No. 98-818

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1998

HAROLD F. RICE,
Petitioner,
VS.
BENJAMIN J. CAYETANO,
Governor of the State of Hawaii,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKA FEDERATION OF NATIVES AND COOK INLET REGION, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Amici Curiae, the Alaska Federation of Natives ("AFN") and Cook Inlet Region, Inc. ("CIRI") represent tens of thousands of Alaska Natives — the aboriginal peoples who crossed the Bering Strait and settled Alaska between 15,000 and 3,000 years ago. AFN is a statewide, non-profit organization representing 90,000 Alaska Natives on issues important to the Alaska Native community. AFN is comprised of representatives of each of the twelve Alaska regional corporations established under the Alaska Native Claims Settlement Act of 1971 ("ANCSA") as well as representatives from regional non-profit associations and rural Alaska Native villages. CIRI is the ANCSA regional corporation for the area around Cook Inlet, discovered by Captain James Cook in 1778. CIRI is owned by roughly 7,000 Native shareholders of Athabascan, Eskimo and Aleut descent. CIRI provides health, housing, and employment services and income to many of its shareholders.[1]

SUMMARY OF ARGUMENT

The unique native peoples of Alaska have been recognized as "Indian" "Tribes" for four hundred years. The Founders' understanding of the "Eskimaux" as Indian Tribes, and Congress' recognition of its power over Alaska Natives ever since the passage of the Fourteenth Amendment and the acquisition of the Alaskan territory, help illuminate Congress' power over, and responsibility for, all Native American peoples.

The treatment of Alaskan Eskimos is particularly instructive because the Eskimo peoples are linguistically, culturally, and ancestrally distinct from other American "Indians." Many modern scholars do not use the word "Indian" to describe Eskimos or the word "tribe" to describe their nomadic family

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[1] No counsel for a party authored any part of this brief; no one other than *amici* or their counsel made a monetary contribution to its preparation or submission. Supreme Court Rule 37.6. All parties consented to the filing of this brief in letters on file with the Clerk of this Court. *Id.* 37.3(a).

groups and villages. The Framers, however, recognized no such technical distinctions. In the common understanding of the time, Eskimos, like Hawaiian Natives, were aboriginal peoples; they were therefore "Indians." Their separate communities of kind and kin were "Tribes." Congress' special power over these aboriginal peoples is conceded by Petitioner and is beyond serious challenge. This brief uses the unique perspective and historical experience of the Arctic peoples of Alaska to illuminate three historical propositions:

1. During the Founding Era, and during the Constitutional Convention, the terms "Indian" and "Tribe" were used to encompass the tremendous diversity of aboriginal peoples of the New World and the wide range of their social and political organizations. The Founding generation knew and dealt with Indian Tribes living in small, familial clans and in large, confederated empires. Native Alaska villages and Native Hawaiians residing in their aboriginal lands (*i.e.*, the small islands that comprise the State of Hawai`i) are "Indian Tribes" as that phrase was used by the Founders.

2. The Framers drafted the Constitution not to limit Congress' power over Indians, but to make clear the supremacy of Congress' power over Indian affairs.

3. Congress has retained the power to promote the welfare of all Native American peoples, and to foster the ever-evolving means and methods of Native American self-governance.

This history is accurately reflected in two centuries of this Court's jurisprudence. Starting with Chief Justice Marshall, this Court has recognized the power of the United States to provide for the welfare, and to promote the self-governance, of Indian peoples. With Congress' permission and support, Native American peoples have long selected their own leaders. This right is part of the structure of America's complex experiment in multi-sovereign governance. Petitioner, a citizen of Hawai`i and *not* a Native Hawaiian, has no more "right" to vote in the quasi-sovereign government structures of Native American peoples than he does to vote in the state elections of New York.

I. FRAMING THE CONSTITUTION

A. The Contemporaneous Understanding of "Indian"

Petitioner apparently contends that Native Hawaiians are not "Indian Tribes" because they lived in a "Kingdom" ruled by a "King" — a Kingdom overthrown by Western businessmen and American officials in 1893. Whatever the merits of this view of "Indian Tribes" in modern ethnographic terms, Petitioner's understanding of the Constitution is wildly anachronistic. In the language and understanding of the Founders, "tribes" or "peoples" did not lose their identity as such when conquered or ruled by kings. Like other Native American peoples, Hawaiian Natives lived for thousands of years as "tribes," then as confederations of tribes, now as conquered tribes.

1. The Founders Used "Indians" to Refer to the Aboriginal Peoples of the "New Founde Lands"

All aboriginal peoples of the New World were "Indians." That is what it meant to be an "Indian." The Founders knew that Columbus had not landed in India or the Indies; Columbus's navigational error had been corrected, but his malaprop had survived. And so, in the words of one of the earliest English books about America, the native peoples were "Indians," for the simple reason that "*so caule wee all nations of the new founde lands.*"[2]

Roger Williams made the same point in *A Key Into the Language of America* (1643). Williams understood that the English terms for the aboriginal peoples, "Natives, Savages, Indians, Wild-men . . . , Abergeny men, Pagans, Barbarians, Heathen," were the white-man's concepts, not the names that the natives "give themselves":

They have often asked mee, why we call them *Indians*,

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[2] Gonzalo Fernández de Oviego y Valdéz, *De la natural hystoria de las Indias* (1526), *trans. by* R. Eden (1555), in E. Arber, ed., *The First Three English Books on America* (Birmingham, Eng., 1885) (emphasis added).

Natives, &c. And understanding the reason, they will call themselves *Indians*, in opposition to *English*, &c.[3]

Indians were defined by contrast. Indians were *the other— non*-English, *non*-Europeans, *un*civilized, *un*believers—the "savages" the Europeans "discovered" in the "new founde lands."

2. The Founders Knew that the "Indian" Peoples Were Politically and Ethnically Diverse

The earliest explorers of the New World encountered an extraordinary diversity of aboriginal peoples—from the elaborate Aztec and Inca civilizations of the South to the nomadic "Esquimaux" of the North. These early experiences and the contemporary fascination with these diverse cultures informed the concept of "Indians" in the colonial era.

The accounts of Hernan Cortes and Bernal Diaz portrayed the "Indians" of the New World living in villages and towns, building stone temples and paying gold tribute to conquering tribes led by Montezuma.[4] The English came to North America looking for gold, and seeking to displace their Spanish competitors, inspired in part by the Spanish experience.

During the same era, starting with John Cabot's 1497 voyage, repeated quests for the "Northwest passage" from the Atlantic to the Orient brought wave after wave of Englishmen into contact with the "Esquimaux Indians" from Greenland to Alaska. In 1578, an English explorer captured several Eskimo, including a "strange man and his bote" (a kayak), off of Baffin

[3] *Quoted in* Robert F. Berkhofer, Jr., *The White Man's Indian* (1979), 15.

[4] Early explorers understood that Montezuma's Aztec "Empire" reflected the ascendancy of some Indian peoples over others. Each Indian village or "people" ("gente") was separately named, had their own "chiefs," and paid "tribute" to or were at war with the Aztec people. *See,* Cortés, *Letters from Mexico* (1519-1526) (Pagden, tr., 1986), 30-36, 50-57, 66-85, 95-97, 109; Díaz, *The Conquest of New Spain* (1568) (Cohen, tr., 1963), 140-88; Fray Diego de Landa, *Relación de las Cosas de Yucatán* (1566), ch. VIII; *see* A.M. Josephy, Jr., *The Indian Heritage of America* (rev. ed., 1991), 212-13.

Island, and brought them to London. The "captive Eskimos . . . quickly became the center of widespread interest."[5] In a contemporary account, the "'strange man and his bote . . . was such a wonder onto the whole city and to the rest of the realm that heard of it as seemed never to have happened the like great matter to any man's knowledge.'"[6] Queen Elizabeth was "so impressed . . . she granted [the Eskimo] permission to hunt swans on the Thames," an act for which Englishmen were punished by hanging.[7] An Eskimo paddled a kayak up the Thames before the Pilgrims set foot on Plymouth Rock.

For the next two hundred years, European explorers continued to encounter the "Esquimaux Indians." In his famous 1778 voyage — in which he "discovered" the Hawaiian Islands and encountered the "Indians" there — Captain Cook sailed through the Bering Strait and along the coast of Alaska, discovering Cook Inlet, from which *amicus* Cook Inlet Region, Inc. takes its name. He described encounters with "Esquimaux" "nations" in western America.[8] In 1789, McKenzie explored "Cook's River" and passed among the "Esquimaux *Indians*."[9]

There was no understanding in the founding generation that Indians constituted a distinct or separate race. Indians were

[5] Wendell H. Oswalt, *Eskimos & Explorers* (2d Ed.) (1999), 32.

[6] Michael Lok, "East India by the Northwestw[ard]", in *A True Discourse of the Late Voyages of Discoverie . . . [by] Martin Frobisher* (1578), *reprinted in The Three Voyages of Martin Frobisher* (Hakluyt Society), 87. With such experiences, the imagery of primitive man entered the culture. By 1600, Shakespeare's audience readily understood Othello's sad likening of himself to "the base indian" who "threw a pearl away richer than all his tribe." (V.ii.348-49).

[7] Oswalt, *supra*, at 32.

[8] James Cook, *A Voyage to the Pacific Ocean* (1784), vol. II, bk. IV, ch. IV, pp. 357, 368, 371, 374; *id.* at ch. VI, pp. 391, 400; *id.*, ch. XI, pp. 521-22.

[9] Alexander McKenzie, *Voyages from Montreal* (3rd American ed., 1803) (*quoted in* Oswalt, *supra*, at 65); *see also* Arthur Dobbs, *An Account of the Countries Adjoining Hudson's Bay* (1744), 49 (describing the "Eskimaux Indians"); Henry Illis, *A Voyage to Hudson's-Bay, by the Dobbs Galley and California* (1748) (1967 reprint) (references to "Eskimaux Indians").

often assumed by the European settlers to be peoples like themselves:

> Before the development of modern dating methods that established beyond doubt the great antiquity of early man in America, it was believed that the Indians were offshoots of known civilizations of the Old World. Some scholars argued that they came from Egypt, others that they had broken away from the Chinese, and still others that they were descendants of Phoenician or Greek seamen.... Another belief, more legend than theory, held that various light-skinned tribes possessed the blood of Welshmen who had come to America in the remote past....[10]

Others theorized the Indians were the "lost tribes" of Israel.[11]

In his popular *Notes on the State of Virginia*, Thomas Jefferson accepted the plausibility of the popular notion that the Indians had migrated to America from Europe via "the imperfect navigation of ancient times."[12] Jefferson noted, however, that Cook's voyage through the Bering Strait suggested that all the "Indians of America" except the "Eskimaux" migrated from Asia. Jefferson theorized that the Eskimos had come to

[10] Josephy, *supra*, at 40.

[11] *Id.* at 40; Letter, Jefferson to Adams, June 11, 1812 (discussing a popular book arguing "all the Indians of America to be descended from the Jews ... and that they all spoke Hebrew"), *in* Jefferson, *Writings* (Library of America, 1984),1261; Diaz, *supra*, at 26 (objects at Indian site attributed "to the Jews who were exiled by Titus and Vespasian and sent overseas").

[12] Jefferson, *Notes on the State of Virginia* (1787), *in* Jefferson, *Writings*, at 226. Jefferson's *Notes* — which had circulated among several of the Founders for years before the Constitutional Convention — were written in 1781, published in February 1787 and appeared in newspapers during the Convention. Barlow to Jefferson, June 15, 1787, in *Papers of Thomas Jefferson* (Boyd, ed.), 11: 473 ("Your Notes on Virginia are getting into the Gazetts in different States"); *see also, e.g., id.* at 8:147, 9:38, 517, 12:136 (Madison's copy); *id.* at 10:464, 15:11 (Rutledge's comments on); *id.* at 8:160, 164 (Adams comments on); *id.* at 8:147, 229, 245 (Monroe's copy); *id.* at 21:392-93 (citations re circulation of *Notes*).

America via Greenland from "the northern parts of the old continent," *i.e.*, Northern Europe.[13]

Modern scholars might be "puzzled whether they [Eskimos] were Indians, or a separate and somewhat mysteriously distinct people on earth . . . ."[14] The panel below seemed puzzled whether the native people of Hawai`i are "Indians." Such distinctions would themselves have puzzled the Founding generation. The "Indians" were many peoples, with distinct languages, cultures and socio-political organizations. They had diverse origins, perhaps Asia, perhaps Europe, perhaps the lands of the Bible. But from wherever they came, and whatever their distinct cultures and governments, they were all "Indians," for they were aboriginal inhabitants of the New World. The Founding generation had no difficulty thinking of Eskimos as "Indians." They would have had no more difficulty treating as "Indians" native peoples whose origins lay a thousand years ago in the South Pacific. As far as the Founders knew, all the "aboriginal inhabitants" of the New World came from the South Pacific via the "imperfect navigation of ancient times."

B. The Founding Generation Used "Tribes" to Denote Peoples of Like Kind or Kin

Petitioner assumes that the word "Tribe" in the Constitution refers to some specific type of government or social organization. It is not so. All Native American peoples were "tribes," whether they lived in villages or spread out in vast federations or empires. "Tribe" and "nation" were used to refer not to governments, but to groups of people recognizing a common membership or identity as such. Application of the biblical concept of "tribes" to the "Indians" reflected the understanding that the natives of the New World were not one people, but many "peoples," "nations," or "tribes"—terms used inter-

[13] Jefferson, *Notes*, *supra*, at 226.

[14] Josephy, *supra*, at 57; *see also Oxford English Dictionary* (1 st ed.) ("*OED*"), "Indian" ("The Eskimos . . . are usually excluded from the term").

changeably well into the Nineteenth Century.[15]

Eskimos lived in small clans or villages that some scholars distinguish from "tribes." The Founding era knew no such technical usage. Notwithstanding the absence of clear government, Eskimo peoples were called "Tribes" and "Nations."[16]

More generally, peoples of every sort were "tribes." In Gibbon's already popular *Decline and Fall of the Roman Empire* (1776), the early inhabitants of Britain were said to live in "Tribes."[17] The early Greeks and Romans were "tribes." Welshmen belonged to Tribes.[18]

For the Founding generation, "tribes" came into the language from the most widely read account of tribal history — the biblical story of the Twelve Tribes of Israel.[19] The Bible gives the history of the Tribes from the birth of the sons of Israel, through the growth of the families to immense "tribes" numbering in the tens of thousands. The Bible follows the tribes into captivity and exodus and into Canaan, where the "tribes" lived in a unified Kingdom under Kings David and Solomon.[20] Even under the reign of Kings, the peoples re

[15] Berkhofer, *supra*, at 16.

[16] Alexander Fisher, *A Journal of a Voyage of Discovery* (1821) ("all the Esquimaux tribes") (quoted in Oswalt, *supra*, at 74); *The Private Journal of Captain G.F. Lyon*, (1824) (an Eskimo "tribe") (*quoted in* Oswalt, *supra*, at 179); George Lyon, *A Brief Narrative of an Unsuccessful Attempt to Reach Repulse Bay* (1825); *Narrative of the Second Arctic Expedition Made by Charles F. Hall* (Nourse, ed., 1879), 63 (describing "tribe" of "Eskimo"); John Murdoch, "Review of *The Eskimo Tribes*," *American Anthropologist*, 1:125-133 (1888); Heinrich Rink, *Tales and Traditions of the Eskimo* (1875) 1-5 (describing small and large divisions of Eskimos as "tribes").

[17] Vol. 1, p. 33 (describing the "tribes of Britons" who "took up arms with savage fierceness" and the "love of freedom without the spirit of union.")

[18] *OED*, "Tribe," def. 2.a-d.

[19] *OED*, "Tribe" (application of the word "to the tribes of Israel . . . from its biblical use, was the earliest use in English").

[20] *Genesis* 49:1- 28 (Jacob predicts the fate of the twelve tribes); *Numbers* 1 (God instructs Moses to call heads of each tribe); 2 *Samuel* 5:1-3 (leaders

mained "tribes." When King Solomon dedicated the temple in Jerusalem, he called together the leaders of the "tribes":

> Solomon assembled the elders of Israel, and all the heads of the tribes, the chief of the fathers of the children of Israel, unto King Solomon in Jerusalem, that they might bring up the ark of the covenant of the Lord out of the city of David, which is Zion.[21]

When the Kingdom ended, it divided by tribe. The tribes of Benjamin and Judah fought the other tribes that revolted and were "lost."[22] Throughout all this history, through the unification and monarchical period, through the revolt and diaspora, the Bible taught that the people of Israel remained "tribes," led by their "chief fathers."[23] In the New Testament, all the peoples of the earth were "tribes."[24] In the founding generation, "tribes" in the New World, like "tribes" in the Bible, referred not to a form of social organization or government, but to "peoples" who identified themselves by kin, tradition, or faith.

The Founders had seen analogies to the complex tribal history of the Bible. The Founders knew the native peoples evolved, united and divided in ever shifting forms of government. The native peoples had formed "powerful confederac[ies]," tribes united under common chiefs, and federations of tribes joined with other federations.[25] The colonies and the States under the Articles of Confederation had repeatedly dealt with vast federations of tribes, including the "Six Nations" in

of tribes form league under King David); 1 *Chronicles* 11:1-3 (same); *Psalm* 122 (David expresses joy for the house of God, where tribes give thanks).

[21] 1 *Kings* 8:1 ("King James translation" (1611-1769)); 1 *Kings* 11:12-13.

[22] *See* 1 *Kings* 12; 2 *Chronicles* 10-11, 36; 2 *Kings* 17, 25.

[23] *Ezra* 1:5.

[24] *Matthew* 24:30 (Christ prophesizes that, at the end of time "then shall all the tribes of the earth mourn, and they shall see the Son of man coming").

[25] Jefferson, *Notes on the State of Virginia*, *supra*, at 221.

the north and the "five civilized tribes" in the south.[26] The Indian peoples were "tribes" not because they formed any particular organization, but because they recognized themselves as distinct peoples, with cultures, languages and societies separate from each other and from the European invaders.

By the Founding era, "Tribe" had expanded from groups of people to the natural division of plants and animals. Milton asked in *Paradise Lost*, "Oh flours . . . who now shall reare ye to the Sun, or ranke Your Tribes?" (xi, 279). John Adams wrote, "there is, from the highest Species of animals upon this Globe which is generally thought to be Man, a regular and *uniform Subordination of one Tribe to another down to the apparently insignificant animalcules in pepper Water.*"[27] All creation came in tribes. Mankind was organized in tribes, the Animal Kingdom was organized in "tribes," the "Vegetable Kingdom" was organized in "Tribes."[28] To every kind its tribe.

The Founding generation knew Indian peoples who lived in small, leaderless bands; they also knew Indian peoples organized in complex federations and empires. The Europeans and the American colonists understood that the aboriginal peoples warred with and conquered each other, made agreements and alliances, formed confederations and even kingdoms and empires. Through all this complex and still evolving history, the Indian "peoples" were called "Nations" and "Tribes." Contrary to Petitioner's unspoken assumption, the Founding generation would have had no difficulty conceiving of Indian

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[26] *See, e.g.*, Treaty with the Six Nations, Oct. 22, 1784 (treaty with the many tribes of Senecas, Mohawks, Onondagas, Cayugas, Oneida and Tuscarora), *in* C. J. Kappler, ed., *Indian Affairs: Laws and Treaties*, 2:5-6; Treaty of Fort McIntosh, Jan. 21, 1785 (treaty with the Wiandot, Delaware, Chippewa, and Ottawa "and all their tribes"), *in id.* at 2:6-8; Treaty of Hopewell, Nov. 28, 1785 (treaty with all the "tribes" of the Cherokee), *in id.* at 2:8-11.

[27] Adams, July 1756 (emphasis added), in L.H. Butterfield, *et al.*, eds., *Diary and Autobiography of John Adams* (Cambridge, Mass., 1961), I:39.

[28] *Id.*; *see also OED*, "Tribe," 5.a; Cook, *supra*, at ch. II, p. 300 (In the west side of America, "[t]he insect tribe seems to be more numerous").

Tribes who originated in Polynesia, and lived in a "Kingdom" under a "King." Congress has determined that the aboriginal peoples of Hawai`i are, within the meaning of the Constitution, Indian Tribes. That judgment is historically correct.

C. The Historic Distinction Between the Indian Peoples and the European Settlers Was Not Racial

As Jefferson's *Notes on the State of Virginia* and other contemporary works show, the division of the world into "European settlers" and "Indians" was not essentially racial. The Indians were not a race, they were many peoples, thought to share diverse ancestry with peoples all over the world. The distinction between European and Native American peoples was political. The European settlers (who arrived with Royal charters) recognized the "aboriginal peoples" as separate nations — separate sovereigns with whom they would have to deal as one nation to another. Before and after the Constitution, the new settlers treated the Indian peoples as separate nations, with whom they made war, peace and treaties. The treatment of the aboriginal peoples under the Constitution was systematically and structurally distinct from the inhumane and unendurable treatment accorded to "slaves." This distinctive nation-to-nation relationship survived the settlement of the West, the Civil War Amendments, and two hundred years of Congressional action and judicial construction.

D. The Constitutional Convention — Perfecting Congress' Supremacy Over Indian Affairs

The Articles of Confederation gave the Continental Congress power over relations with the Indians only so long as Congress' dealings with Indians *within* a State did not "infringe" that State's legislative power. This created constant friction over where the States' power ended and Congress' power began. The sole stated purpose of the Indian terms of the new Constitution was to eliminate any uncertainty as to Congress' supremacy. The Framers intended to grant Congress broad, supreme authority to regulate Indian affairs. The two references to "Indians" in the Constitution generated virtually

no debate at any time in the Constitutional Convention. That relations with the Indians should be one of the *federal* powers appears to have been universally accepted. The Framers sought only to make clear that Congress' power here was supreme.

The Articles had given the Continental Congress "sole and exclusive right and power" of regulating relations with Indians who were "not members of any of the states, *provided* that the legislative right of any state within its own limits be not *infringed* or violated." Articles of Confederation, Art. X, March 1, 1778 (emphasis added). As Madison explained, this language created two major problems. First, no one knew when or whether Indians were "members of states"; second, the grant to Congress of "sole and exclusive power," so long as Congress did not "intrud[e] on the internal right" of States was "utterly incomprehensible." The provision had been a source of "frequent perplexity and contention in the federal councils."[29] Capitalizing on the uncertainty, several states (Georgia, New York and North Carolina) had infringed Congress' power by making their own arrangements with local Indians. As a result, during the Constitutional Convention and Ratification, Georgia was in armed conflict, and on the verge of war, with the powerful Creek Nation.[30]

The only debate on the issue in the Convention focused on the need for federal *supremacy* over the states. Madison objected early on to the "New Jersey Plan" on the ground that it failed to bar states from encroaching on Congress' power over "transactions with the Indians."[31] In August, Madison

[29] *Federalist* 42, *in* XIV *Documentary History of the Ratification of the Constitution* (J. Kaminski, ed., 1983) ["*Documentary History*"], XV:431.

[30] The need for a powerful federal government to deal with the Indians, and to avoid the then current troubles in Georgia, was a frequent refrain during Ratification. *See, id.* at XIII:507, 557; XV:399, 550; XVIII:12, 152.

[31] "Notes of James Madison," June 19, 1787, *in The Records of the Federal Convention of 1787*, at 3:316 (Max Farrand, rev. ed. 1966) [hereafter, "*Federal Convention*"] ("By the federal articles, transactions with the Indians appertain to Congress. Yet in several instances, the States have entered into treaties & wars with them"); *see also, id.* at 325-26.

proposed that Congress be given the power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."[32] Madison's proposal was submitted to the Committee on Detail without discussion.

The Committee on Detail recommended that power over Indians be dealt with in the Commerce clause, which would provide Congress with power over commerce "with the Indians, within the limits of any State, not subject to the laws thereof." The proposal provoked no debate.[33] On August 31st, the Convention referred various "parts of the Constitution" (including the Commerce Clause) to a "Committee of eleven," including Madison.[34] Without recorded discussion, the Committee recommended that the language be simplified to commerce "with *the Indian tribes*."[35] The Convention accepted the recommendation without debate or dissent.[36]

There is no support for the notion that the reference to "Indian tribes" was intended to *narrow* Congress' authority over Indian affairs. As noted above, the debate in the Convention focused solely on making clear the *supremacy* of Congress' power. During the ratification debates, the new Constitution was defended on the ground that it gave Congress power over "*Indian affairs*" and "trade with the *Indians*."[37] In the only

[32] 2 *Federal Convention*, at 321, 324; *see also id.* at 143 (Rutledge noted that "Indian affairs" should be added to Congress' powers).

[33] *Id.* at 367. Similarly, since Indians did not pay tax, the proposal to exclude "Indians not taxed" from the apportionment clause was accepted without discussion.

[34] *Id.* at 481.

[35] *Id.* at 493, 496-97, 503 (emphasis added).

[36] *See id.* at 495. The language appears in the final version. *Id.* at 569, 595.

[37] *Federalist* 40, *in Documentary History*, XV: 406 (Constitution represents "expansion on the principles which are found in the articles of confederation," which gave Congress power over "trade with the Indians"); Federal Farmer, October 8, 1787, *in id.* at XIV: 24 (under the new Constitution, federal government has power over "all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs"); Federal Farmer, October 10, 1787, *in id.* at 30, 35 (federal power over "foreign

extended discussion of the issue during Ratification, Madison used the phrases "commerce with the Indian tribes" and "trade with Indians" interchangeably; Madison explained that the purpose of the new provision was to eliminate the limitation on Congress' power over trade with the Indians living within the States.[38] The notion that the reference to "Tribes" was a limit on Congress' ability to deal with the native peoples is without support and is contrary to the only expressions of the Framers' original intent. The Constitution gave Congress power over the Indian peoples, however and wherever it found them.

E. The Founders Asserted Power Over All Indians

The First Federal Congress treated the Constitution as granting broad power to regulate "trade and intercourse" with "Indians," "Indian tribes," "nations of Indians," and "Indian country."[39] Congress understood its power to "operate immediately on the persons and interests of individual citizens."[40]

The actions of the new government also show that even when the Framers knew nothing about the organization of Indian peoples, they nevertheless intended to assert federal power over those peoples. Shortly after taking office, President Washington gave instructions to Commissioners to negotiate with the Creeks. It was, as noted, the war between the Creeks and Georgia that had fostered the apparently universal conclusion that the new federal government must be given supremacy over Indian affairs. Washington instructed the Commissioners to determine the nature of the Creek's political divisions and governments, including "[t]he number of each division"; "[t]he number of Towns in each District"; "[t]he names, Characters

concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs"). The Federal Farmer Letters are considered "one of the most significant publications of the ratification debate." *Id.* at 14.

[38] Madison, *Federalist* 42, *in Documentary History* XIV: 430-31.

[39] "An Act to regulate trade and intercourse with the Indian tribes," July 22, 1790, ch. 33, §4, 1 Stat. 137, *in 1 Doc. Hist. of the First Federal Congress, 1789-1791* (De Pauw, ed., 1972) ["*First Federal Congress*"], at 440.

[40] Madison, *Federalist* 40, *in Documentary History*, XV: 406.

and residence of the most influential Chiefs — and . . . their grades of influence." And, most tellingly, the Commissioners were to learn "*[t]he kinds of Government (if any)* of the Towns, Districts, and Nation."[41] Washington, like other Founders, did not know how the Creek lived and how (if at all) they governed themselves. But however the Indian peoples lived, and however (if at all) they governed themselves, they were still Indian peoples and they were still subject to the supreme power of the Federal Government over Indian Tribes.

Jefferson gave similar instructions to Lewis and Clark. When they encountered unknown Indian peoples, the explorers were to learn the "names of the nations"; "their relations with other tribes or nations"; their "language, traditions, monuments"; and the "peculiarities in their laws, customs & dispositions."[42] Like Washington, Jefferson knew there was much he and his fellow citizens did not know about the "Indian" peoples; but he intended to find out and to assert federal authority over whatever he found.

It is inconceivable anyone thought that if Washington's Commissioners or Lewis and Clark found a native people living without "chiefs," like many Eskimo, or under a King like Montezuma or Kamehameha, these people would be beyond Congress' power over Indian "tribes" or nations.

II. FRAMING OF THE FOURTEENTH AMENDMENT

A. The Fourteenth Amendment Was Not Intended to Abolish Congress' Power Over Native Peoples

The Framers of the Fourteenth Amendment did not intend to eliminate Congress' special power to adopt legislation singling out and favoring Indians; they did not intend to alter the nation-to-nation relationship between the United States and the Indian peoples created by the Constitution. Indeed, the

[41] Washington, Instructions to the Commissioners for Southern Indians, August 29, 1789, *in* 2 *First Federal Congress*, at 207 (emphasis added).

[42] Thomas Jefferson, "Instructions to Captain Lewis," June 20, 1803, *in* Jefferson, *Writings*, *supra*, at 1126, 1128.

Framers of the Amendment were at pains to make certain that they preserved that structure.

"Indians" are expressly singled out for special treatment by the text of the Amendment. In order to eliminate the morally repugnant language which counted slaves as three-fifths persons, the Framers of the Fourteenth Amendment redrafted the apportionment clause. The Framers deleted the "three-fifths persons," but retained the express exclusion of "Indians not subject to tax" (Amend. XIV, §1), because, while they intended to wipe out the badges and incidents of slavery, they intended to preserve the special relationship between the United States and the Indian peoples: Before and after the Amendment, Indians were not citizens, they did not vote, they did not count for apportionment, and they were subject to special legislation in furtherance of Congress' historic trust responsibilities.

The only debate during the drafting and ratification of the Fourteenth Amendment was not about *whether* the special relationship with the Indian peoples should be preserved, but about how to make certain it was preserved. When one Senator suggested that specific reference be made excluding "Indians" from the citizenship clause, the Senator presenting the clause argued this was unnecessary. The Amendment provided citizenship only to persons "within the jurisdiction" of the United States,[43] and Indian nations were treated like alien peoples not fully within the jurisdiction of the government:

> . . . in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with Indian tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes.[44]

Congress debated what language to adopt in order to make certain that the special status of the Indian tribes was

[43] Similar limiting language occurs in the Equal Protection Clause.

[44] *Cong. Globe*, 39th Congress, 1st Sess. 2895.

preserved.[45] There was no support for, or consideration given to, eliminating the special relationship between the United States and the Indian peoples. The uniform intent was to preserve Congress' ability to decide when Indians would be granted citizenship, when Indians would be taxed, and when Indians would be subject to special legislation.[46]

It is hard to imagine, as Petitioner seems to do, that the Framers of the Fourteenth Amendment expressly singled out Indians to be deprived of the rights of citizenship and apportionment, and yet intended to abolish Congress' special power to enact legislation for the benefit of the Indian peoples. The position is not only without historical support, it is contrary to Congress' clear efforts to preserve the separate status of the Indian peoples. As one Senator leading the charge for civil rights that year urged his colleagues in connection with a civil rights act, "I should be very glad if our friends would not embarrass this general bill with provisions in regard to this particular class of persons [Indians]. *Let them be legislated for separately.*"[47]On this, there was agreement. The separate treatment of the Indian tribes was woven into the structure in Constitution and preserved by the Civil War Amendments.

III. SPECIAL TREATMENT OF ALASKA NATIVES

A. The Framers of the Fourteenth Amendment Treated Alaska Natives as "Indian Tribes"

Congress proposed the Fourteenth Amendment by two-thirds majority; in 1867, after ratification, the Fortieth Congress declared the Amendment the law of the land. The *same*

[45] *See, e.g.*, Remarks of Sen. Doolittle, *Cong. Globe*, 39th Cong., 1st Sess., 2895-2896 (1866) ("[Senator Howard] declares his purpose to be not to include Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them").

[46] Congress expressed the same intent in the Civil Rights Act that same year. The Act, granting citizenship to the emancipated slaves, specifically excluded "Indians not taxed." Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

[47] Remarks of Sen. Trumbull, *Cong. Globe*, 39th Congress, 1st Sess., 527.

Congress ratified the Treaty of Cession with Russia for the acquisition of Alaska. The Treaty reaffirmed the special place of, and Congress' special power over native peoples. The treaty provided that all Alaskan inhabitants

> *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.*[48]

Congress agreed that "Alaskan Natives [would be] under the guardianship of the federal government and entitled to the benefits of the special relationship" between the United States and the Indian tribes.[49] "It is," as this Court noted in a related context "improbable, to say the least, that the same Congress which affirmatively approved . . . these . . . Indian preferences was, at the same time, condemning [them under the equal protection clause] as racially discriminatory." *Morton v. Mancari*, 417 U.S. 535, 548-49 (1974).

B. The Diversity of Alaska Native Government — from the Primeval Village to ANCSA

Alaska Natives are comprised of at least three distinct groups: Athabascans, Eskimos, and Aleuts.[50] Current scholarship suggests that the Athabascan peoples migrated across the Bering land bridge more than 10,000 years ago. The Eskimos and Aleuts appear to have migrated, in Jefferson's phrase, through "ancient navigation" in various waves, some as recently as two thousand years ago.[51] Since the acquisition of

[48] Treaty of March 30, 1867, 15 Stat. 539, 542.

[49] *Alaska Chapter v. Pierce*, 694 F.2d 1162, 1168-69 (9th Cir. 1982).

[50] Federal Field Committee, *Alaska Natives & the Land* 39, 99-128 (1968); Hubert Bancroft, *History of Alaska* 69-84 (1886).

[51] Field Committee, *supra*, at 129-284; Josephy, *supra*, 60-61.

Alaska, Congress has treated these peoples as "Indian Tribes."[52]

Congress also has recognized and promoted diverse forms of self-governance for Alaska Natives — from small villages to vast regions. The vast majority of Alaska Natives—particularly Eskimos and Aleuts — have traditionally lived in Native villages, not in the reservations or tribal governments common in the 'lower 48.'[53] The villages are distinct Native communities. Some of them are organized on a traditional basis, with village councils and leaders. Others have organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.* They have constitutions, bylaws, and charters, provide municipal services and engage in business. A few villages have even incorporated as cities under state law.[54] All the Native villages are communities of aboriginal peoples and thus "Indian tribes" under the Constitution.[55]

Congress has also provided other forms of self-government unique to Alaska Natives, under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601, *et seq.* ANCSA effected a "fair and just settlement of all claims by Natives . . . of Alaska, based on aboriginal land claims." *Id.* § 1601(a). Under ANCSA, Congress distributed land and money to *state chartered corporations* mirroring preexisting Native organizations. ANCSA authorized more than 200 Native villages to

[52] *See* Felix S. Cohen, *Handbook of Federal Indian Law* 404 (1941) ("The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians of the United States. It is now substantially established that . . . the laws of the United States with respect to the Indians . . . are generally applicable to the Alaskan natives.").

[53] In *Morton v. Ruiz*, the Court noted approvingly Congress' decision to provide welfare benefits to Alaska Natives, even though they were not Indians living "on or near reservations." 415 U.S. 199, 212 (1974).

[54] Field Committee, *supra*, at 5-6, 47.

[55] In 1936, the IRA was amended to enable Alaska Natives, including those "not [previously] recognized as [Indian] bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to organize and receive benefits. 25 U.S.C. § 473a.

create "village corporation[s]," and to receive statutory benefits as such. *Id.* § 1607.[56] ANCSA also authorized the creation of twelve "regional corporations" to serve Alaska Natives living in areas covered by twelve existing regional Native organizations. 43 U.S.C. § 1606. The regional corporations receive lands and money, manage settlement assets, and share certain revenues with their shareholders and village corporations.[57] Both village and regional corporations are "bod[ies] of Indians" organized under congressional authorization into "communities under one leadership." *See Montoya v. United States*, 180 U.S. 261, 266 (1901). The government validly exercises its authority over Indian affairs through such entities. *See United States v. John*, 437 U.S. 634, 650 n.20; 652-53 (1978).[58]

The unique ANCSA corporations serve Congress' trust obligation to the Alaska Native communities who surrendered their aboriginal land claims.[59] The corporations reflect Congress' effort to tailor its historic goals to the particular

[56] *Seldovia Native Ass'n v. United States*, 144 F.3d 769,772 (Fed.Cir. 1998).

[57] *Seldovia*, 144 F.3d at 772-73; *Broad v. Sealaska Corp.*, 85 F.3d 422, 425 (9th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997).

[58] Several federal statutes include Alaska Native villages and ANCSA corporations as "Indian tribes." *See, e.g.*, Indian Tribal Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(e); Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(2); Indian Health Care Improvement Act, 25 U.S.C. § 1603(d); Indian Child Welfare Act, 25 U.S.C. § 1903(8) (including Native villages). Other laws recognize Alaska Native villages as "tribes" for broader purposes. *See* 63 Fed. Reg. 71941, 71945-46 (1998). *See generally* Appendix A hereto.

[59] Congress permits ANCSA Corporations to restrict the right to vote in corporate governance to Alaska Natives. 43 U.S.C. § 1606(3)(D)(i); *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie*, 101 F.3d 1296, 1296 (9th Cir. 1996), *rev'd on other grounds*, 118 S. Ct. 948 (1998). This limitation reflects Congress' historic goal of promoting Native self-governance and mirrors the traditional restriction on the right to vote in tribal government to members of the tribe. American Indian Policy Review Comm'n, 95th Cong., 1st Sess., Final Report 108-09 (1977) ("the tribe, as a political institution, has primary responsibility to determine tribal membership for purposes of voting in tribal elections . . . and other rights"); *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

circumstances of the Alaska Native peoples. Just as Congress has chosen to organize and deal with new tribes and confederations of tribes or nations like the "Six Nations" or the "Creek Nations" or "the five civilized tribes," Congress exercises its constitutional powers and responsibilities over Alaska Natives through village and regional corporations.[60] Congress has chosen to permit a statewide approach to self-governance for Native Hawaiians, an approach consistent with the statewide governments of these peoples before the age of exploration.

IV. ARGUMENT

A. John Marshall's Conception of the Indian 'Nations'

For two hundred years, this Court has recognized the *political* distinction the Constitution draws between "Indian tribes" and all other people. The early opinions of Chief Justice John Marshall reflect the original intent of the Framers and lay the groundwork for this Court's jurisprudence. Marshall wrote that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). With deliberate irony, he called the Indian tribes "domestic dependent nations." *Id.* at 17. The Indian peoples had surrendered "their rights to complete sovereignty," *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-74 (1823), and yet they continued to be "nations" that governed themselves. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

Marshall knew that the constitutional text reflected this pre-existing nation-to-nation relationship. The Indian Commerce Clause, U.S. Const. art. I., § 3, cl. 8, and the Treaty Clause, *id.* art. II, § 2, cl. 2, granted Congress broad power to regulate Indian affairs. These provisions permitted the United States to fulfill its obligations to the dependent Indian "nations" that were its "wards." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18; *Worcester*, 31 U.S. (6 Pet.) at 558-59. As "guardian," Congress

[60] *See Venetie*, 101 F.3d at 1297 ("the trust relationship [between Alaska Natives and the United States] survived the passage of ANCSA").

had both the obligation and the power to enact legislation protecting the Indian nations. *See Worcester*, 31 U.S. (6 Pet.) at 560-61; *accord Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants").

Marshall defined "Indians" broadly to include all of the "original inhabitants" or "natives" who occupied America when it was discovered by "the great nations of Europe." *Johnson*, 21 U.S. (8 Wheat.) at 572-74; *Worcester*, 31 U.S. (6 Pet.) at 544 (1832) (Indians are "those already in possession [of land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man").[61]

He also conceived of "tribes" in broad, inclusive terms. He used "tribe" and "nation" interchangeably: A "tribe or nation," he noted, "means a people distinct from others" — a "distinct community." *Worcester*, 31 U.S. (6 Pet.) at 559, 561.[62] Like the Founders, Marshall defined an "Indian tribe" as nothing more than a community, large or small, of descendants of the peoples who inhabited the New World before the Europeans.

Although the aboriginal "tribes" or "nations" or "peoples" were defined in part by common ancestry — or, as petitioner likes to say, by "blood" — their constitutional significance lay in their separate existence as "independent *political* communities." *Id.* at 559 (emphasis added). The "race" of Indian peoples was constitutionally irrelevant. Native peoples were "nations," *id.* at 559-60, and the relationship between the United States and the Natives reflected a political settlement between conquered and conquering nations.

[61] *See Johnson*, 21 U.S. (8 Wheat.) at 575 (Indians in French Canada); *id.* at 581 (Indians in Nova Scotia); *id.* at 584-87(Indians in Virginia, Kentucky, the Louisiana Purchase, and Florida). Marshall noted the United States had dealt with variously organized "tribes" or "confederacies." *See id.* at 546-49.

[62] *See also Cherokee Nation*, 30 U.S. (5 Pet.) at 20 ("an Indian tribe or nation within the United States"); *Johnson*, 21 U.S. (8 Wheat.) at 590 ("the tribes of Indians inhabiting this country").

This Court has kept faith with Marshall's conception: The Indian Nations have always been defined by ancestry *and* political affiliation. It could not be otherwise. In the Native cultures, the two are inextricably intertwined. The Court's definition is legal, and the Native American's self-definition is historic, religious or cultural; but the two reduce to the same elements: "Indians" are (i) the descendants of aboriginal peoples who (ii) belong to some Native American "people," "nation," "tribe," or "community," as the founding generation understood those terms.[63]

B. "Native American" is Not a "Racial" Distinction

These interwoven qualifications reflect this Court's consistent understanding that constitutionally relevant Indian status, while based in part on ancestry, is a political classification. *United States v. Antelope*, 430 U.S. 641, 646-47 (1977). It is an individual's membership in a "political community" of Indians — even a community in the making — and not solely his or her racial identity, that brings him or her within Congress' broad authority to regulate Indian affairs. *Id.* at 646.

Petitioner's suggestion that the use of blood quantum as part of the formula to determine who is and is not a Native American constitutes impermissible "racial" discrimination ignores two hundred years of constitutional jurisprudence. This Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign political communities" — not "racial groups."[64] This Court has long

[63] *See, e.g., Montoya*, 180 U.S. at 66 ("a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory "); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *see Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Antelope*, 430 U.S. at 647 n.7 (individuals "anthropologically" classified as Indians may be outside Congress' Indian commerce power if they sever relations with tribe).

[64] *Antelope*, 430 U.S. at 646; *see Fisher v. District Court*, 424 U.S. 382, 389 (1976); *Mancari*, 417 U.S. at 553-54; *see also Sac & Fox Nation*, 508 U.S. at 123; *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

recognized that a tribe's "right to determine its own membership" is "central to its existence as an independent political community."[65] From time immemorial, Native American communities have defined themselves at least in part by family and ancestry.[66] Kinship and ancestry is part of what it means to be an "Indian." Indians by ancestry or blood is what the Framers meant by "Indians." It is what Chief Justice Marshall meant by "Indians." It is what the Framers of the Fourteenth Amendment meant by "Indians." This central conception of "Indian" identity is woven into the Constitution and the entire body of law that has grown up in reliance on that conception.

Congressional authority to use such traditional requirements for tribal membership or benefits has never been doubted. In *John*, this Court approved Congress' creation of an Indian reservation for the benefit of "Chocktaw Indians of one-half or more Indian blood, resident in Mississippi," 437 U.S. at 646. The Court unhesitatingly applied the definition of "Indian" that appears in the IRA, which has governed Indian Tribes for most of this century: "'all other persons of one-half or more Indian blood.'" *Id.* at 650 (quoting 25 U.S.C. § 479). Similarly, ANCSA's use of a blood quantum formula as one factor in determining "Native" status is a valid method of defining those belonging to the group eligible for statutory benefits, and the use of the blood quantum "does not detract from the political nature of the classification."[67] The use of blood ties is integral to the nature of the political deal struck between the conquering

[65] *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76, 95 (1906); *Boff v. Burney*, 168 U.S. 218, 222-23 (1897).

[66] *See Indian Policy Report* at 108-09 ("the tribe, as a political institution, has primary responsibility to determine tribal membership *for purposes of voting in tribal elections* . . . and other rights arising from tribal membership. Many tribal provisions call for one-fourth degree of blood of the particular tribe but tribal provisions vary widely. A few tribes require as much as one-half degree of tribal blood . . . ."); *accord* Felix S. Cohen, *Handbook of Federal Indian Law* 22-23 & n.27 (1982 ed.).

[67] *Alaska Chapter*, 694 F.2d at 1168-69 n.10 (noting absence of other practicable methods, like tribal rolls or proximity to reservations).

Europeans and the Native peoples, as they set out to maintain partially separate existences while inhabiting the same country.

The constitutional text and historic relationship gives Congress not just the "right" to discriminate between Native Americans and others, but the *responsibility* to do so. As this Court has long recognized, from the relationship between these former sovereign peoples and the "superior nation" that conquered them arises "the power *and the duty*" of the United States to "exercis[e] a fostering care and protection over all dependent Indian communities within its borders . . . ."[68] Only last term, this Court acknowledged the continued significance of this historic trust relationship.[69]

C. Application of "Indian Tribes" to the Enormous Diversity of Native American Communities

This Court has repeatedly applied the concepts of "Indian" and "Tribe" to a wide variety of Native American communities, recognizing the constant evolution of Native community life and that the questions whether and how to treat with these changing communities are assigned by the Constitution to Congress. In *The Kansas Indians*, the Court recognized that the Ohio Shawnees remained a "tribe," even though tribal property was no longer owned communally and the tribe had abandoned Indian customs "owing to the proximity of their white neighbors." 72 U.S. 737, 755-57 (1866).

Fifty years later, the Court approved similar tribal designation for the Pueblo Indians of New Mexico. After long experience under Spanish rule, the Pueblo Indians seemed little like the "savages" of James Fennimore Cooper. The Pueblo Indians lived in villages with organized municipal governments; they

[68] *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (emphasis added); *see Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (the government owes a "distinctive obligation of trust" to Indians).

[69] *See Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1934 (1999) (recognizing "special federal interest in protecting the welfare of Native Americans").

cultivated the soil and raised livestock; they spoke Spanish, worshiped in the Roman Catholic Church; prior to the acquisition of New Mexico by the United States, they enjoyed full Mexican citizenship. *See United States v. Joseph*, 94 U.S. (4 Otto.) 614, 616 (1877). Nevertheless, the Pueblo Indians lived in "distinctly Indian communities," and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes." *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913); *Candelaria*, 271 U.S. at 439-40, 442-43. For Native American "communities," the Court held that "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress . . . ." *Sandoval*, 231 U.S. at 46; *accord Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911).

Sixty years later, in *United States v. John*, the Court recognized Congress' authority to create a reservation for the benefit of Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State. 437 U.S. at 652-53. The Mississippi Choctaw were Indians. They had recently organized into a distinctly Indian community. The Court therefore deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law." *Id.* at 650 n.20; 652-53.

Similarly, this Court has recognized Congress' broad authority to deal with individual "Indians"[70] or large organizations comprised of numerous "Tribes."[71] Congress may create or recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress' trust obligation to the historic Indian peoples.[72] Congress' treatment of the Alaska Native peoples — including the creation of unique regional corporations whose shareholders comprise numerous Native Villages — has properly been upheld as within Congress' special power over and responsibility for the Native American peoples.[73]

[70] *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865) (regulation of "commerce with the Indian tribes means" regulation of "commerce with the individuals composing those tribes"); *see Ruiz*, 415 U.S. at 230-38 (addressing the scope of federal Indian welfare benefits for individuals living in Indian communities); *Mancari*, 417 U.S. at 551-55.

D. Petitioner's Suggestion That This Court Overrule *Morton v. Mancari* Should Be Rejected

Petitioner suggests that, if *Mancari* permits members of Indian tribes, defined in part by ancestry, to receive special treatment, then *Mancari* "would be irreconcilable with this Court's equal protection jurisprudence, particularly *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and would have to be overruled." Pet. Br. at 42 n.17. Petitioner misreads *Mancari* and *Adarand* and provides no basis for sweeping away two hundred years of settled law.

[71] *See Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894) (Delaware Indians entitled to rights of Cherokee Nation which Delawares had joined); *United States v. Blackfeather*, 155 U.S. 218 (1894) (same for Shawnee).

[72] *See John*, 437 U.S. at 652-53; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976).

[73] Although the Alaska Natives' situation is "distinctly different from that of other American Indians," *Alaska Chapter*, 694 F.2d at 1168-69 n.10; *see Metlakatla Indian Community v. Egan*, 369 U.S. 45, 50-51 (1962), it is "well established" that Athabascan Indians, Eskimos, and Aleuts are "dependent Indian people" within the meaning of the Constitution. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918); *see also, Pence v. Kleppe*, 529 F.2d 135, 138-39 n.5 (9th Cir. 1976) ("Indian" means "the aborigines of America" and includes Eskimos and Aleuts in Alaska); *United States v. Native Village of Unalakleet*, 411 F.2d 1255, 1256-57 (Ct. Cl. 1969) ("Eskimos and Aleuts are Alaskan aborigines" and, therefore, "Indians").

1. "Native American" is Not a "Suspect" Classification

As the history shows, and as this Court has long recognized, the express constitutional provisions creating Congress' special power over the Indian tribes are based not on race, but on the political recognition of "Indian tribes" as "'domestic dependent nations.'" *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Congressional treatment of Indians is subject to the rational basis standards reserved for political classifications.

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. [¶] The 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 the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.[74]

The inseparable burdens and benefits applicable only to Native Americans are based not on race, but on a political resolution of issues uniquely consigned by the Constitution to Congress and subject to judicial review, if at all, under the deferential rational basis standard.[75]

2. The Equal Protection Clause Does Not Eliminate Congress' Power to Regulate Indian Affairs

Petitioner argues that this Court's 1995 decision in *Adarand* somehow establishes a new 14th Amendment limit on Congress' powers respecting Indians. This contention is

[74] 425 U.S. at 480; *Antelope*, 430 U.S. at 645 (Indian legislation "repeatedly . . . sustained . . . against claims of unlawful racial discrimination").

[75] *Antelope*, 430 U.S. at 646 ("federal regulation of Indian affairs is not based upon impermissible classifications."); *Moe*, 425 U.S. at 479-80 (applying rational basis scrutiny to tax preference favoring Indians because it is not "invidious discrimination against non-Indians on the basis of race").

directly contrary not only to *Adarand*, but also to the Court's repeated statements about both the history and purpose of the 14th Amendment. *Adarand* held only that *racial* classifications are subject to strict scrutiny (whether enacted by Congress or by the states). *Adarand* did not and could not eliminate Congress' textually-based, constitutional authority to deal with the "Indian Tribes." Indeed, Justice O'Connor's opinion made clear that the Court was articulating only a "general rule" that did not affect the *political* powers of government, such as the enumerated federal power over immigration to deal with racial groups.[76]

Moreover, the Court took pains to point out that it was *not* overruling "long-established precedent that has become integrated into the fabric of the law." 515 U.S. at 233. The Court's decision left firmly in place long standing precedents, like those involving Native Americans, that were "likely to have engendered substantial reliance." *Id. Mancari* reflected two centuries of jurisprudence concerning the relationship between the United States and Native Americans. It also confirmed what a hundred years of jurisprudence and the legislative history of the 14th Amendment make clear: that the Amendment was not intended to abolish Congress' authority over Indian affairs.[77] *Mancari* reflected settled law when it held that statutory employment preferences for persons who were "one fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe" did "not constitute 'racial discrimination.'" 417 U.S. at 553, n.24. *Mancari* also reflected settled law in affirming Congress' power to grant preferences for individual Indians as "members of quasi-sovereign tribal entities." *Id.* at 554.

In over 130 years since the adoption of the 14th Amendment, and in the twenty-five years since *Mancari*, in case after

[76] *Adarand*, 515 U.S. at 217-18 ("special deference to the political branches of the Federal Government" in such cases is "appropriate").

[77] *Cf. Elk v. Wilkins*, 112 U.S. 94, 102-03 (1884) (14th Amendment citizenship and apportionment clauses did not alter status of Indians).

case, this Court and the lower federal courts have integrated these principles into the fabric of the law, upholding an enormous "variety of statutes and decisions according special treatment" to native peoples. *Moe*, 425 U.S. at 480.[78] Native Americans throughout the country have ordered their ways of life around this enormous body of law. To subject all these statutes to "strict scrutiny" would have enormous and disastrous consequences for the government's dealings with the Native American peoples.

> If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[79]

Nothing in *Adarand* or in the history of the 14th Amendment requires or justifies such a revolution. As this Court has recognized since *Adarand*, the government's solemn commitment to a special relationship with the Indian peoples lives on.[80]

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: July 28, 1999 Respectfully Submitted,

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[78] *See United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc). (Scalia J.) (rejecting equal protection challenge because "the Constitution itself . . . 'singles Indians out as a proper subject for separate legislation'").

[79] *Mancari*, 417 U.S. at 555, *quoted with approval in Moe*, 425 U.S. at 480, *and in Antelope*, 430 U.S. at 645.

[80] *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-62 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44, 62, 72 (1996) (recognizing the viability and significance of the Indian Commerce Clause); *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 953-54 (1998) (recognizing the federal power over Indian country).