.” In *Holyfield*, an Indian mother arranged for the adoption of her twins by the Holyfields, a non-Indian couple.¹¹² The children never lived on the reservation or even visited the reservation, but both of their parents were domiciled on the reservation.¹¹³ Even though the domicile of minor children is typically that of their parents, the Supreme Court of Mississippi held that the children were not

¹⁰⁵ 25 U.S.C. § 1903(4).

¹⁰⁶ *Mancari*, 417 U.S. at 555.

¹⁰⁷ *See* *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (affirming the judgment of the lower court in an unsigned per curiam decision, with the effect that tribal courts have jurisdiction over civil tort claims against non-tribal members); *see also* *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016) (holding that tribal convictions can be used for purposes of sentence enhancement in a federal criminal case under the Sixth Amendment).

¹⁰⁸ 490 U.S. 30.

¹⁰⁹ 133 S. Ct. 2552.

¹¹⁰ 490 U.S. at 53–54.

¹¹¹ *See* 25 U.S.C. § 1911 (1978).

¹¹² 490 U.S. at 39.

¹¹³ *Id.* at 37.

domiciled on the reservation because the mother had intentionally given birth 200 miles from the reservation, and had legally abandoned the twins under state law.¹¹⁴ The U.S. Supreme Court reversed, holding that the Mississippi Band of Indian Choctaw twin babies were “domiciled” on the reservation under § 1911 of the ICWA.¹¹⁵

In a majority opinion delivered by Justice Brennan, the Court determined that the legislature must have intended a uniform, federal definition of “domiciled” for purposes of the ICWA.¹¹⁶ Usually a child’s domicile is wherever the parents are domiciled, and there is no reason to believe Congress intended to deviate from that understanding.¹¹⁷ The Court connected this definition to what they believed to be a primary purpose of the ICWA: protecting not just the best interest of Indian children and families, but also the interests of the tribe.¹¹⁸

In support of its holding, the Court cited to a discussion of § 1915 found in the House of Representative Report, which stated that the ICWA “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.”¹¹⁹ The Court also cited to the testimony of Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, who testified to the “chances of Indian survival” and tribal self-governance.¹²⁰ Finally, the majority quoted the Supreme Court of Utah to summarize the tribal interest, which that court found to be “on a parity with the interest of the parents.”¹²¹ According to the Supreme Court of Utah:

This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand . . . State abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions . . . are as entitled to respect as the interests of the parents.¹²²

Thus, as expressed by the Supreme Court of Utah and accepted by the majority in *Holyfield*, the unique relationship of a tribe to its children necessitates the tribal interest in custody proceedings.

Justice Stevens’ dissent characterized tribal rights very differently. He stated that the ICWA’s primary goal is preventing “unjustified removal of Indian children from their families,” and found that the Act gives tribes rights “not to restrict the rights of parents of Indian children, but to complement and help effect them.”¹²³ He did acknowledge an

¹¹⁴ *Id.* at 39–40.

¹¹⁵ *Id.* at 41.

¹¹⁶ *Id.* at 43.

¹¹⁷ *Id.* at 44–45.

¹¹⁸ *See id.* at 49 (“Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.”).

¹¹⁹ *Id.* at 37 (citing H.R. REP. NO. 95-1386, at 23).

¹²⁰ *Id.* at 34.

¹²¹ *Id.* at 52–53 (citing *In re Adoption of Holloway*, 732 P.2d 962, 969–70 (1986)).

¹²² *Id.*

¹²³ *Id.* at 55, 57.

element of tribal sovereignty, but only “over the domestic relations of tribe members,” such that once a child was abandoned, they would assume the domicile of their caregiver.¹²⁴

The argument regarding how to understand “domicile” reveals a larger debate about whether the ICWA is intended to protect tribes, Indian families, or both. While on the surface the difference in emphasis may seem subtle, the doctrinal implications for the ICWA are significant. In *Holyfield*, the majority of the Supreme Court emphasized the ICWA’s purpose as related to tribes just as much as it did the purpose related to Indian children and families.¹²⁵ Although not explicit, the connection to the tribe supports a political understanding of “Indian.” This emphasis is consistent with a broader view of the ICWA as part of a larger body of Indian regulations designed to protect the unique political status of tribes.

Alternatively, Justice Stevens’ approach to the ICWA focused narrowly on the interest of the parents. For him, granting jurisdiction to the tribe was merely a means of ensuring the protection of Indian parental rights. If the parent abandoned the child, then there is no longer a need to grant the tribe jurisdiction. By minimizing the role of the tribe, his approach effectively places the ICWA outside the context of other Indian regulations designed to ensure self-government. In that sense, “Indian” becomes more of a racial classification, and the Act a remedial legislation targeted towards protecting parents with Indian heritage.

This subtle difference in focus has a huge doctrinal impact. Within the body of Indian regulations, the ICWA might not look so different in that it recognizes the special federal obligation to protect tribal interests. However, placed in the context of other child custody laws, the ICWA’s regulations stand out.¹²⁶ By the time the Supreme Court took a second look at the ICWA in 2013, there was a notable shift in the Court towards the latter, more racial lens.

B. *Baby Veronica Case*

In *Baby Veronica*,¹²⁷ it seems that Justice Stevens’ narrower interpretation of the tribal role in the ICWA won the day. In only the second ICWA case to make it to the nation’s highest court,¹²⁸ the Court primarily interpreted the phrase “continued custody” in § 1912(f), the phrase “breakup of families” in § 1912(d), and the word “preference” in § 1915(a).¹²⁹ Dusten Brown, an Indian father, sought to halt the adoption proceedings of his

¹²⁴ *Id.* at 58.

¹²⁵ *See generally id.*

¹²⁶ *See* Plaintiffs’ Consolidated Response to Federal Defendants’ Motion to Dismiss and State Defendant’s Motion to Abstain and Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), (6) at 2, *Carter et al. v. Washburn et al.*, No. 2:15-cv-01259-NVW (D. Ariz. Nov. 13, 2015) [hereinafter Plaintiffs’ Response to Defendants’ Motion to Dismiss] (“Once ICWA is implicated in a child custody proceeding, state rules and procedures no longer apply in ordinary fashion.”). For example, in Arizona, when the parents’ rights are terminated, ordinarily the law “establishes a preference for adoption by ‘a person who has a significant relationship with the child,’ including a ‘foster parent.’” *Id.* at 11. However, if the custody proceeding is subject to the ICWA, then there is a “statutory pecking order” that prefers Indian families. *Id.*

¹²⁷ *Baby Veronica*, 133 S. Ct. 2552.

¹²⁸ *See* Kathleena Kruck, *The Indian Child Welfare Act’s Waning Power after Adoptive Couple v. Baby Girl*, 109 Nw. U. L. REV. 445, 459 (2015).

¹²⁹ *Baby Veronica*, 133 S. Ct. at 2557.

daughter, Veronica, by the non-Indian Capobiancos.¹³⁰ Although the state court ruled in his favor, the Supreme Court reversed.¹³¹

The Court held that § 1912(f), which protects Indian parents' rights to 'continued custody' of their children, did not apply when Mr. Brown never had custody of Veronica.¹³² Justice Alito delivered the majority opinion, which justified this interpretation using the plain language of the statute and the definition of "continued."¹³³ Justice Alito added that "[w]hen . . . the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's *primary goal* of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated."¹³⁴ This analysis mirrors Justice Stevens' understanding of the primary goal of the ICWA in *Holyfield*, leaving out the protection of tribal interests. By removing tribal interests from the legislative interpretation, Justice Alito implicitly suggests a racial understanding of "Indian."¹³⁵

The majority's racial understanding of the Act is further revealed by its interpretation of the "breakup of the Indian family" language and the placement preference provision. The majority found that the "active efforts" provision, which requires social workers to offer services before terminating Indian parental rights, does not apply when "the parent abandoned the Indian child before birth and never had custody of the child," because there would be no "breakup of the Indian family."¹³⁶ Since Mr. Brown never had custody of Veronica, and he was the Indian parent, the majority did not think she had an Indian family to begin with.¹³⁷ Although the Cherokee Nation was never properly notified of Veronica's case, the Court found that since no Cherokee families tried to adopt Veronica, and Mr. Brown was not seeking to adopt her himself, there could be no placement "preference" under § 1915(a).¹³⁸

The majority opinion weakened the political understanding of the term "Indian" in the ICWA by reading out any tribal interest in Indian children. When construing the "continued custody" provision as limited to Indian parents that have had custody of their child, the majority excluded protection of tribal sovereignty as a goal of the ICWA. By

¹³⁰ *Id.* at 2556 (characterizing the South Carolina Supreme Court's decision as holding that "certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child").

¹³¹ *Id.* at 2557.

¹³² *Id.* at 2560–62.

¹³³ *See id.* (citing to two different dictionary definitions of "continued").

¹³⁴ *Id.* at 2561 (emphasis added).

¹³⁵ *See also id.* at 2559 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law.").

¹³⁶ *Id.* at 2557.

¹³⁷ *Id.* at 2563 ("It would, however, be unusual to apply § 1912(d) in the context of an Indian parent who abandoned a child prior to birth and who never had custody of the child.").

¹³⁸ The majority did not mention a clerical error, which caused the Cherokee Nation to not be properly notified under the ICWA. *See* Allyson Bird, *James Island Family Turns Over 2-Year-Old Girl following Court Order*, POST & COURIER, (Dec. 31, 2011, 12:01 AM), <http://www.postandcourier.com/article/20111231/PC16/312319969>. Veronica's mother attempted to check with the Cherokee Nation to see if Mr. Brown was a member. *Id.* However, he spelled Mr. Brown's name incorrectly and provided the wrong date of birth. *Id.* The Cherokee Nation was thus unable to confirm his tribal membership. *Id.*

construing the term “Indian family” narrowly, to include only family with which the child had lived, the majority precluded any future connection to the tribe. The majority also claimed that no Cherokee family sought to adopt Veronica, but ignored the lack of tribal notice in the case, effectively undermining the Cherokee Nation’s interest in the child.¹³⁹

Additionally, some dicta of the majority opinion can be seen as inviting a broader constitutional challenge to the Act under a theory of racial discrimination.¹⁴⁰ Justice Alito states in his opinion that interpreting the provisions at issue in the manner suggested by the dissent would “raise equal protection concerns.”¹⁴¹ Yet, it is ambiguous whether he or the other Justices believe that the provisions raise equal protection concerns as interpreted by the majority, since they do not reach the question in *Baby Veronica*’s case.

Other parts of the opinion suggest that the majority felt negatively about the application of the ICWA in general. For instance, Justice Alito describes a hypothetical case under the dissents’ interpretation of the provisions where the father would “abandon his child in utero and refuse any support for the birth mother,” encourage her to put the child up for adoption, and then “play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests.”¹⁴² He also expresses that Indian children under the ICWA may be less likely to be adopted, stating concerns with “dissuad[ing] some . . . from seeking to adopt Indian children,” which would “unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home”¹⁴³

Justice Alito’s strong statements imply that the ICWA leaves Indian children vulnerable to the whims of the Indian parent, and acts to delay their search for a stable home. This alternative vision of the ICWA as racially discriminatory legislation relies on vague hypotheticals rather than facts. It is unclear, for example, if non-Indian families are actually discouraged from adopting Indian children by the ICWA. Even if they were, one would still have to prove the ICWA negatively impacts the children’s ability to be placed in homes, implying that they are without an Indian placement. The majority’s reasoning confuses (a) the ability to place Indian children in non-Indian homes with (b) the ability to place Indian children in adoptive homes more generally. The majority acts, without evidence, as if a barrier to (a) is the same as a barrier to (b). While tribal sovereignty and the importance of the tribe to the Indian child were central considerations in the *Holyfield* decision, the *Baby Veronica* opinion reads more like an Assimilationist-Era text, re-imposing a race-based understanding on what it means to be “Indian.”

¹³⁹ For a thorough discussion of the ramifications of the *Baby Veronica* decision, see Kruck, *supra* note 128.

¹⁴⁰ See Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 126, at 1 (“This case is a successor to *Adoptive Couple v. Baby Girl*.”). See also First Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and Other Relief at 26, *Carter*, No. 2:15-cv-01259 (D. Ariz. Apr. 5, 2016) [hereinafter Amended Complaint] (“Although the court did not reach constitutional issues, a core premise of the *Baby Veronica* decision . . . was that ICWA cannot force a child to create a racially-conforming relationship and that a child would not be made to sever existing relationships in order to create new racially-conforming ones.”).

¹⁴¹ *Baby Veronica*, 133 S. Ct. at 2565.

¹⁴² *Id.*

¹⁴³ *Id.* at 2563–64.

V. A CURRENT CHALLENGE: CARTER, ET AL. V. WASHBURN, ET AL.

After *Baby Veronica*, it was only a matter of time before a more comprehensive challenge to the ICWA surfaced, and, sure enough, the Goldwater Institute quickly spearheaded the charge. Founded in 1988 by Senator Barry Goldwater, the Goldwater Institute is a conservative think tank based in Arizona.¹⁴⁴ In July 2015, the Goldwater Institute filed a class action lawsuit in the District Court of Arizona,¹⁴⁵ claiming that key provisions of the ICWA and the amended BIA guidelines are unconstitutional as written and as applied.¹⁴⁶ The complaint includes seven counts, arguing that certain key ICWA provisions are unconstitutional and that new BIA guidelines are also unconstitutional.¹⁴⁷ The first count and the focus of this discussion is an equal protection claim under the Fifth Amendment. Based on this claim, the plaintiffs seek an injunction¹⁴⁸ against the application of the ICWA's jurisdiction-transfer provision, "active-efforts" provision, burdens of proof for foster care placement and termination of parental rights, and placement preferences.¹⁴⁹

The named plaintiffs in this case are baby girls A.D. and L.G., baby boys C.C. and C.R., and three foster/adoptive couples, all of whom allegedly suffered injury due to the

¹⁴⁴ See *About*, GOLDWATER INST., <http://goldwaterinstitute.org/en/about/> (last visited Sept. 17, 2017). Ironically, then-Senator Goldwater voted for the ICWA in 1977. See Suzette Brewer, *War of Words: ICWA Faces Multiple Assaults from Adoption Industry*, INDIAN COUNTRY TODAY MEDIA (July 8, 2015), <http://indiancountrytodaymedianetwork.com/2015/07/08/war-words-icwa-faces-multiple-assaults-adoption-industry-160993>. Regarding the current litigation against the ICWA, Senator James Abourezk stated, "I knew Barry Goldwater—he was my friend and often came to me for advice on most tribal matters . . . I wish he were alive to see this travesty because he would never approve of it . . ." *Id.*

¹⁴⁵ Civil Rights Class Action Complaint for Declaratory and Injunctive Relief, *Carter*, No. 2:15-cv-01259 (D. Ariz. July 6, 2015) [hereinafter Complaint].

¹⁴⁶ See *A.D. v. Washburn*, GOLDWATER INST. (July 7, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/equal-protection-for-indian-children/>.

¹⁴⁷ See generally Amended Complaint, *supra* note 140. Other constitutional claims beyond the scope of this Paper include that certain ICWA provisions violate procedural and substantive due process, that the ICWA as a whole exceeds the federal government's power under the Indian Commerce Clause and the Tenth Amendment, and that it violates the freedom of association under the First Amendment by forcing children to "associate with and become members of federally-recognized tribes." *Id.* at 32. Additionally, plaintiffs claim that the BIA's actions in issuing new guidelines were unlawful and "in excess of statutory authority." *Id.* at 33. Finally, the complaint alleges that DCS receives federal financial assistance, and Mr. McKay has subjected these plaintiffs to de jure discrimination in violation of Title VI of the Civil Rights Act. *Id.*

¹⁴⁸ See *id.* at 28.

¹⁴⁹ The claims for relief under the equal protection guarantee of the Fifth Amendment refer to multiple ICWA provisions, as well as new BIA guidelines. The first is the jurisdiction-transfer provision, 25 U.S.C. § 1911(b). See Amended Complaint, *supra* note 140, at 26 ("The jurisdiction-transfer provision . . . is based solely on the race of the child and the adults involved."). The second is the "active efforts" provision, which allegedly "creates a separate set of procedures for children with Indian ancestry and all other children based solely on the child's race." *Id.* Next are the burdens of proof for foster care placement and termination of parental rights. *Id.* at 26–27 ("Government cannot treat the best interests of children with Indian ancestry differently and less seriously than those of other children."). Finally, the Amended Complaint goes straight to the heart of the ICWA: the placement preferences. *Id.* at 27 (stating these preferences "single out and treat differently children with Indian ancestry" as well as "non-Indian adults involved in the care and upbringing" of Indian children).

ICWA.¹⁵⁰ The complaint names defendants Assistant Secretary of Indian Affairs of the BIA Kevin Washburn and Secretary of the Interior Sally Jewell.¹⁵¹ The complaint also names Director of the Arizona Department of Child Safety, Gregory McKay, who has a statutory duty to “protect children” and is tasked with ensuring departmental compliance with the ICWA.¹⁵² The Gila River Indian Community filed a motion to intervene as a defendant in October of 2015,¹⁵³ and the Navajo Nation Department of Justice filed a similar motion the following month.¹⁵⁴ The tribes and government defendants filed motions to dismiss the amended complaint, which were granted due to lack of standing.¹⁵⁵ Plaintiffs have appealed the dismissal to the Ninth Circuit Court of Appeals, where they hope to prove standing and reach the merits of the case.¹⁵⁶

The complaint reveals much about how the plaintiffs and Goldwater Institute seek to portray the ICWA. The named plaintiffs filed this class action “on behalf of themselves and all off-reservation Arizona-resident children with Indian ancestry and all off-reservation Arizona-resident foster, preadoptive, and prospective adoptive parents in child custody proceedings involving children with Indian ancestry.”¹⁵⁷ By using the term “ancestry” repeatedly in their class-certification, rather than Indian child as defined by the ICWA, the complaint emphasizes “Indian” as a race-based determination. The use of the word “ancestry” in particular makes the connection to Indian culture sound historical, rather than a living, breathing connection to the tribe.

¹⁵⁰ The child-plaintiffs seem to have been chosen not because they were sent to live with Indian families against their best interest, but rather because compliance with ICWA allegedly caused them to spend additional time in foster care. For example, Baby Boy C.C. “languished in foster care for approximately four years” before his foster parents could legally adopt him. *Id.* at 8. All the children-plaintiffs, except Baby Girl L.G., have more than 50% non-Indian blood, and are enrolled or eligible to enroll in either the Gila River Indian Community or the Navajo Nation. *Id.* at 3–4. Baby Girl L.G. is not eligible for tribal membership, but her half-brother Baby boy C.R. is eligible. *Id.* at 4. Thus, in their consolidated child custody proceeding, Baby Girl L.G. was subject to the same ICWA related delays as her brother. *Id.* at 10.

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ The Gila River Indian Community asserted two interests under Rule 24(a)(2). *See* Motion of the Gila River Indian Community to Intervene as Defendant, *Carter*, No. 2:15-cv-01259 (D. Ariz. Oct. 16, 2015). First, Baby Girl A.D. was an enrolled member of the Community. *See id.* at 3. Second, the plaintiffs’ claims of the unconstitutionality of certain provisions would “eliminate” the Community’s role in her custody proceedings. *Id.* at 4.

¹⁵⁴ The Navajo Nation asserted two similar interests in the subject of this action under Rule 24(a)(2). *See* Navajo Nation Motion to Intervene, *Carter*, No. 2:15-cv-01259 (D. Ariz. Nov. 18, 2015). The first was that Baby Boy C is an enrolled member of the Navajo Nation, and the plaintiffs were “seeking to prohibit the application of ICWA to Navajo children in state custody . . .” *Id.* at 4. The second interest was the Navajo Nation’s “ability to determine its own citizenship and protect its children who are enrolled citizens.” *Id.* The Navajo Nation interpreted the plaintiffs’ claim as attacking typical tribal membership policies that rely on “blood quantum or lineage.” *Id.* at 5.

¹⁵⁵ *See* Order at 1, 3, *Carter*, No. 2:15-cv-01259-NVW (D. Ariz. Mar. 16, 2017) (“From the outset Plaintiffs have grounded sweeping challenges to ICWA and the 2015 Guidelines on vague or narrow allegations of their own experience with ICWA.”); *see also id.* at 19 (“They do not have standing to have this Court pre-adjudicate for state court judges how to rule on facts that may arise and that may be governed by statutes or guidelines that this Court may think invalid.”).

¹⁵⁶ *See* Appellants’ Opening Brief at 1, *Carter et al. v. Washburn et al.*, No. 17-15839 (9th Cir. Aug. 31, 2017) (“Plaintiffs have been—and the proposed class are going to be—deprived of their right to equal treatment under the law.”).

¹⁵⁷ *Id.* at 2–3.

Furthermore, the complaint juxtaposes the ICWA with other child custody laws, rather than placing it in the context of Indian Law more broadly. Plaintiffs' counsel argues that the plaintiffs are similarly situated by claiming: "But for ICWA, a strong likelihood exists that these families . . . would be allowed to become permanent under *race-neutral* Arizona laws permitting individualized *race-neutral* evaluation by state court of what is in the children's best interests."¹⁵⁸ If other child custody laws in Arizona are "race-neutral,"¹⁵⁹ then the ICWA is, by implication, race-based. This characterization of the ICWA, in combination with defining the class of children by their "Indian ancestry," seeks to erase the modern tribe from the picture entirely.

From the first sentence of the complaint, it is evident that this case is a direct claim of racial discrimination. The first three citations¹⁶⁰ are to *Brown v. Board of Education*,¹⁶¹ *Dred Scott v. Sandford*,¹⁶² and *Plessy v. Ferguson*.¹⁶³ Plaintiffs claim that "[c]hildren with Indian ancestry . . . are still living in the era of *Plessy* . . ."¹⁶⁴ Next, the plaintiffs point to the Multiethnic Placement Act (MEPA) and the Interethnic Placement Act (IEPA), both of which prohibit discrimination based on race, color, or ethnicity in adoption placements.¹⁶⁵ These references reaffirm the positioning of the ICWA squarely in the context of family law, rather than Indian Law. Thus, the plaintiffs set the stage for their main argument: the ICWA discriminates based on race, because "Indian" is a racial classification.¹⁶⁶ While the characterization of the ICWA may seem minor in comparison to their more substantive claims, the plaintiffs' positioning of the case is fundamental to achieving strict scrutiny, and therefore maximizing their chance of success on the equal protection claim.¹⁶⁷

The plaintiffs will likely try to build on Justice Alito's understanding of the ICWA in the *Baby Veronica* case, but they have a serious precedent problem. As discussed in Part IV, the Supreme Court has previously found that "Indian" does not refer to race but to a

¹⁵⁸ *Id.* at 11 (emphasis added).

¹⁵⁹ *Id.*

¹⁶⁰ See Amended Complaint, *supra* note 140, at 2.

¹⁶¹ 347 U.S. 483 (1954).

¹⁶² 60 U.S. 393 (1857).

¹⁶³ 163 U.S. 537 (1896).

¹⁶⁴ *Plessy* held that maintaining separate but equal train-cars for African Americans was constitutional. *Id.* at 550–51. For more on the comparison to *Plessy*, see Clint Bolick, *Native American Children: Separate but Equal?*, HOOVER INST. (Oct. 27, 2015), <http://www.hoover.org/research/native-american-children-separate-equal> ("More than a century ago, Adolph Plessy was consigned by law to a separate "colored" streetcar because he was one-eighth black. Today, children with only a small percentage of Indian blood and few if any ties to a reservation are involuntarily made subject to tribal jurisdiction and deprived of their full rights of American citizenship.").

¹⁶⁵ For a comparison between the MEPA and the ICWA, see Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).

¹⁶⁶ See Amended Complaint, *supra* note 140, at 2.

¹⁶⁷ Race-based classifications are subject to strict scrutiny. See *Korematsu*, 323 U.S. at 216 (stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and subject to the "most rigid scrutiny"). It is also possible that the "Indian" as a political category could be a suspect class subject to strict scrutiny, considering historical discrimination and lack of political access. See *United States v. Carolene Prods. Co.*, 304 US 144, 153 n.4 (1938). However, neither side would likely make this argument. For the plaintiffs, this would force them to discuss the reasons for the ICWA in the first place, only heightening the need for tribal protections. For the defendants, regarding Indians as a political category defined as a "suspect class" would ironically make it easier to strike down the ICWA.

political group.¹⁶⁸ Therefore, if the case proceeds to the merits, the plaintiffs must ask the court to make a leap from the text of the ICWA to tribal standards for membership, which often look to blood quantum and lineage.¹⁶⁹ If a court reaches the merits and adopts this logic, then the plaintiffs can make a historical analogy to the “One Drop Rule.”¹⁷⁰ The “One Drop Rule” developed as a way to define African-Americans as black, and therefore subordinate them, even if they only had one black ancestor.¹⁷¹ If the defendants successfully argue that the ICWA is about political affiliation rather than race, they avoid strict scrutiny. Thus, the outcome of this case likely hinges on the interpretation of “Indian” in the ICWA.

VI. CONCLUSION

Passed during a period when the official federal policy had turned towards tribal self-determination,¹⁷² the ICWA protects tribal sovereignty by granting tribes power over their child custody proceedings. In the context of legislation such as the ICWA that treats the tribes as political entities, there is no defensible reason to apply strict scrutiny under the Equal Protection Clause. For purposes of the ICWA, “Indian” is much closer to a political classification than a racial classification because it explicitly defers to the Indian tribes’ definition of “Indian,” and does not seek to impose race-based restrictions. Any fair reading of the statute must note the important tribal interest at stake in maintaining sovereignty, based on legislative history and the historical context of Indian identity in the United States. This reading does not mean that tribal interests are more important than the best interests of Indian children, but rather recognizes that they are inextricably linked.

Treating the statute as race-based legislation would be an unfair characterization of the ICWA and would lead to an improper application of strict scrutiny. In *Morton v. Mancari*, the Supreme Court understood the unique relationship between the federal government and the tribes. The modern battle over the ICWA is threatening this political relationship by seeking to redefine “Indian” in a racial manner. If the ICWA is to be

¹⁶⁸ See *Mancari*, 417 U.S. 535. See also Federal Defendants’ Motion to Dismiss and Memorandum of Points and Authorities at 2, *Carter*, No. 2:15-cv-01259 (D. Ariz. Oct. 16, 2015) (“The claim that provisions of ICWA are racially discriminatory is foreclosed by governing Supreme Court precedent . . . establish[ing] that classifications based on tribal membership . . . are political, not racial classifications.”); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (reaffirming the holding of *Mancari*, and finding that “federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications”).

¹⁶⁹ See Paul Adams, *Blood Quantum Influences Native American Identity*, BBC (July 10, 2011), <http://www.bbc.com/news/world-us-canada-14089253> (describing the range of practices of tribes, from requiring a 50% tribal blood for membership, to requiring 6.25% tribal blood, to not having a blood quantum requirement at all).

¹⁷⁰ For an analogy to the “One Drop Rule”, see Israel & Dewan, *supra* note 19 (showing Goldwater Institute Vice President of Litigation, Timothy Sandefur, made the following statement: “Imagine if you said, if you have a single drop of Chinese blood . . . It would be obviously a violation of the Fifth Amendment”).

¹⁷¹ For a thorough discussion of the “One Drop Rule,” see Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997).

¹⁷² See Gallagher, *supra* note 41, at 87.

challenged, it should be challenged on its own merits and treated as legislation based on the unique political classification of “Indian.”

Some may be concerned by the broader implications of treating “Indian” as a political classification, such as Congress passing legislation that harms Indian sovereignty, or even legislation based on racial biases that could pass rational basis review. However, I perceive two safeguards to this problem. The first is that such legislation is unlikely to be rationally tied to the unique relationship between the federal government and Indian tribes, under the *Mancari* standard. The Supreme Court could have chosen to apply regular rational basis review in *Mancari*, but instead created a caveat. This caveat is consistent with both the intentions of the Fourteenth Amendment, as well as a realistic understanding of the historical subordination of Indians in the United States. If legislation is not related to this unique relationship, it could be struck down. By asking if the legislation is related to the unique relationship, the Court is essentially asking if the legislation treats Indians as a political rather than racial group.

The second safeguard is that any hypothetical racist legislation targeting Indians is likely to impose some race-based definition of Indian. This could be considered the legislative slip-up safeguard. It seems unlikely that discriminatory legislation would allow the discriminated party to self-define. If it did, Indian tribes could essentially opt out by adjusting their own charters or membership structures. Legislative history may also indicate race-based intent. Thus, even if the legislation is arguably related to the unique relationship between tribes and the government under *Mancari*, plaintiffs could argue that “Indian” was intended as a race-based classification for purposes of the statute, such that it merits strict scrutiny.

The Census gives respondents the opportunity to mark “Indian” as their race and to separately identify as a member of a tribe.¹⁷³ Being Indian can certainly mean both. While there are no easy answers as to whether Indian is political or racial, the question becomes to what extent a court should make that decision for tribes. As the ICWA faces broader constitutional challenges, it is an important time to fight to maintain the *Mancari* standard, despite its potential drawbacks. To do so, ICWA proponents should demonstrate that “Indian” is a political classification for purposes of the ICWA, and that efforts to reframe the ICWA as race-based legislation are inconsistent with both legislative intent and the unique relationship between the federal government and tribes.

¹⁷³ See Goldberg, *supra* note 68, at 1394.