

**INDIANS AND EQUAL PROTECTION:
THE ROBERTS COURT YEARS**

CENSUS OFFICE.

CARROLL D. WRI
Commissioner of Labor
Appointed October 5,

REPORT

ON

INDIANS TAXED AND INDIANS NOT TA

IN

THE UNITED STATES

(EXCEPT ALASKA)

AT THE

ELEVENTH CENSUS: 1890.



WASHINGTON, D. C.:
GOVERNMENT PRINTING OFFICE.
1894.

FLETCHER

FALL 2023

THE FOURTEENTH AMENDMENT

IN THE SENATE OF THE UNITED STATES.

DECEMBER 14, 1870.—Ordered to be printed.

Mr. CARPENTER, from the Committee on the Judiciary, submitted the following

REPORT.

The Committee on the Judiciary, who were instructed by resolution of the Senate, of April 7, 1870, "to inquire into and report to the Senate the effect of the fourteenth amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are not citizens of the United States, and whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not annulled," respectfully report:

That in the opinion of your committee the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian

"INDIANS NOT TAXED"



"MOVE ON!"

HAS THE NATIVE AMERICAN NO RIGHTS THAT THE NATURALIZED AMERICAN IS BOUND TO RESPECT?—[SEE PAGE 363.]

Judge - -

I would join. *Yes*
Jack

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell ✓
Mr. Justice Rehnquist

From: Blackmun, J.

1st DRAFT

Circulated: 6/11/74

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

Nos. 73-362 AND 73-364

Rogers, C. B. Morton, Secretary of the Interior, et al.,
Appellants,
73-362 v.
C. R. Mancari et al.
Amerind, Appellant,
73-364 v.
C. R. Mancari et al.

On Appeals from the United States District Court for the District of New Mexico.

Reviewed
6/11
L.F.P.

[June —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Indian Reorganization Act of 1934 accords an employment preference for qualified Indians in the Bureau of Indian Affairs [BIA]. Appellees, non-Indian BIA employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, and as violative of the Due Process Clause of the Fifth Amendment. A three-judge federal district court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. *Mancari v. Morton*, 359 F. Supp. 585 (N. M. 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U. S. — (1974).

Join

MORTON V. MANCARI

FEDERAL STATUTES RATIONALLY RELATED TO THE FULFILLMENT OF THE TRUST RESPONSIBILITY ARE CONSTITUTIONALLY VALID.

HAAALAND V. BRACKEEN ^f

YAY WE WON



SHITTING ON OUR PARADE

2

HAALAND v. BRACKEEN

KAVANAUGH, J., concurring

against federal parties lack standing to raise the equal protection issue. So the equal protection issue remains undecided.

In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race. Those scenarios raise significant questions under bedrock equal protection

to conduct **BRACKEEN AND WEST FLAGLER** and not off-reservation gaming operations. 71 F. 4th 1059, 1062, 1065–1068 (2023); Response in Opposition to Application for Stay 7–10, 13–14. If the compact authorized the Tribe to conduct off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-reservation, then the compact would likely violate the Indian Gaming Regulatory Act, as the District Court explained. 573 F. Supp. 3d 260, 272–274 (DC 2021); see 25 U. S. C. §§2710(d)(1), (d)(8)(A).

To the extent that a separate Florida statute (as distinct from the compact) authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U. S. 181, 206 (2023); *Adarand Constructors, Inc. v. Peña*, 515

CRYSTAL BALL GAZING INTO THE BRACKEEN ARGUMENT



G state of + tribal judges

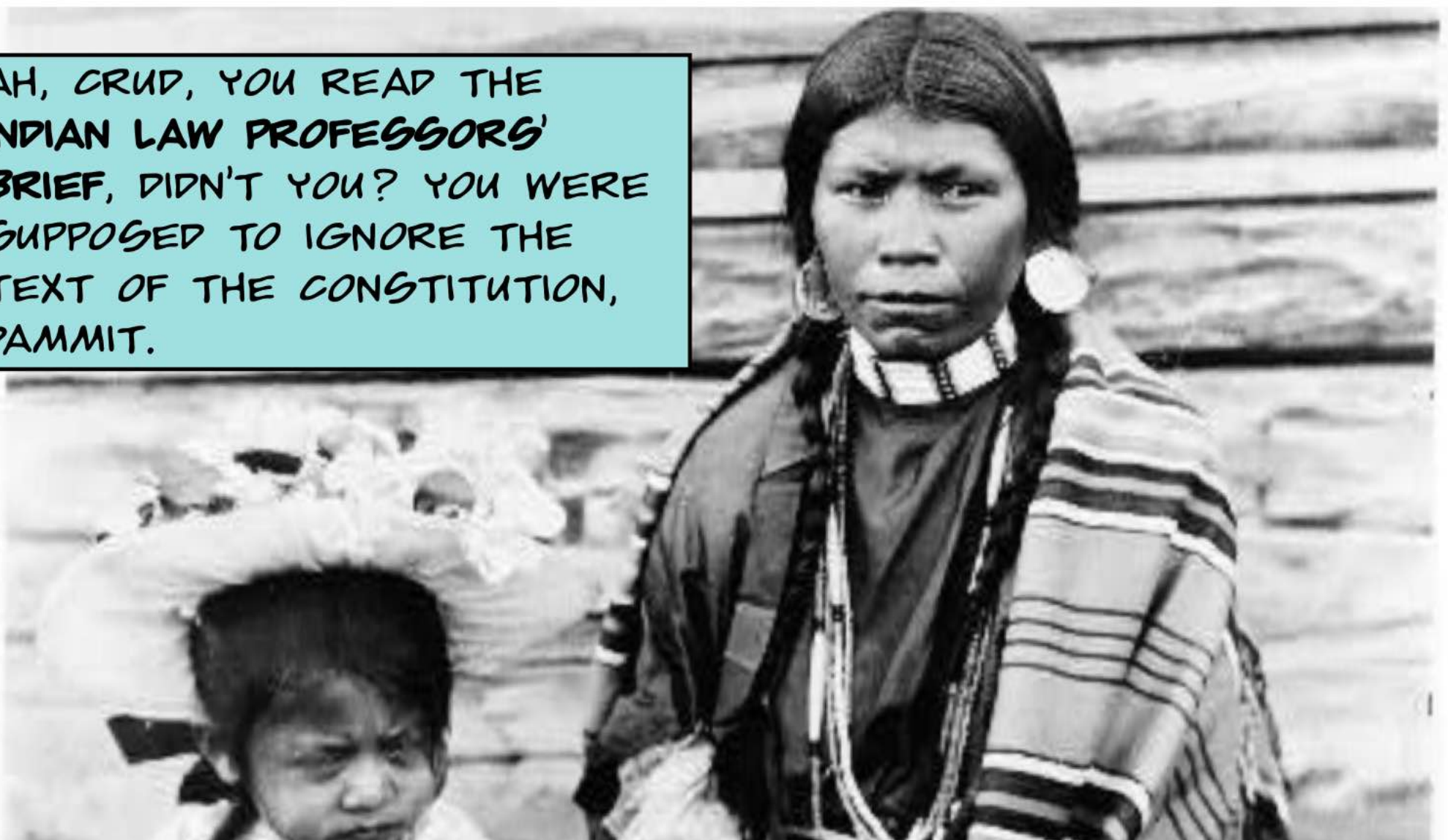
How invi
"Tribes mentioned in the
West"

Treaty power

Tribes are -- are mentioned in the Constitution, and, in fact, we have the treaty power which mentions tribes as separate, indicates that they're separate sovereigns.

MR. MCGILL: Your Honor, the Court

AH, CRUD, YOU READ THE INDIAN LAW PROFESSORS' BRIEF, DIDN'T YOU? YOU WERE SUPPOSED TO IGNORE THE TEXT OF THE CONSTITUTION, DAMMIT.



*WOTB. Non-deleg S/N
get time of day

KBJ: Role of SCOTUS

~~THE~~ Scope of Cong. powers
Judgment of Cong

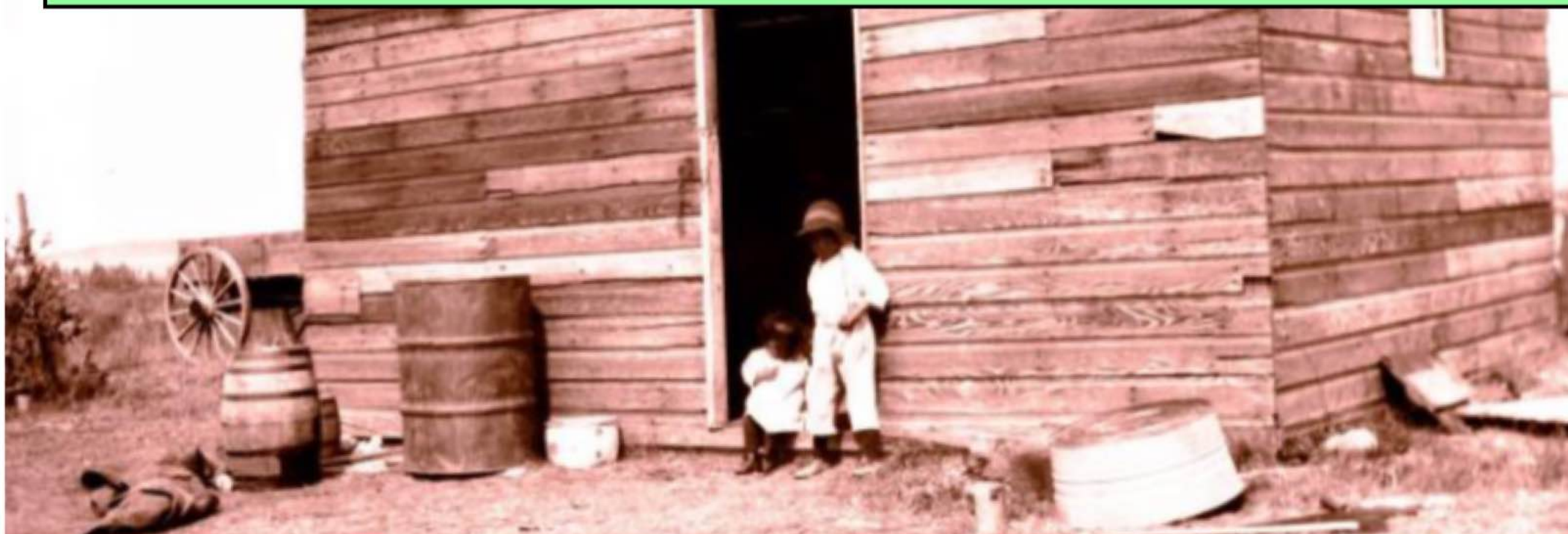
Ex: "Very, very great deference"
" "

62 of 226

1 sovereignty. So let me just ask you, how -- how
2 much weight, if any, should we be giving to
3 clear, direct statements from Congress that this
4 was being done pursuant to its understanding of
5 its plenary authority as given it -- given to it
6 in the Constitution and that it was necessary
7 from Congress's perspective to solve for the
8 problem of these state welfare practices that
9 were causing harm to Indian children given its
10 responsibility as a trust relationship for
11 Indian affairs?

12 MR. KNEEDLER: I think very, very

THROUGHOUT MOST OF HISTORY, THIS COURT GAVE VIRTUALLY ABSOLUTE DEFERENCE TO CONGRESS' JUDGMENT IN INDIAN AFFAIRS. THERE ARE CERTAINLY CONSTITUTIONAL LIMITS LIKE THE TAKINGS CLAUSE AND FREE SPEECH, BUT THIS COURT CANNOT SUBSTITUTE ITS POLICY JUDGMENT, REGARDLESS.



Cong finds, makes reasonable
and essential choice, acts

SA bans non-Indian adopt?

EK No

SA Not rationally related?

What limits?

CHIEF JUSTICE ROBERTS. NO, NO, GO

ahead.

JUSTICE ALITO: Could Congress go further than it has gone in ICWA and say that an Indian child may not be adopted by an -- by a non-Indian couple under any circumstances?

MR. KNEEDLER: I think that would -- that would obviously go further, and I would want to know the -- the -- the circumstances,

IF CONGRESS DETERMINED THAT SUCH A BAN IS RATIONALLY RELATED TO THE FULFILLMENT OF THE TRUST RESPONSIBILITY, I FAIL TO SEE HOW THIS COURT COULD SECOND-GUESS THAT DETERMINATION, BUT YOU ASSHOLES HAVE FIVE VOTES AND CAN DO ANYTHING YOU WANT.



Handwritten notes on lined paper:

PK: power at time

SA: tomorrow?

1

2 MR. KNEEDLER: Seriously misguided.

3 JUSTICE ALITO: -- if it were -- yeah.

4 Okay. If it were to do it tomorrow, would that

5 fall outside Congress's plenary power?

6 MR. KNEEDLER: Well, I -- it has to be

7 -- the plenary power, I mean, I think there are

8 at least two -- two things to bear in mind about

9 this. I think Congress, when dealing with a

10 tribe in its political capacity, has a great

STILL NOT RATIONALLY RELATED TO THE FULFILLMENT OF THE TRUST RESPONSIBILITY.

SO THE RATIONS JOKE? NOT FUNNY? TOO SOON? I MEAN, TRAGEDY PLUS TIME EQUALS COMEDY, RIGHT?



Q If limited number of vaccines?

A Probably not

No subject matter off limits or geog. area

13 CHIEF JUSTICE ROBERTS: I -- I do want
14 to follow up on Justice Alito's question.

15 There's a limited number of vaccines.
16 Can the federal government decide to distribute
17 those to -- to Indians and not others?

18 MR. KNEEDLER: Well --

19 CHIEF JUSTICE ROBERTS: It's a very
20 simple hypothetical.

21 MR. KNEEDLER: Well, probably not, but

AGAIN, IF IT'S RATIONALLY RELATED TO THE FULFILLMENT OF THE TRUST RESPONSIBILITY, IT'S VALID. THE ANALYSIS IN HORRIFIC AND CYNICAL HYPOTHETICAL WOULD START WITH CONGRESS'S FINDINGS. IN THIS CASE, THE FINDINGS ARE ABSOLUTELY UNCONTRVERTED. AGAIN, EASY TEST, EASY CASE.



CJ Non-Indian family want to adopt but ~~not~~ Indian members of N want them to

Does it trump best interests?

5K long adopted baseline rules

15 A non-Indian couple comes forward and
16 says we would like to adopt the six-month-old
17 baby, and they check all the boxes under, you
18 know, best interests of the child. In other
19 words, in normal circumstances, this would be a
20 perfect placement for the child.

21 But non-family members of the tribe
22 say that, no, they think it would be better for
23 the child to be raised with the tribe on the
24 reservation.

25 Does that priority trump the

IT WOULD IF THE NON-FAMILY TRIBAL MEMBERS ARE ALSO THE PERFECT PLACEMENT.

CHECK YOUR BIASES, CHIEF. INDIAN FAMILIES CAN ALSO BE PERFECT PLACEMENTS.



of citizenship

SA Hypo: parents say no to
ICWA

"unilateral"

JUSTICE ALITO: -- along those lines,

2 Mr. Kneedler, suppose the parents of a child
3 that is going to be adopted say we don't want
4 our child treated as an Indian under ICWA. And
5 the tribe says, well, this child is eligible for
6 tribal membership. Or maybe we have enrolled --
7 we have unilaterally enrolled the child as a
8 member of the tribe. What happens then?

9 MR. KNEEDLER: Well, if the -- I'm --

10 I'm not sure. Of all the facts in the

THAT'S TWO HYPOS. THE FIRST WAS DECIDED IN HOLYFIELD WHERE THIS COURT HELD THAT THE WISHES OF THE BIO PARENTS ARE NOT DISPOSITIVE. SEE ALSO, COLONIALISM, 'CUZ SOME INDIAN PEOPLE SADLY DIDN'T WANT THEIR CHILDREN TO BE RAISED BY OTHER INDIANS OR BE CONSIDERED INDIANS ANYMORE.

AND THE SECOND, TRIBES DON'T "UNILATERALLY" ENROLL PEOPLE. ALSO, AMERICA UNILATERALLY IMPOSES CITIZENSHIP SO B.F.D. QUIT TRYING SO HARD TO BE SMARTY.

BK: "other Indian families"
does it make a difference

TK: d/n know empirically

child whose parents who are
members of two tribes

No TT affected by this

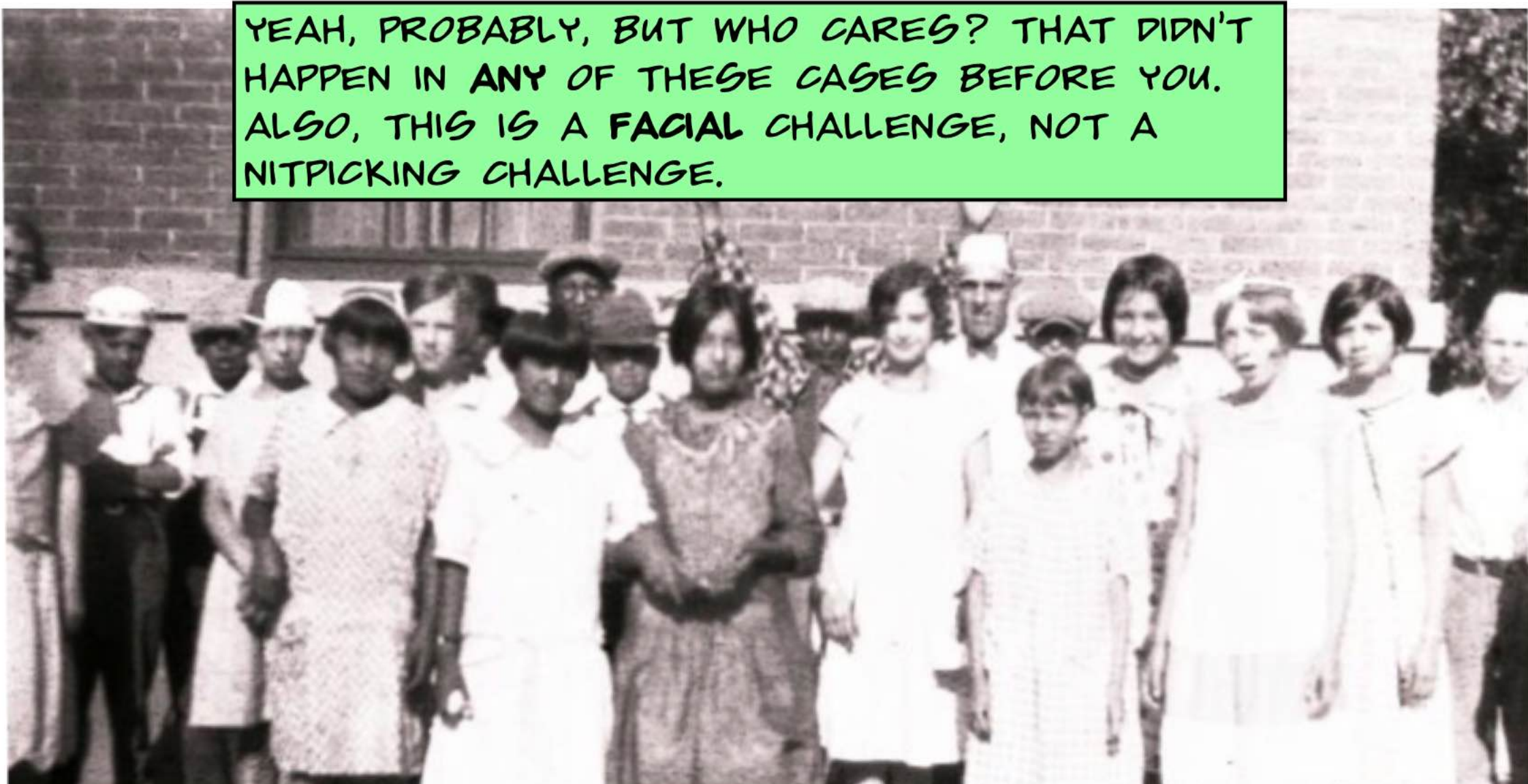
10 FOR OTHER INDIAN FAMILIES, INCLUDING FAMILIES
11 who are of a different tribe, correct?

12 MR. KNEEDLER: Yes.

13 JUSTICE KAVANAUGH: Okay. And does
14 the third preference, that preference, ever make
15 a difference?

16 MR. KNEEDLER: I mean, I don't know
17 empirically, but they -- but it can in the
18 following circumstance -- I mean, first of all,
19 it's important to understand --

YEAH, PROBABLY, BUT WHO CARES? THAT DIDN'T
HAPPEN IN ANY OF THESE CASES BEFORE YOU.
ALSO, THIS IS A FACIAL CHALLENGE, NOT A
NITPICKING CHALLENGE.



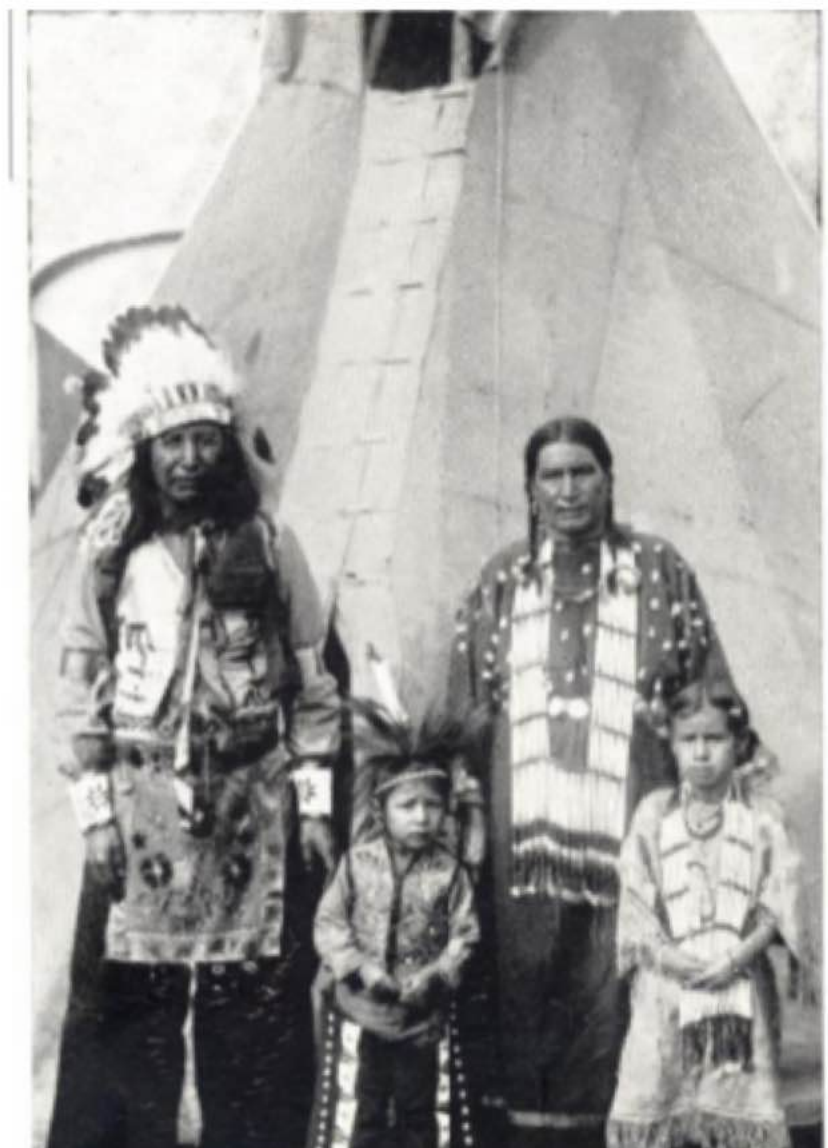
(CT leaves)

18 JUSTICE KAVANAUGH: So -- so, to get
19 to the heart of my concern about this, you would
20 agree, I think, but tell me if you disagree,
21 that Congress couldn't give a preference for
22 white families for white children, for black
23 families for black children, for Latino families
24 for Latino children, for Asian families for
25 Asian children.

I SEE YOU WAITED FOR JUSTICE THOMAS TO GO TAKE A SHIT BEFORE YOU ASKED THIS ONE.

EASY ANSWER. CONGRESS ONLY OWES A DUTY OF PROTECTION TO INDIANS AND TRIBES. ONCE AGAIN — RATIONALLY RELATED TO THE TRUST RESPONSIBILITY. ALSO, FACIAL CHALLENGE.

JESUS CHRIST.



ACB: EP problem

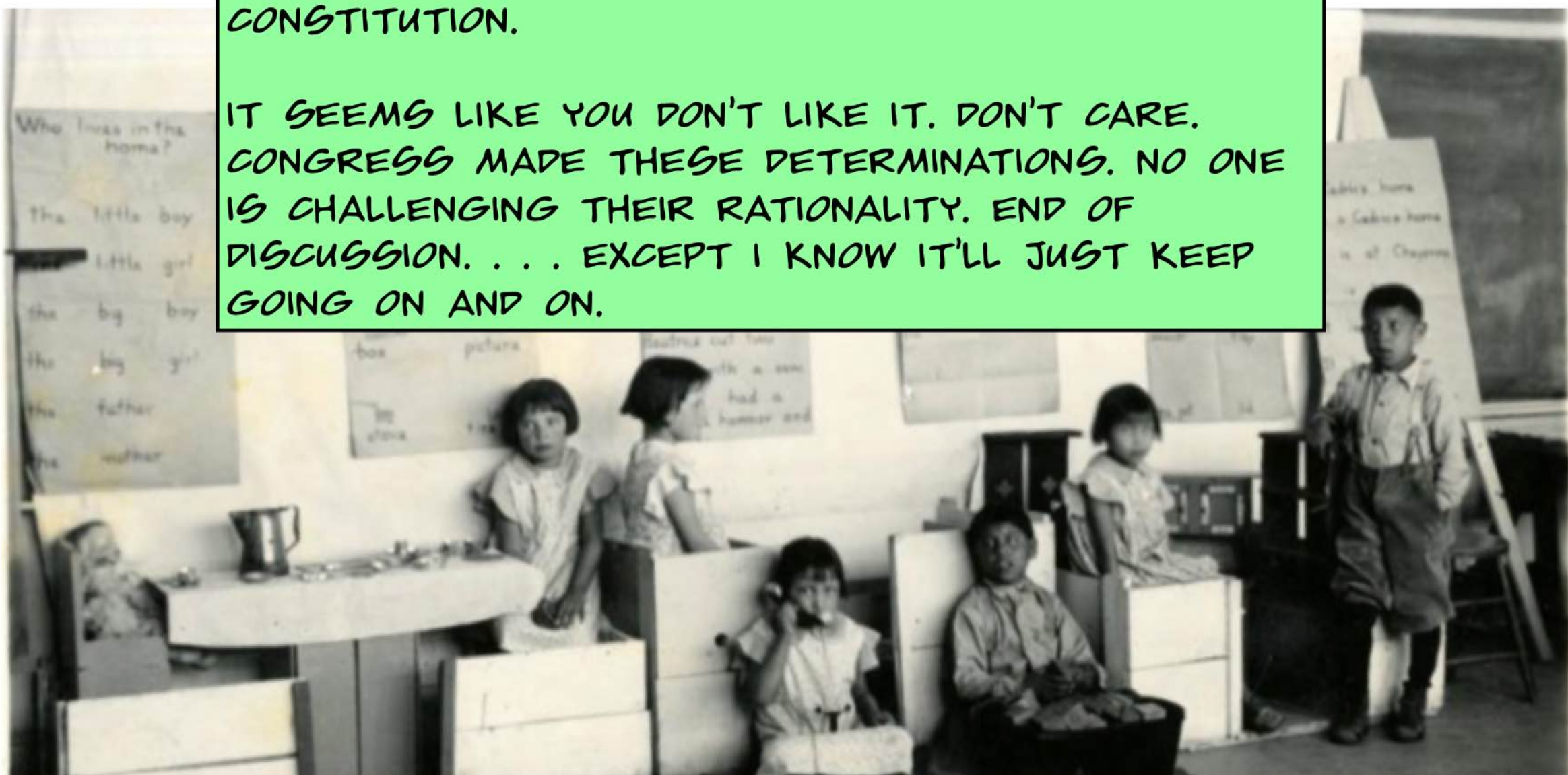
EK: don't rest w/ notion +
tribes are fungible

1 the second preference didn't kick in. You get
2 down to the third preference. And I guess -- I
3 mean, I'll get to the heart of my concern, is,
4 you know, if -- if you're thinking about that
5 from an equal protection point of view, I mean,
6 let's assume I agree with you that these are
7 political classifications, this is just treating
8 Indian tribes as fungible.

9 MR. KNEEDLER: Well --

10 **AGAIN, FACIAL CHALLENGE; RATIONAL RELATIONSHIP;**
INDIANS AND TRIBES MENTIONED IN THE
CONSTITUTION.

IT SEEMS LIKE YOU DON'T LIKE IT. DON'T CARE.
CONGRESS MADE THESE DETERMINATIONS. NO ONE
IS CHALLENGING THEIR RATIONALITY. END OF
DISCUSSION. . . . EXCEPT I KNOW IT'LL JUST KEEP
GOING ON AND ON.



govts powers"

"in the teeth of the framers"

BK Hypo: 1) other agencies

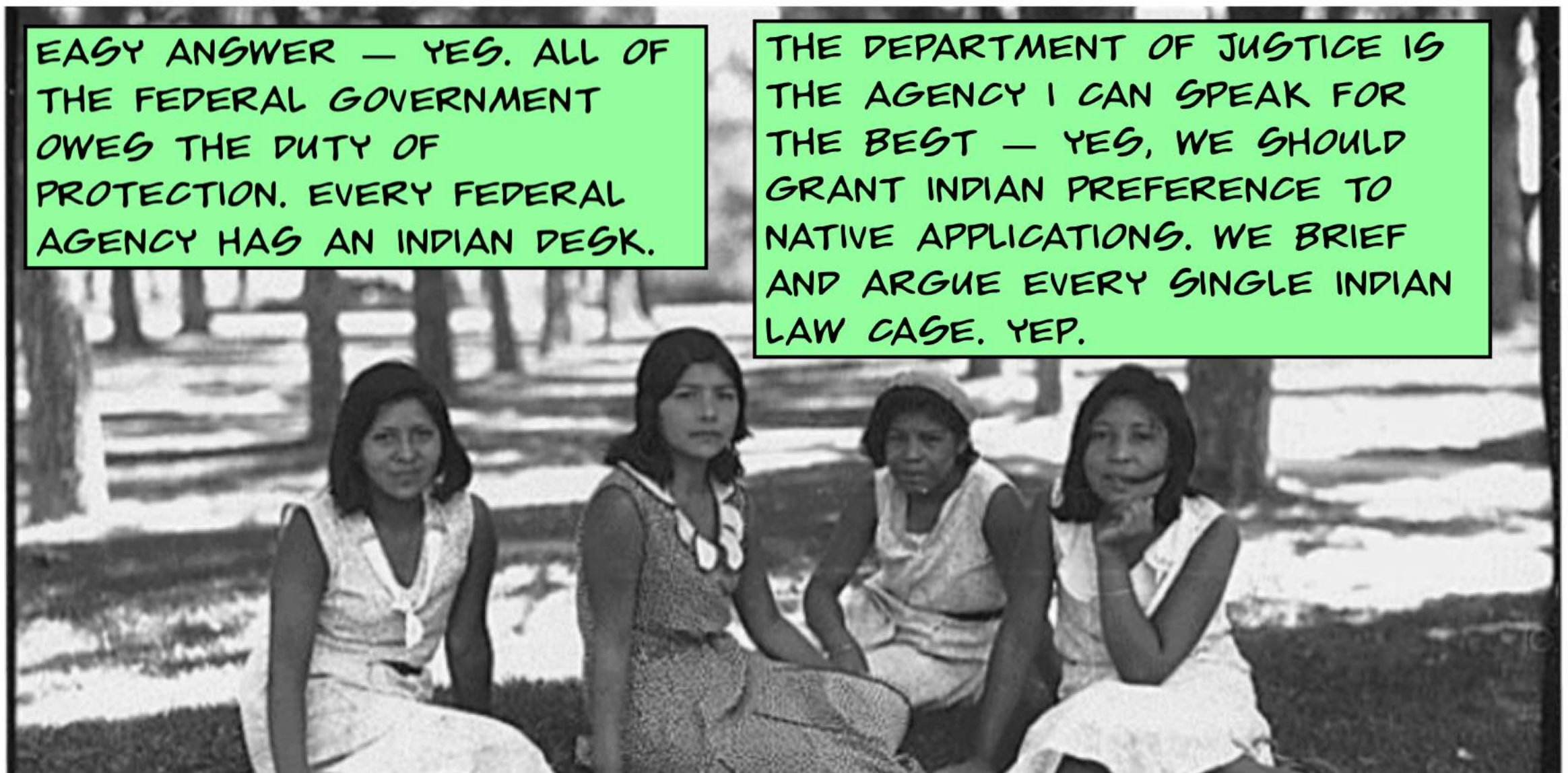
EK more difficult

17 as I think you said, you're relying on Mancari,
18 and I just want to understand what you see as
19 the limits of Mancari, and a couple of the
20 hypotheticals I asked earlier, could Congress
21 grant a hiring preference to American Indians
22 for federal agencies other than the BIA, such as
23 Treasury or Justice or --

24 MR. KNEEDLER: I -- I think that would
25 be much more difficult as I stand here.

EASY ANSWER — YES. ALL OF THE FEDERAL GOVERNMENT OWES THE DUTY OF PROTECTION. EVERY FEDERAL AGENCY HAS AN INDIAN DESK.

THE DEPARTMENT OF JUSTICE IS THE AGENCY I CAN SPEAK FOR THE BEST — YES, WE SHOULD GRANT INDIAN PREFERENCE TO NATIVE APPLICATIONS. WE BRIEF AND ARGUE EVERY SINGLE INDIAN LAW CASE. YEP.



(tribal desks?)

BK

2) ~~more~~ college admissions

EK

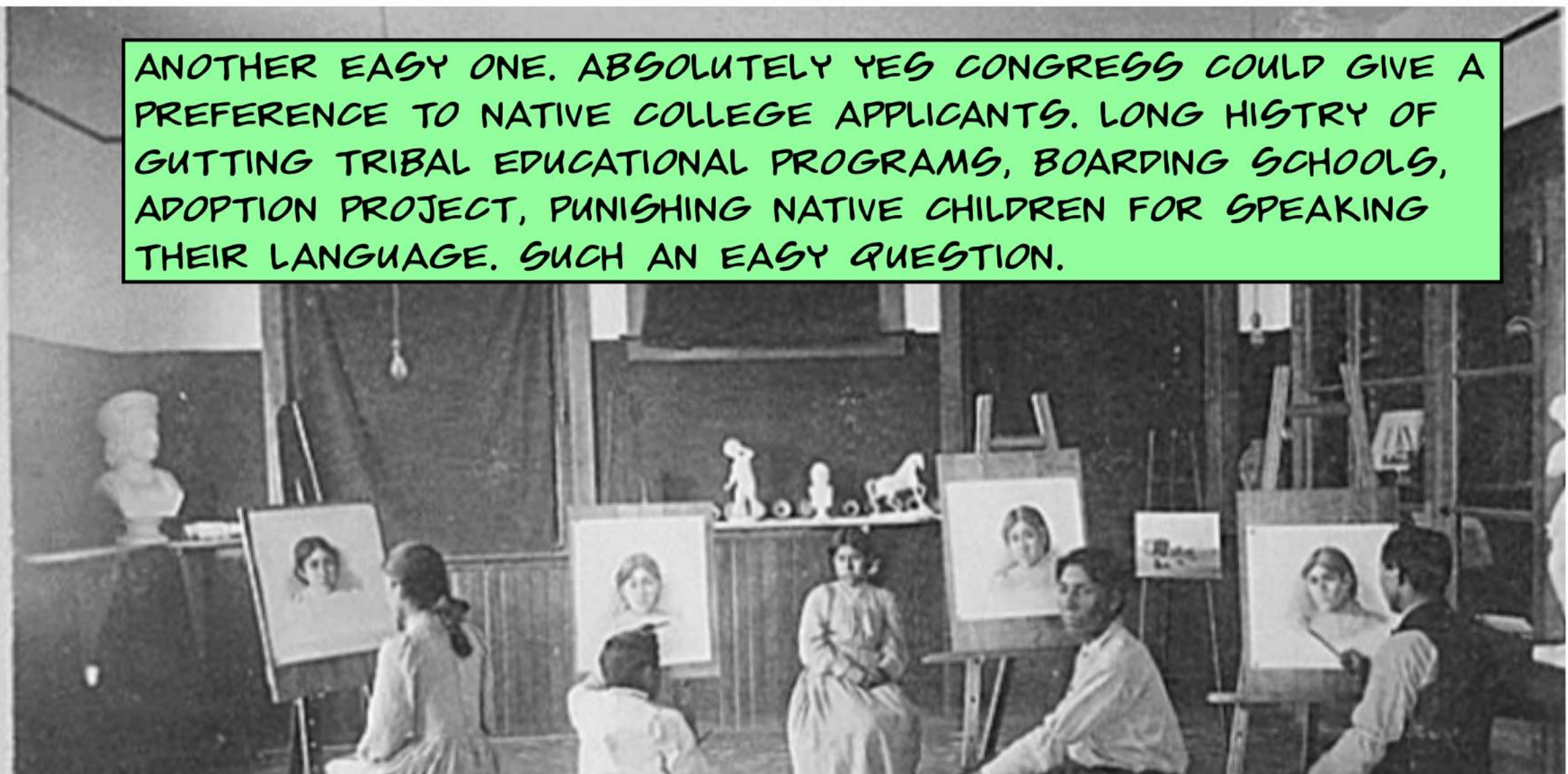
more difficult

STAR WARS

JUSTICE KAVANAUGH: How about Congress decides for the -- to help the tribes and tribal members that it's going to mandate that states give a preference in college admissions to American Indians?

MR. KNEEDLER: Again, I think that would -- that would be much more difficult to

ANOTHER EASY ONE. ABSOLUTELY YES CONGRESS COULD GIVE A PREFERENCE TO NATIVE COLLEGE APPLICANTS. LONG HISTORY OF GUTTING TRIBAL EDUCATIONAL PROGRAMS, BOARDING SCHOOLS, ADOPTION PROJECT, PUNISHING NATIVE CHILDREN FOR SPEAKING THEIR LANGUAGE. SUCH AN EASY QUESTION.



even the president has
be a tribal member

(CJ looks bored, ^{head}~~hand~~
on hand)

B/C: Catholics?

E/C: Cong. Made a judgment
about tribes (only)

18 JUSTICE KAVANAUGH: -- I think you
19 referred earlier to common spiritual practices
20 that may exist in those circumstances. Does
21 that suggest that Congress could say that, you
22 know, Catholic parents should get a preference
23 --

24 MR. KNEEDLER: No. No, not -- not at
25 all.

I SEE YOU WAITED FOR THE CHIEF JUSTICE TO GET BORED BEFORE YOU DROPPED THE CATHOLICS BOMB.

Girls Glee Club - Day School #24 - Wahblee, S.D.



VEHICLES FOR MISCHIEF

SCARY TREES AHEAD



**GAMING MONOPOLIES — WEST FLAGLER V. HAALAND
OR MAVERICK GAMING V. UNITED STATES**

**ICWA'S THIRD PREFERENCE OR INDIAN CHILD
DEFINITION — YET ANOTHER BRACKEEN CASE**

**INDIAN STATUS MAJOR
CRIMES ACT CASE**

**NANABOOZHOO MIGHT
THINK OF SOMETHING
ELSE TO TEST US**