"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Pena, Rice v. Cayetano, and Other Recent Cases

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"INVIDIAUS" AMERICAN INDIAN TRIBAL SOVEREIGNTY: MORTON V. MANCARI CONTRA ADARAND CONSTRUCTORS, INC., V. PENA, RICE V. CAYETANO, AND OTHER RECENT CASES

Frank Shockey*

Introduction

To import generic equal protection theories . . . into federal Indian law constitutes an error of significant magnitude, for it confuses a puzzling, conceptually intractable, and little-understood corner of public law with its mainstream.1

Professor Philip Frickey, among other commentators, has expressed concern about the continuing viability of Morton v. Mancari2 as a reconciliation of the body of federal law concerning American Indians3 with the equal protection ideals exposited in Brown v. Board of Education4 and applied to the federal government in Bolling v. Sharpe.5

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3. Major issues in the situation this article will treat are the legal meaning of "Indian" and the criteria by which the federal government determines if individuals and groups are Indian. By "American Indian" I refer to indigenous people both of the forty-eight contiguous states, and of Alaska, although the Inuit and Aleut peoples are not ordinarily subsumed under that term. "Alaska Native" refers to indigenous people of Alaska specifically, but for the purposes of this article, distinguishing Alaska Natives from indigenous people of the forty-eight contiguous states is unimportant; therefore I shall use "American Indian" to refer indigenous people of both Alaska and the forty-eight contiguous states, and use "Alaska Native" only when that distinction is relevant. The apparent distinction between "Native Hawaiians," or the indigenous people of Hawaii, and those of the forty-nine continental states is eminently relevant to the purpose of this article, however, so I shall refer to that group of people specifically by that term here. The term "Native American," which is possibly more politically correct, does not necessarily exclude Native Hawaiians in the same fashion as "American Indian" does. I therefore use "Native American" only to refer to all the indigenous peoples of the United States, including Hawaii. The federal government usually refers to American Indians simply as "Indians," probably because that is the term used in the Constitution. U.S. CONST. art. I, § 8, cl. 3; see also U.S. CONST. art. I, § 2, cl. 3. Alaska Natives have since been incorporated within the purview of both the term "Indian" and "American Indian" for most federal purposes. E.g., 25 U.S.C. § 479 (1994).
One unfamiliar with the evolution of federal American Indian policy might see little overt connection between tribal sovereignty and the destruction of racially discriminatory and later also of racially preferential policies across the levels of American government. Indeed, an uninformed onlooker, conditioned by the anti-racist sentiments prevailing today, could not but expect that the destruction of policies making racial distinctions would liberate American Indians from the same legally sanctioned oppression that the government has visited on other minorities in the past. The holding of *Mancari* indicated that the relationship of American Indians to the federal government was political, not racial. If *Mancari* were a perfect harmonization of federal Indian law with equal protection, it would protect all federal programs for American Indians from attacks claiming that Indians are singled out as a race for special treatment. Suits attacking federal programs targeted specifically at Indians for using racial criteria — particularly in employment preference situations — have nonetheless been pursued since *Mancari* was decided in 1974.6

American Indian people have undeniably benefitted from the varied remedial civil rights legislation enacted since the early 1960s, including the affirmative action programs that the Supreme Court disapproved in *Regents of the University of California v. Bakke*7 and *Adarand Constructors, Inc., v. Pena.*8 Such benefits accrued solely from American Indians' status as members of one of the minority ethnic and racial groups that the affirmative action programs named as beneficiaries, and not from their membership in sovereign tribal entities which the Supreme Court has famously called "domestic dependent nation[s]."9 The conclusion that all legislation enacted for the benefit of American Indians is congruent to affirmative action legislation, and therefore unconstitutional for violating the right of equal protection,10 is simply erroneous.

The troublesome fact remains that the federal government legally has defined and continues to define who is Indian according to racial as well as political criteria. *Morton v. Mancari* has served to protect federal programs singling out American Indians from equal protection challenges in the quarter

10. Professor Frickey has pointed out that guarantee of equal protection under the law found in the Fourteenth Amendment to the Constitution applies, by its wording, only to the states and not the federal government, and that its extension to the federal government through interpretation of the fifth amendment is a "product of the judges' mind[s]." *Philip P. Frickey, Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law,* 110 HARV. L. REV. 1754, 1759 (1997). The origin of an equal protection guarantee applicable to federal policies is unimportant to the purpose of this article; what is important is that the Supreme Court has ruled that there is such a guarantee, *e.g., Bolling v. Sharpe,* 347 U.S. 497 (1954).
century since its decision largely by downplaying the racial component and emphasizing the political component of the federal government's relationship with American Indians and the tribes they compose. That solution has become increasingly unstable since the intensification of the scrutiny under which federal policies utilizing racial criteria must be placed following the decision in Adarand. Mancari's failure to acknowledge the racial component of the federal relationship to Indians may prove to be its undoing.

The Adarand holding, and Justice John Paul Stevens's lengthy dissent, have been particularly dangerous to the stability of Mancari as precedent due to their composite interpretation as questioning Mancari in subsequent cases. The Ninth Circuit Court of Appeals recently denied a challenge to a law creating obstacles to non-Native reindeer ownership in the interest of Alaska Natives in the case of Williams v. Babbitt,11 but in the process the court of appeals made some potentially damaging remarks in dicta concerning the effects of Adarand on Mancari. The Ninth Circuit's interpretation of Justice Stevens's Adarand dissent is particularly misleading, and may provide ammunition for a later court to view Adarand as weakening, or even overruling, Mancari, as the plaintiffs in Williams argued.12 Justice Stevens's dissent in a case decided in early 2000, Rice v. Cayetano,13 by arguing that Mancari acknowledged the racial aspects of the federal relationship to American Indians, could lend further support to the Ninth Circuit's alarming claims.14

The rationalization of the use of racial and political criteria in federal Indian policy found in Mancari is at a crossroads; recent cases have both ambiguously supported and attacked that case's principles. This article evaluates the present situation by analyzing the court decisions and pieces of legal scholarship that have conditioned it, and by delving into the legal history of the federal government's relationship to American Indians.

I divide the body of this paper into three parts. Part I investigates the legal origins of political and racial conceptualizations of American Indians, and the use of those conceptualizations as bases for aspects of the federal relationship to Indians rather than merely for employment preferences. Part II examines the Mancari case, comparing it to its progenitor, Simmons v. Eagle Seelatsee.15 Part III considers subsequent cases and commentaries that have influenced the current status of Mancari, with particular attention to possible interpretations of recent cases, including Adarand, Williams, and Rice. I

11. 115 F.3d 657 (9th Cir. 1997); see supra note 7.
12. Williams, 115 F.3d at 663.
13. 120 S. Ct. 1044 (2000).
14. "If Justice Stevens is right about the logical implications of Adarand [in his dissent in that case], Mancari's days are numbered." Williams, 115 F.3d at 665.
conclude with prognostication concerning future outcomes of this currently uncertain situation.

I. Race, Sovereignty, and the Relationship of the Federal Government to American Indians

The concepts of race and sovereignty are deeply imbedded in the relationship of American Indian people to the governments of the United States. The federal government, having established itself as the sole authority in the United States authorized to deal with tribes and their members, has throughout its history alternately constructed American Indians as a race of human beings, and as an amalgamation of political sovereigns incidentally composed of members of that race, to widely different effects. The United States Supreme Court has usually been the most eloquent interpreter of the laws of the United States, but in the area of law concerning Indians, Congress's enactment of contradictory policies or simple ignorance of Indian issues has also often forced the Court to make, rather than interpret, policy. Congress particularly disregarded tribes in the early nineteenth century, requiring the Court to arbitrate with little statutory direction such legal matters as arose concerning Indians. I will examine in this section the Court's use of racial and political constructions of American Indians in three of the most important foundational cases determining the relationship of Indians to the United States: Cherokee Nation v. Georgia, United States v. Rogers, and Worcester v. Georgia.

The only explicit mention of American Indians in the original Constitution is in the enumeration of the powers of Congress, in a clause known as the Commerce Clause: "[The Congress shall have power] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The portion of the Constitution that conferred treaty-making power on the President, and the portion that named treaties as "the supreme law

16. The federal government is the sole supreme authority that may deal with tribes under the interpretation of the Commerce Clause of the Constitution in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). State, county, municipal, or other non-federal regulation of tribes may arise only by the specific authorization Congress. Several western states have been so authorized with regard to some areas of law by a 1953 Act of Congress known commonly as Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.
17. See generally I INDIAN AFFAIRS: LAWS AND TREATIES 1-22 (Charles J. Kappler ed., 1904). A cursory glance at the compilation of the revised statutes relating to Indians as of the end of the nineteenth century indicates that an overwhelming majority of them were enacted in the second two-thirds of the century.
22. Id. art. II, § 2, cl. 2.

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of the land,"23 have both been interpreted as applying to American Indian tribes. The fourteenth amendment excludes "Indians not taxed" from the apportionment of representatives.24 The authority to make treaties and to regulate commerce was insufficient power to resolve disputes involving Indians and still permit continued westward expansion across the continent.

Confronted with little Constitutional direction and Congress's inaction, the Supreme Court was compelled to fabricate a relationship between the United States and tribes. Two early cases, *Fletcher v. Peck*25 and *Johnson v. M'Intosh*,26 characterized the property rights of Indians as legally different from that held by Euro-Americans. Indian (or "aboriginal") title is generally communal or originated in communal possession, and permits the holder only the right of occupancy.27 These cases held that aboriginal title could not be bought or sold except by the colonizing European sovereign or the Euro-American State created from the colony. Indians could not sell their land to anyone — aboriginal title could only be extinguished by force of arms or by cession through treaty. This doctrine is known as the doctrine of discovery. The wordings of the Court's opinions in these cases have since been used to justify dispossession of large tracts of land without compensation. The fabricated concept of aboriginal title is a racially, or at least geographically, dependent concept; no European nation seriously contended that the citizens of another European nation held their lands under a different, and less secure, form of title than did its own citizens. Chief Justice John Marshall's invention of aboriginal title was an important first step toward embracing the doctrine of discovery and other racial legal constructions of American Indians.

A. *Cherokee Nation v. Georgia*

The racial and political aspects of American Indians' relationship to the United States became particularly germane a few years after *Johnson*, in the early 1830s. The State of Georgia passed in late 1829

an act to add the territory lying within the chartered limits of the State of Georgia, now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and to

23. *Id.* art. VI, cl. 2.
24. *Id.* amend. XIV, § 2.
25. 10 U.S. (6 Cranch) 87 (1810).
annul all laws and ordinances made by the Cherokee nation of Indians . . . and to regulate the testimony of Indians. 28

The Cherokee Nation brought a bill to the Supreme Court on its original jurisdiction, asking for an injunction to prohibit the State of Georgia and its officers from enforcing its laws on the Cherokee Nation. The bill argued that those laws violated the treaties between the United States and the Cherokee Nation, and thereby, the Constitution. The Supreme Court granted a hearing in the case of Cherokee Nation v. Georgia, as it involved as parties a State of the Union and a nation of indeterminate sovereign status. The State of Georgia did not send any representatives to appear before the Court. 29 Georgia refused to acknowledge the supremacy of the federal government at the time, as did several other southern states. The nullification conflict, and the question of whether other branches of the federal government could be made to conform to Supreme Court holdings, placed pressure on the Court, and particularly on its Chief Justice.

Chief Justice John Marshall is probably the single most important individual in the formative development of the relationship of American Indians to the United States. Marshall delivered the opinions of the Court in the Fletcher, Johnson, Cherokee Nation, and Worcester cases, among others. In 1830, Marshall was acutely aware that the state of Georgia, and President Andrew Jackson, would not abide by his decision if he found that the Cherokee Nation was an independent, foreign nation like, for example, France or the United Kingdom. 30 He was also aware of the ramifications of the decision for the possibility of continued westward colonization. Marshall was not entirely unsympathetic, however, to the Cherokee Nation's situation:

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made. 31

30. See, e.g., id. at 102, 105, 109.
Marshall's task in *Cherokee Nation* was to rationalize the various recognitions of the Cherokee Nation's sovereignty with the purpose and method of American colonialism, or to postpone the issue. He did a little of both.

Marshall disposed of his momentous task in a few short paragraphs — the two concurring opinions and the dissenting opinion compose the largest volume of the case report. Marshall noted in considering the question of the Court's jurisdiction that the acts of the federal government had clearly recognized the Cherokee Nation as a state of some sort. The wording of the applicable section of the Constitution, concerning judicial powers, extends the jurisdiction of the Supreme Court to "controversies between a state or the citizens thereof, and foreign states, citizens, or subjects," and confers original jurisdiction on the Court in cases in which a state is a party.\(^{32}\) The Cherokee Nation was not a state of the union, and its attorneys did not argue that it was, but that it was a foreign nation. Marshall persistently referred to the tribe as an aggregate of members — rather than "the Cherokee Nation," he used "the Cherokees"; rather than "it," he used "they." He wrote, for example, paraphrasing the argument of the Cherokee Nation's attorneys: "they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.\(^{33}\)

Marshall created a new sovereign status within the U.S. political system to refute the Cherokee Nation's claim that it was a foreign nation, and thereby permit continued colonization. The five sentences he used to do so continue to color the relationship of American Indians to the United States even today:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.\(^{34}\)

Marshall induced from the quasi-subordinate status of some tribes that had then been subsumed within the external boundaries of the United States the

\(^{32}\) U.S. CONST. art. III, § 2, cl. 1-2.


\(^{34}\) Id. at 17.
more universal principle "that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states." The difference between the nineteenth century political relationship of the United States to the tribes of the western portion of the continent, or to the Kingdom of Hawaii, and, for example, to the Empire of Japan, resulted almost entirely from differences in geographic location and racial constitution. The facile basis for this difference has since been largely forgotten. Other nations would pooh-pooh the suggestion that the United States Congress has or ever had "plenary power" to legislate with regard to the affairs of Japanese, or the affairs of any other nation's citizens. Victory in World War II gave the United States a great influence over the rewritten Japanese Constitution, but the United States did not absorb Japan as a state, or as a trust territory. What distinguished American Indian nations, or the Hawaiian Kingdom, from the defeated empire of Japan? Geographical location? The Kingdom of Hawaii shared more similarities to Japan in that regard than it did American Indian nations. Was the distinction based on the race of the inhabitants? Perhaps, but the inhabitants of all three were of different races than the ruling elite of the United States. One could also argue that the historical period in which the United States obtained hegemony over Japan was different from that in which the United States dispossessed most tribes and annexed Hawaii. Each of these explanations provides a portion of the necessary contemporary justification for the United States's actions, but none of them justify the refusal to act on the knowledge that the federal power over American Indians, and the annexation of Hawaii, are and were opportunistic contrivances.

Marshall laid bare the racial nature of this distinction between the sovereignty of Indian nations and that of the states, the federal government, and foreign nations, in an attempt to bolster his argument:

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. . . . [T]he peculiar relations between the United States and the Indians occupying our territory are such,

35. Id. at 18.
36. Norgren has nonetheless commented that creating the appellation "domestic dependent nation" was little more than a "transparent ploy" that allowed Marshall "to avoid further attacks on the powers of the Court from Jackson and states' rights forces." Norgren, supra note 30, at 109. The disposition of successive cases has supported this viewpoint only occasionally.
that we should feel much difficulty in considering them as designated by the term foreign state.\textsuperscript{37}

Throughout his arguments regarding the lack of foreignness of tribal nations, Marshall characterized their relationship to the United States as "peculiar" and "unlike that of any other two peoples in existence" and referred to "peculiar and cardinal distinctions which exist no where else." The only explanation for the evolution of this peculiar and unequal relationship in this opinion is Marshall's generalization about the dependent nature of Indians\textsuperscript{38} and their "habits and usages \ldots in their intercourse with their white neighbours."\textsuperscript{39}

Why, indeed, would the citizens of a foreign nation consider appealing to an American court of justice for a "wrong" committed in their own country? To appeal to "the government" diplomatically, or to threaten war, as between nations, would much more exemplify the behavior of a "foreign nation." Marshall's argument only makes sense if the domesticity of the Cherokee Nation is assumed.

At the present time, the foreign nations of Luxembourg, Monaco, and San Marino, for example, are small, lack military power, and are surrounded by and dependent upon much larger and more powerful nations. What distinguished such small nations from American Indian tribes? Each was founded by essentially tribal groups of Europeans in the Dark Ages or Middle Ages. Luxembourg and Monaco were long dominated by their stronger neighbor nations, and San Marino was long protected by the Roman Catholic Church. All three nations' sovereignty was recognized again in the midst of the wars of the nineteenth century. None of the dominant countries argued (at least not to any effect) that the smaller countries were peculiarly dependent on them, although they were, and still are, clearly quite dependent on their larger neighbors. American Indian tribes were in America, the New World, not Europe, the Old World. Their lands and their populations were subject to discovery, conquest, and colonization by whatever European sovereign could arrive first. Marshall had written in considerable detail about the doctrines of discovery and conquest and applied them to American law in\textit{ Fletcher} and\textit{ Johnson}. Now Marshall stressed that it was the "habits and usages of the Indians, in their intercourse with their white neighbors"\textsuperscript{40} that set them apart

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\textsuperscript{37.} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 18.

\textsuperscript{38.} Marshall expanded further on the dependency of Indians:

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

\textit{Id.} at 17-18.

\textsuperscript{39.} \textit{Id.} at 18.

\textsuperscript{40.} \textit{Id.}
from Europeans and Euro-Americans. The relative level of civilization — "civilization" defined, of course, by Europeans — became the standard by which to distinguish a band of aboriginal people, whose rights could be disregarded, from a bona fide foreign nation. The Court accordingly found that the Cherokee Nation, not being a state of the union or a foreign nation, had no standing with which to bring a case to the Supreme Court on original jurisdiction. The Cherokee Nation decision defined the political sovereignty of tribes in a racial fashion, foreshadowing a case decided fifteen years later: United States v. Rogers. 41

B. Race-Based American Indian Law Becomes Clear: United States v. Rogers

Fifteen years later the Supreme Court decided a case concerning the membership of tribes. In United States v. Rogers, the Court was called on to decide if non-Indians could become members of a tribe, in this case the Cherokee Nation. The answer to such a question could have been left to the Cherokee Nation to determine; however, this possibility was neglected because the Cherokee Nation was not even involved in the proceedings. The Court instead awarded itself the power to determine the citizenship of tribes, and accordingly decided the case.

Rogers, a "white" man, was indicted for the murder of Jacob Nicholson, another "white" man, in a part of Indian country (present-day Oklahoma) belonging to the Cherokee Nation. When brought before the Arkansas District Court, which claimed jurisdiction over that portion of Indian country, Rogers claimed that he had joined the Cherokee Nation, married a Cherokee woman, and was therefore a Cherokee Indian. He argued that Nicholson was also a Cherokee Indian for the same reasons. As such, Cherokee Indians in Indian country were exempt from the laws of the United States pursuant to the Trade and Intercourse Act of 1834. 42 The district court refused to decide the case, sending it to the Supreme Court by certificate of division on six questions, most of which the Supreme Court refused to answer, finding them irrelevant.

Chief Justice Roger Taney, well known for delivering the opinion of the Court in the infamous case of Dred Scott v. Sanford, delivered a similarly race-based opinion in Rogers twelve years before. Taney took only a few pages to explain why Rogers simply could not possibly be a Cherokee, making some politically damaging remarks in the process. Two particular sections of Taney's opinion make clear the racial character of the relationship of American Indians to the United States that Marshall avoided discussing directly in Cherokee Nation. The first discusses the racial basis for the guardian-ward relationship:

41. 45 U.S. (4 How.) 567 (1846).
42. Id. at 572.
It would be useless at this day to inquire whether the [doctrine of discovery] is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political department of the government, and not for the judicial.43

Taney found Rogers's claim that he became an Indian through adoption preposterous, and accordingly interpreted the exception in the Trade and Intercourse Act as applicable only to a pseudo-scientifically defined race of Indians:

[W]e think it very clear, that a white man who at a mature age is adopted into an Indian tribe does not thereby become an Indian, and was not intended to be embraced by the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and

43. Id.
who will generally be found the most mischievous and dangerous inhabitants of the Indian country.\textsuperscript{44}

Taney saw American Indians in this case as a physically defined race. Although Taney claimed that the exception applied to "those who by the usages and customs of the Indians are regarded as belonging to their race," the Court neglected to determine whether Rogers was regarded by the "usages and customs" of the Cherokee Nation as "belonging to their race." Earlier in the opinion Taney denied that tribes had any sovereignty the United States was bound to respect: "The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied."\textsuperscript{45} The Court held that Rogers was clearly not an Indian, and remanded the case to the district court for trial. Rogers has never been overruled and continues to be cited, though rarely.\textsuperscript{46} Most importantly, Rogers approved the use of racial criteria in determining tribal membership, and implicitly, in other matters relating to Indians. Subsequent cases expanded that approval luxuriantly.\textsuperscript{47}

C. The Court Affirms Sovereignty Over Racial Dependency: Worcester v. Georgia

Chief Justice Marshall indicated in a passage from the Cherokee Nation case that he was not unsympathetic to the Cherokee Nation's political

\textsuperscript{44} Id. at 572-73.
\textsuperscript{45} Id. at 572.
\textsuperscript{46} E.g. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) (citing Rogers to help justify divesting a tribe of its jurisdiction over non-Indians on its reservation).
\textsuperscript{47} See United States v. Candelaria, 271 U.S. 432, 441-42 (1926) ("Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico."); Montoya v. United States, 180 U.S. 261, 266 (1900) ("We are more concerned in this case with the meaning of the words 'tribe' and 'band.' By a 'tribe' we understand 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; by a 'band,' a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design."); Westmoreland v. United States, 155 U.S. 545, 548 (1895) (upholding Rogers in the face of the plain language of a treaty); Taylor v. Brown, 147 U.S. 640, 646 (1893) (referring to "transactions with members of a race of people treated as in a state of pupilage and entitled to special protection") (citing Pickering v. Lomax, 145 U.S. 310 (1892), and Felix v. Patrick, 145 U.S. 317, 330 (1892)); id. at 330 ("Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts, and as persons 'in a state of pupilage.' Congress, too, has recognized their dependent condition, and their hopeless inability to withstand the wiles or cope with the power of the superior race.").
situation, and not unmindful of their sovereignty.\textsuperscript{48} Cherokee Nation has had disastrous results for American Indian tribal sovereignty, and United States v. Rogers is a member of the line of cases beginning with Johnson v. M'Intosh or perhaps Fletcher v. Peck, and including Cherokee Nation, which denied aspects of the sovereignty of tribes on racial grounds. Fortunately, these cases do not define American Indian law altogether. Other members of the Court who had deferred to the opinion of the Chief Justice in Cherokee Nation were willing to join Marshall in rebuking Georgia for usurping the authority of the federal government to act with regard to tribes in a case decided less than a year later. This case, Worcester v. Georgia,\textsuperscript{49} has been the cornerstone upon which subsequent cases upholding tribes' sovereignty have been built.

Georgia passed an act in late 1830 prohibiting white people from living in the areas within its boundaries that were occupied by the Cherokee Nation. Worcester, a white Christian missionary from Vermont, went to the Cherokee Nation with its approval and in order to preach there. Worcester was apprehended, tried in county court, and sentenced to four years of hard labor for residing in that area in contravention of state law. Worcester's attorneys, who had argued the Cherokee Nation case the year before, brought the case to the Supreme Court on writ of error to the Superior Court for Gwinnett County. The Supreme Court found that the case, involving much the same issue as Cherokee Nation, had this time been properly brought before it.

The Court was therefore forced to consider the question of whether states could pass laws governing tribes and their lands. Marshall first acknowledged that "the very passage of [the act prohibiting whites from residing in the Cherokee Nation] is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction."\textsuperscript{50} Now Marshall made a rather surprising statement, after his articulation of the doctrine of discovery in Johnson and his creation of "domestic dependent nations" in Cherokee Nation:

\begin{quote}
America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give
\end{quote}

\textsuperscript{48} See supra note 32.
\textsuperscript{49} 31 U.S. (6 Pet.) 515 (1832).
\textsuperscript{50} Id. at 542.
the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors. 51

Just to make sure that no one suspected he had been bamboozled into submission by Georgia's recalcitrance and President Jackson's open hostility to the Court, Marshall added further denigration of the doctrine of discovery: "The extravagant and absurd idea, that the feeble settlements made on the east coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man." 52 Discovery, argued Marshall, provided a government only with the right to purchase lands from and treat with Indians exclusive of other European nations, and conferred no jurisdiction or other regulatory power.

Marshall accordingly began to analyze the language of the treaty of Hopewell between the United States and the Cherokee Nation, a treaty between two sovereign nations that had been at war. After a long and detailed analysis, Marshall concluded that the treaty explicitly recognized the national character of the Cherokees, and their right to self-government. Cogently combining the analysis of the treaty with the explanation of the doctrine of discovery, Marshall stated,

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. 53

Marshall noted additionally that the state of Georgia itself long had held a similar view — that American Indians had full rights to their lands and government of them — and pointed out that "[Georgia's] new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December 1828." 54

Having presented all his arguments, Marshall concluded that the Cherokee Nation was indeed quite sovereign (albeit with certain limitations under the doctrine of discovery), and the State of Georgia had no authority in Cherokee country:

51. Id. at 542-43.
52. Id. at 544-45.
53. Id. at 559.
54. Id. at 560.
The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.\(^5\)

The Court sent a special mandate to the superior court of Gwinnett county, ordering it to reverse its decision and release Worcester. President Jackson and the state of Georgia subsequently conspired to remove the Cherokees to Oklahoma by force on the infamous "trail of tears," notwithstanding the Court's recognition of Cherokee sovereignty. Although the Worcester case failed to protect the Cherokees from forced removal, it has been upheld repeatedly as the strongest single legal recognition of the sovereignty of tribes.

**II. Simmons v. Eagle Seelatsee, Morton v. Mancari, and the Attempt to Harmonize Equal Protection with Federal American Indian Policy**

Worcester v. Georgia upheld the sovereignty of tribes by focusing on the political position of tribes as outside U.S. politics and their acknowledgement as independent political entities.\(^6\) Cherokee Nation v. Georgia and United States v. Rogers denied the sovereignty of tribes by focusing on a view of their members' racial positions as non-European and uncivilized.\(^7\) Judicial disapproval of racial criteria in federal Indian law seemingly should be the most important step in recognizing the political sovereignty of American Indian tribes, then. Racial criteria are so ingrained in the relationship of the federal government to Indians, though, that attempting to extricate them from federal Indian law has the opposite effect, unless a full-scale acknowledgment of the sovereignty of all tribes, a return of all judicial, legislative, and executive powers, and a return of all lands illegally ceded, taken by force, or otherwise wrested from tribes in bad faith, accompanies that repudiation of racial criteria. Rather than go so far in returning tribes' sovereignty to them, or so far in terminating tribes altogether, the Supreme Court has tried to take a moderate approach to reducing the use of racial criteria, by arguing that the primary relation of the United States to Indians is political, and racial criteria are auxiliary, at best. Racial criteria are important to the federal government's method of determining tribal membership, and to the administration of the trust relationship. The partially conflicting views, that racial criteria are essential to the federal relationship to Indians, and that racial criteria are a

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55. *Id.* at 561.
56. *See supra* Part I.C.
57. *See supra* Parts I.A., I.B.
minor part of the federal government's mostly political relationship to Indians, were articulated by two cases that arose in the later part of the civil rights era: Morton v. Mancari and Simmons v. Eagle Seelatsee.

The Court's argument in Morton v. Mancari against viewing American Indian preferences as racial discrimination relies on the unique historical construction of American Indian tribes in the U.S. legal system. Legislation with regard to Indians has long been considered a constitutionally and judicially approved activity. The tenor of the Court's arguments in Mancari indicate a recognition that over the years since Cherokee Nation and Worcester, federal laws had become more important in protecting American Indian sovereignty from state and local governments and their constituents, than in restraining Indians from exercising the power of the "tomahawk," to which Chief Justice Marshall had referred, in defense of their sovereignty. Protection from state and individual interference, and varied social services and other benefits, were now provided to tribes and individual Indians in recognition both of historical inequities perpetrated by the United States and its citizens, and of the continuing sovereign status of tribes. Ruling special benefits and protection for Indians illegal under equal protection laws would be effectively the same as declaring assimilation complete and terminating the sovereign status of tribes:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Historical discourses would be largely pointless if the Court were to rule that determination of who is an "Indian" for the purposes of the trust relationship is a purely racial matter.

Rather than attempt to prove that American Indians as groups and as a whole, for federal purposes, are constructed solely as political entities and not as a racial group, the Court indicated that it would be sufficient to show that American Indians were constructed at least partly as something other than a racial group. If the demonstration that race is only one of a number of factors determining group membership is sufficient to justify the federal government's

61. Mancari, 417 U.S. at 552.
various forms of "special treatment" for that group, then the Court clearly made a proper use of policy history in *Mancari* and in subsequent cases. To ask the Court to decide that for federal purposes American Indian tribes, and American Indians, are solely political entities, would be to ask the impossible, for they clearly are not and have not been, either historically or legally. To so rule, the Court would have to strike down the portions of the Indian Reorganization Act that uphold the authority of Congress and the Bureau of Indian Affairs (BIA) to use racial criteria in determining the membership of tribes and the eligibility of individuals for services. The Court in *Mancari* did not set out to make such a drastic revision of the other two branches' policies — rather, it seems to have built on a 1965 federal district court decision, *Simmons v. Eagle Seelatsee,* to decide tacitly that race could be a factor in the determination of eligible groups, so long as it were not the only one. *Simmons* was the forebear of *Mancari,* its arguments concerning the legal use of race with regard to Indians were not taken up in *Mancari,* but its acknowledgement that racial criteria were essential to the federal relationship to Indians was important, though used carefully and quietly by the Court. The Court cited *Simmons* as the judicial support for its concern that "every piece of legislation dealing with Indian tribes and reservations" might be "deemed invidious racial discrimination." This concern, as we will see, stemmed from *Simmons*'s explicit recognition of the necessity of racial criteria in many areas of the federal relationship to Indians. The Court was careful in *Mancari,* however, not to acknowledge directly the widespread presence of racial criteria in federal Indian law in the way that *Simmons* did.

A. *Simmons v. Eagle Seelatsee* and a Pragmatic Argument for the Use of Racial Criteria in the Federal Relationship to Indians

The district court was confronted in *Simmons* with a challenge to the use of racial criteria in determining the eligibility of individuals to inherit allotted lands from deceased Indian relatives. The specific criterion in this case, a blood quantum requirement, was found in section 7 of a 1946 act regarding the Confederated Tribes and Bands of the Yakima Indian Nation exclusively. The blood quantum requirement excluded those relatives of members, who were not also enrolled members with one quarter or more Yakima blood, from inheriting any allotted lands.

Joseph Simmons, Sr., was a member of the Yakima Nation who had received an allotment and continued to hold it at the time of his death. After

64. *Mancari,* 417 U.S. at 552-53.
65. Now known as the "Confederated Tribes and Bands of the Yakama Indian Nation."
his death, the Secretary of the Interior denied Simmons's heirs the right to inherit his allotment because none of them met the blood quantum requirement of section 7. Simmons's heirs challenged the act, claiming that it was unconstitutional because it failed to provide Yakima Indians with due process of law in that it bore "no reasonable relation to the guardianship the United States has of Indians," and because it violated the Fifth Amendment, under *Bolling v. Sharpe*.

The district court's argument concerning the merits of the *Simmons* case centered, as one might expect, on Congress's authority to determine tribal membership. Also as one might expect, the district court premised that argument with the plenary power of Congress to legislate on Indian matters. The Constitutional authority from which Congress derives its "plenary" power over Indians is by no means clear; however, several long-standing and often-quoted cases in the Supreme Court have upheld that power. The case of *United States v. Kagama* is usually identified as the judicial decision allowing Congress plenary power over Indians:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The district court did not cite *Kagama* as the source of Congress's plenary power; rather it considered the matter settled and cited more recent cases that both acknowledged Congress's plenary power and included the power to determine tribal membership within that plenary power.

The district court used those cases to move from invoking the general power of Congress over Indians to supporting its key proposition — that the determination and regulation of tribal membership was a necessary aspect of Congress's plenary power, and section 7 of the 1946 act was nothing more than an exercise of that power. The primary justification for this proposition came from two Supreme Court cases: *Stephens v. Cherokee Nation* and...

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67. Simmons, 244 F. Supp. at 810-11.

68. Id. at 813.

69. 118 U.S. 375 (1886).

70. Id. at 384-85.

71. The term "plenary" was first used in this fashion in *Cherokee Nation v. United States*, 30 U.S. (5 Pet.) 1, 44 (Baldwin, J., concurring), but such a power, in the sense that "plenary" means "absolute" was not viewed as residing in Congress until *Kagama*.

Cherokee Nation v. Hitchcock. 73 The Stephens case concerned the constitutionality of Congress's delegation of the power to determine tribal membership to the Dawes Commission. 74 Cherokee Nation v. Hitchcock concerned the constitutionality of Congress's authorization of lease sales to subsurface rights on Cherokee lands by the Secretary of the Interior. 75 Both cases held that the determination of tribal membership was a necessary component of Congress's power over Indians.

The district court saw no reason to view the use of a blood quantum requirement in the 1946 Act as racially discriminatory. Whether that requirement was discriminatory or not, courts have not been inclined to overrule congressional actions with regard to Indians, as the district court noted. 76 In any case, the district court was not compelled to confront Congress; it cited Tiger v. Western Investment Co. and several other cases 77 to support its position that "it seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood." The cited cases provided further evidence that Congress had frequently used blood quantum to place some Indians in one group and some Indians in another group, to delineate different entitlements and rights.

Perhaps the clearest statement of the district court's position was its conclusion to the line of argument concerning Congress's powers over tribal membership:

It is plain that Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of "a criterion of race". Indians can only be defined by their race. 78

73. 187 U.S. 294 (1902).
74. The district court cited the following passage:
We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes.
75. The district court cited Cherokee Nation v. Hitchcock in accord with Stephens, as Cherokee Nation v. Hitchcock decided a similar issue, making use of the Stephens holding and quoting it approvingly. Id.
76. Id. (citing Baker v. Carr, 369 U.S. 186, 215 (1962)).
78. Simmons, 244 F. Supp. at 814 (emphasis added).
In support of the contention that Indians can only be defined by their race, or, at least, that that method of definition is so ubiquitous in federal Indian law that no alternative exists but to perpetuate it, the district court constructed a brief argument in a related footnote.\footnote{Id. at 814 n.13.} If the use of a criterion of race were unconstitutional, every statute relating to Indians would be unconstitutional. In that case, the property held in trust for Joseph Simmons Sr. would have been allotted to him unconstitutionally, and his heirs would have no right to inherit it because Simmons's interest in the trust property would be nullified by the unconstitutionality of the trust relationship itself. This argument, although effective in this case, would be impossible to make in the case of \textit{Morton v. Mancari} as it involved non-Indian employees of the BIA.

\textit{Simmons v. Eagle Seelatsee} acknowledged the presence of racial criteria in federal Indian laws in a way that \textit{Morton v. Mancari} avoided. The Supreme Court's holding in \textit{Mancari} contained much more detail, but was worded much more ambiguously. Portions of the opinion of the Court in that case grate quite harshly against the final pronouncement of the district court in \textit{Simmons}:

\begin{quote}
We hold that there was a rational basis for the classification provided in § 7. Necessarily continued intermarriage with white persons would ultimately produce persons who were in no true sense Indians. At some reasonable point a line must be drawn between Indians and non-Indians, between those properly to be regarded as continuing members of the tribe, and those who are not. Th[is] case has no resemblance to Bolling v. Sharpe, where the segregation of pupils, by race, in public schools was held a violation of the Fifth Amendment.\footnote{Id. at 815 (citations omitted).}
\end{quote}

As an explanation of the position of American Indian policy in opposition to equal protection, \textit{Simmons} succeeds much better logically than \textit{Mancari}, but \textit{Mancari} has been the controlling precedent. \textit{Mancari} did, as we shall see, acknowledge \textit{Simmons} and its reasoning, but shied away from its open acceptance of racial criteria.

\textbf{B. Morton v. Mancari and the Denial of Racial Criteria}

Non-Indian employees of the BIA filed a class action suit against Secretary of the Interior Rogers Morton claiming that the longstanding BIA preference system for Indian employees violated several sections of the newly enacted \textit{Equal Employment Opportunity Act of 1972 (EEOA)},\footnote{42 U.S.C. §§ 2000e-2000e1 (1994).} and the Fifth Amendment. The district court found that the EEOA had implicitly repealed that preference, which originated in the nineteenth century and was codified
by the Indian Reorganization Act. On appeal, the Supreme Court reversed, holding that Congress did not intend to repeal the preference with the EEOA (and noting that "repeals by implication are not favored"), and that the preference did not violate the Fifth Amendment under Bolling v. Sharpe. The issue of whether or not Congress intended to repeal the preference with the EEOA is mostly irrelevant here, so I will focus on the Court's holding that the preference did not violate the Fifth Amendment. The reasoning the Court provided for so holding differed markedly from the reasoning it approved of in affirming the Simmons decision.

As we have seen, the district court in Simmons was not bashful about acknowledging the racial aspect of the law determining the Simmons heirs' eligibility to inherit Simmons's allotment. The Court in Mancari noted the unique legal and political status of Indians as tribe members, acknowledging the development of congressional plenary power and a guardian-ward relationship. All this the district court had done in Simmons; but the Court in Mancari refused to admit that the BIA preference contained a racial criterion. Justice Harry Blackmun, writing for the unanimous Court, explained the Court's view of the preference as lacking a racial quality:

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.

The first two sentences of this quote are important to understanding how Blackmun viewed the argument he was making. The second sentence, by adding the claim that the BIA preference is not a racial preference to the first sentence's claim that the preference is not racial discrimination, makes a distinction between racial preferences and racial discrimination. The Court, by so wording its holding, obviously contemplated that there could be racial preferences that were not racially discriminatory, although it argued that this particular preference was neither. Although the Court denied that the BIA preference was a racial preference, it neither explicitly denied nor proscribed the inclusion of a racial criterion as a component of the process for determining the membership of tribes as eligible political groups.

Blackmun further explained the Court's position in a related footnote:

The preference is not directed toward a "racial" group consisting of "Indians"; instead, it applies only to members of "federally
recognized” tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.55

Blackmun argues in this footnote that the preference does not benefit a racial group (Indians), but rather benefits members of certain political groups (tribes), essentially all of whom also happen to be members of that racial group. The preference thus excludes many members of the racial group who are not members of any of the eligible political groups, as Blackmun correctly notes in justification of the differentiation of Indians as a racial group from tribes as political groups. The Court did not address the question of whether the exclusion of members of tribes who are not Indians (should there be such individuals) from the preference would be impermissible. To decide that the BIA preference could not exclude members of tribes who were not racially Indian, the Court would have to overturn, or somehow distinguish, cases (such as United States v. Rogers) in which non-Indians adopted into Tribes were held to still be non-Indians for legal purposes. In doing so the Court would risk unstitching the already flimsy patchwork of legal processes by which American Indian tribal membership is determined.

The Court was faced in Mancari with a difficult problem: if it held that the preference was racial and thereby violated the Fifth Amendment, then it would necessarily also disapprove the criteria for determining tribal membership and the status of individuals as "Indian" in broader terms. Such a decision would overturn Rogers and open the way for non-Indians to join tribes virtually at will, thereby destroying any remnant of a nation-to-nation relationship between tribes and the federal government, and making the trust relationship impossible to administer, if not simply illegal. That decision would also be a momentous intrusion into areas in which the Court has traditionally deferred to congressional action. The Court's other option was to explain, as it did, why American Indian tribes have a special relationship with the federal government that other minority groups do not, and why the policy making up that relationship has never been subjected to the same Constitutional scrutiny as other policy. The Court had not yet made inroads into declaring the recognition of racial distinctions, of all types and for all purposes, illegal. Even a few years later in the landmark degradation of affirmative action policies, Regents of the University of California v. Bakke,86

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85. Id. at 554 n.24.
86. See supra Part I.B.
the Court carefully noted that it did not proscribe race as a selection criterion per se, but only as the sole selection criterion. The BIA preference in Mancari clearly does not use race as the sole criterion. More recently, in Adarand Constructors, Inc. v. Pena, Mancari was not so clearly distinguished, and, most alarmingly, was implicated in the holding by one of the dissenters.

III. Interpretations of Mancari and Its Relationship to Equal Protection Rights

The Supreme Court generally has used Mancari in three ways: (1) in majority opinions, to define the limits of implicit repeals; (2) to justify special federal programs and special legal status for American Indians; and (3) in dissenting opinions and briefs in cases reforming affirmative action programs, to argue that different types of racial preferences are permissible. No Supreme Court case has explicitly questioned Mancari; rather, use of the case in dissenting opinions has associated it with some cases that struck down preference programs. This association in Adarand led the Ninth Circuit Court of Appeals to suggest in Williams v. Babbit that Mancari might be have been modified, or be in danger of reversal. Justices Stevens's use of Mancari in his dissenting opinion to an even more recent case, Rice v. Cayetano, although upholding the case as good precedent, seems to unwittingly support the Ninth Circuit Court's argument by its method. The Court distinguished Mancari in the past from the Bakke case, which struck down a certain type of racial preference. The present situation, involving Adarand, Williams, and Rice, is more complicated and much more contemporarily problematic than that past situation, so I will concentrate more analysis on the present. Mancari is in urgent need of re-explanation, to affirm its stability, or of replacement with a more stable harmonization of equal protection with federal Indian policy. Absent one of those solutions, a differently comprised Court may choose to interpret Adarand in the way that the Ninth Circuit suggested in Williams and the dissent in Rice unintentionally supported.

The Court's use of Mancari in the case of Fisher v. District Court only two years after Mancari was decided exemplifies the way the Court commonly has used the case in other cases involving American Indians. Fisher was a per curiam decision concerning the jurisdiction of the Northern Cheyenne Tribe over adoption proceedings in which all concerned parties

89. Id.
90. 115 F.3d 657 (1997).
91. 120 S. Ct. 1044 (2000).
were Tribe members. In holding that the Tribal Court had exclusive jurisdiction over such proceedings, the Court stated:

We reject the argument that denying [plaintiff] access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974)."

The Court thus used *Mancari* to justify what appeared superficially to be racial discrimination against individual Indians, in much the same way as it had used and would continue to use *Mancari* to justify what appeared to be discrimination against non-Indians by way of preference for Indians. *Fisher* entrenched the *Mancari* concept of the primacy of a tribe's political sovereign status over the racial categorization of the Indians that compose it. The Court used *Mancari* in this way for several years after *Fisher,* but in the past few years it has used other language from its opinion in *Mancari* to support Congress' plenary power over tribes.95

The other more common use of *Mancari* by the Court has been as a keystone of a canon of statutory construction: "repeals by implication are not favored."96 This canon has several other cases behind it, but the regularity at which the Court has cited *Mancari* as one of its important bases in a wide variety of cases97 suggests that the Court considers *Mancari* a stable

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precedent and an important articulation of the strong scrutiny to which arguments concerning implicit repeals must be subjected.

The first major endangerment of Mancari I identify was in the 1978 landmark affirmative action case, Regents of the University of California v. Bakke, on certiorari to the California Supreme Court. Allan Bakke, a white applicant to the University of California, Davis, medical school, applied and was rejected in two consecutive years, while less-qualified minority students were admitted under a special program that reserved sixteen of the one hundred spaces in the entering class for minority students. The Supreme Court of California held the special admissions program unlawful and declared that race could not be considered in the admissions process. Five members of the United States Supreme Court agreed with the California Supreme Court that the medical school's special admission program was unlawful, upholding that part of the California court's decision, but five members agreed that the medical school could not be prohibited from considering race in its admissions process, reversing that part of the California court's decision. Justice Lewis Powell announced the decision of the Court and delivered an opinion, joined in each of two parts by a different four of the other eight members of the Court. Justices Brennan, White, Marshall, and Blackmun concurred with the decision that race could be considered in the admissions process but dissented in arguing that the special admission program was not unlawful. Justices White, Marshall, and Blackmun also wrote separate opinions to emphasize their own positions. Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger concurred with the decision that the special admission program was unlawful but argued that the California Supreme Court's holding that race could not be considered in the admission process should be upheld as well.

The Bakke decision resulted in a serious curtailment of generalized attempts to achieve equal opportunity for all races by way of affirmative action programs. This curtailment included affirmative action directed toward American Indians, but only those programs that were directed toward American Indians solely as a racial minority group, in the same sense that African-Americans or Chicanos compose minority groups. The opinion of the Court, given by Justice Powell, was the only opinion in Bakke to mention Mancari, concisely distinguishing it from the situation at hand. It stated:

Petitioner also cites our decision in Morton v. Mancari, 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs . . . . We observed in that case, however, that the legal status of the BIA is sui generis. Id., at 554. Indeed, we found that

the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion."\textsuperscript{100}

The only mention of \textit{Mancari} in the \textit{Bakke} decision, then, was to distinguish it from \textit{Bakke} and clarify the fact that the attorneys for the University of California misinterpreted \textit{Mancari} in attempting to use it to support their case arguing that the special admissions program was legal. The Court avoided leaving the status of \textit{Mancari} in question after \textit{Bakke} by distinguishing it in the quoted footnote. None of the dissenters tried to use \textit{Mancari} to support their arguments in favor of the special admissions program. Three years later, in \textit{Watt v. Alaska}, the Court used \textit{Mancari} again to explain the canon of construction disfavoring repeals by implication.\textsuperscript{101} Justice Stewart dissented from the decision of the Court, joined by Chief Justice Burger and Justice Marshall. Stewart devoted some argument to distinguishing the holding of \textit{Mancari} from the fact situation in \textit{Watt}, explaining part of \textit{Mancari} in the process.\textsuperscript{102} The use of \textit{Mancari} as good law by both the majority and the dissent in \textit{Watt} indicates that the Court considered the precedent established in \textit{Mancari} to be untouched by \textit{Bakke}.

Justice Stevens's use of \textit{Mancari} in his dissent to the 1995 case of \textit{Adarand Constructors, Inc. v. Pena} could create a serious problem, if some future Court should seize upon the Ninth Circuit Appeals Court's interpretation of it in \textit{Williams v. Babbitt}.\textsuperscript{103} The \textit{Adarand} case, like \textit{Bakke}, did not involve tribes' relationship to the federal government, or Indians at all, except as one group among the various groups targeted by the affirmative action program at issue. \textit{Adarand} Constructors, Inc., was a highway construction company owned by a white person, and lost a federal contract because of a program favoring subcontracting companies owned by "socially or economically disadvantaged individuals." The Court overruled \textit{Metro Broadcasting v. FCC},\textsuperscript{104} holding that "strict scrutiny" must be applied to federal programs involving racial classifications, even if "benign" in nature. The case was remanded to the lower courts with instruction to apply strict scrutiny to the fact situation under established precedent. Justice O'Connor delivered the opinion of the Court, joined by Chief Justice Rehnquist, Justices Kennedy and Thomas, and in "pertinent" part by Justice Scalia. Justices Stevens, Souter, Ginsburg, and Breyer dissented in three separate opinions, the most lengthy and detailed by Justice Stevens and joined in by Justice Ginsburg. Justice

\textsuperscript{100} Id. at 304 n.42.
\textsuperscript{102} Id. at 281.
\textsuperscript{103} 115 F.3d 657 (1997).
\textsuperscript{104} 497 U.S. 547 (1990).
Stevens took issue with the Court's concepts of "skepticism," "consistency," and "congruence," and with the Court's application of the principle of *stare decisis*. Stevens's argument against the Court's concept of consistency implicated *Mancari*, though, I argue, not in exactly the sense the Ninth Circuit claimed in *Williams*.

The programs struck down by both *Adarand* and *Bakke* considered American Indians as a race for affirmative action purposes, not as the constituents of quasi-sovereign political entities. The comparison between the affirmative action issue in *Bakke* and *Adarand*, and the sovereignty and trust relationship issues of *Mancari*, should ideally end here. The opinion of the Court in *Adarand* did not even mention *Mancari*. Justice Stevens used *Mancari*, however, in the midst of his argument that the Court's concept of consistency in equal protection law would undermine efforts to secure equality for disadvantaged minorities. Concerning "consistency," Justice Stevens's dissent stated, "The Court's concept of 'consistency' assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of a minority notwithstanding its incidental burden on some members of the majority." Stevens argued that "benign" programs, designed to "eradicate racial subordination" deserve different treatment from that accorded "invidious programs" designed to "perpetuate a caste system."

In illustration of the difference between benign and invidious programs, Stevens constructed a hypothetical situation involving the World War II-era discrimination against Japanese-Americans. Curfews, exclusion from certain areas, and confinement in camps imposed on the members of a minority defined by racial and ethnic characteristics were surely invidious discrimination, as the Court had opined. At this point in the argument Stevens began to philosophize:

Suppose Congress decided to reward [Japanese-American soldiers'] service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in *Hirabayashi* and *Korematsu* would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those

106. *Id.* at 244 (citing *Hirabayashi* v. United States, 320 U.S. 81 (1943), and *Korematsu* v. United States, 323 U.S. 214 (1944) (both of which, however, surprisingly held the invidious policies lawful, as they were for "national security" purposes)).
cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history.  

The final sentence of this quote included a footnote associating Mancari with the argument, and briefly attempting to relate the situation in Mancari to the situation in Adarand:

To be eligible for the preference in 1974, an individual had to "be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe." We concluded that the classification was not "racial" because it did not encompass all Native Americans. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. In this case respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

Stevens followed the hypothetical argument about Japanese-Americans and the sentence about American Indians with a few more examples to undermine the Court's concept of consistency. He claimed that the Court's concept of consistency "would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with Presidents Johnson's evaluation of his nominee's race as a positive factor." The short citation of Mancari appeared in the middle of a series of philosophical arguments aimed at undermining a concept employed by the Court in reaching the Adarand decision.

The Ninth Circuit Court of Appeals seized on that single sentence from Justice Stevens's dissent two years later in Williams v. Babbitt. Williams wanted to import reindeer from Canada and herd them in Alaska, but was unsure whether the Reindeer Act of 1937 prohibited him from doing so. Officials of the BIA at various local and regional levels informed Williams that his plans would not violate the Reindeer Act, but Native Alaskan herders pressed the issue until it reached the Department of Interior Board of Indian Appeals (IBIA), which decided to the contrary. The IBIA held that even though the Reindeer Act does not mention non-native ownership of reindeer,

107. Id. at 244-45.
108. Id. at 244 n.3.
109. Id. at 245.
110. 115 F.3d 657 (1997).
it must be construed to prohibit non-native entry into the Alaskan reindeer industry, a holding that the federal district court upheld. The Ninth Circuit reversed the district court, holding that Congress intended to "place significant obstacles in the way of any non-native who would operate a reindeer business in Alaska" but that the Reindeer Act does not expressly forbid non-natives from entering into the reindeer business if they can overcome those obstacles.

In deciding that the IBIA's interpretation was simply contrary to the plain language of the statute, the court of appeals mused about several other issues, including the affect of Adarand on Mancari. Judge Brunetti grumbled in his concurring opinion that the court should have dispensed with its lengthy debate on the construction of the Reindeer Act:

> Nothing in the Reindeer Act requires that we "construe" the Act at all. Because the IBIA's interpretation of the Act, and the district court's upholding of that interpretation, were contrary to the plain language of the Act, there is no need to address "the far more complex question" of "to what extent is a court bound to defer to an agency's interpretation where that interpretation raises difficult constitutional questions?"  

Judge Kozinski, writing for the court, nonetheless considered the merits of deferring to the IBIA's interpretation and of ruling that the IBIA's interpretation violated the equal protection guarantees of the Constitution. Kozinski was perhaps prodded to consider Mancari because Williams claimed that Mancari was overruled by Adarand. Kozinski's comments on the situation at first seem to distinguish Mancari: "the IBIA's interpretation makes the Reindeer Act very different from a lot of other legislation pertaining to Native Americans. The government, intervenors and amici have been unable to cite another law that gives natives so broad a preference." Things quickly turned ugly for Mancari, however:

> Although the majority [in Adarand] emphasized that it was only overruling Metro Broadcasting, Justice Stevens in dissent argued that the majority's "concept of 'consistency' [in equal protection jurisprudence] . . . would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." If Justice Stevens is right about the logical implications of Adarand, Mancari's days are numbered.  

112. Williams, 115 F.3d at 668 (Brunetti, J., concurring).
113. Id. at 664.
114. Id. at 665.
Taken in context, as we saw, supra, Justice Stevens was referring not to "the logical implications of Adarand" but to the unconsidered implications of the concept of consistency that the majority chose to apply in that case. Stevens no more intended to imply that the Court was intentionally threatening Mancari than he meant to imply that the Court was officially disapproving the historic nomination of the recently retired Justice Marshall. Whether or not the Court would choose to apply such a concept of consistency in a case questioning the power of Congress to determine tribal membership using racial criteria is quite another matter. This quotation from the Williams opinion may seem to be a serious questioning of Mancari, but Kozinski had a penchant for ambivalence. In a later footnote, he wrote:

Intervenors claim that subjecting laws favoring Indians to strict scrutiny "would effectively gut Title 25 of the U.S. Code." Such a dire prediction, however, is unwarranted. We have little doubt that the government has compelling interests when it comes to dealing with Indians. In fact, Mancari's lenient standard may reflect the Court's instinct that most laws favoring Indians serve compelling interests. See Cohen, Handbook of Federal Indian

115. Concerning the recent case of Rice v. Cayetano, 120 S. Ct. 1044 (2000), Robert J. Deichert has argued that the Court was correct in striking down the OHA voting restriction because the Fifteenth Amendment is "a complete bar to government[-]sponsored racial discrimination with respect to the right to vote." Robert J. Deichert, Rice v. Cayetano: The Fifteenth Amendment at a Crossroads, 32 CONN. L. REV. 1075, 1119 n.302 (2000). Deichert apparently did not recognize that he also argued implicitly against the continued existence of American Indian tribes as distinct polities: most recognized tribes hold elections under the Indian Reorganization Act, 25 U.S.C. § 476 (1994). The IRA defines "Indian" as "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." 25 U.S.C. § 479 (1994). Another section of the code provides the Commissioner of Indian Affairs (with the approval of the Secretary of the Interior) to manage all Indian affairs, 25 U.S.C. § 2 (1994). This section of the code was interpreted in United States ex rel. West v. Hitchcock, 205 U.S. 80 (1907), as providing the Commissioner with the authority to determine tribal membership. Determination of tribal membership frequently includes a blood quantum requirement, e.g., Qualifications for Enrollment and the Deadline for Filing Application Forms Rule, 25 C.F.R. § 61.4 (1999). Under these terms, it appears that tribal elections differ little from the OHA election except in that they are mandated by the IRA rather than by the Hawaiian Homes Commission Act. Assuredly, American Indian tribes often have existing governmental structures that Native Hawaiians have not been permitted, but that distinction is relevant only to the question of the existence of a trust relationship with Native Hawaiians, a question that Mr. Deichert answered in the affirmative and the Rice Court left unclear. The alternatives seem to be that there is an exception to the Fifteenth Amendment, or that non-Indians are being illegally discriminated against in being kept from voting in tribal elections. The Court appears to have recognized that the "quasi-sovereign" status of tribes excepts them from the Fifteenth Amendment, but the distinction the Court made between Native Hawaiians and Indians, and between the OHA and tribal governments, Rice, 120 S. Ct. at 1058-59, is in my view immaterial.
The Court's reliance on a political-racial distinction may be no more than an imprecise reference to the special status of Indian tribes under the Constitution and laws. If so, Title 25 will only be stripped of those laws that are not narrowly tailored.

Did Kozinski intend to question Mancari or not? The statement about Mancari's days being numbered surely implies a level of uncertainty concerning the precedent's stability, but considered in the context of the footnote, the statement appears more to be an expression of uncertainty concerning the endurance of the precise principles of Mancari. Kozinski seems more likely to have been suggesting that the Court might more satisfactorily reformulate Mancari's harmonization of equal protection with federal American Indian policy, or that strict scrutiny was not to be applied to racial criteria used in federal Indian policy. The Ninth Circuit partially recanted Kozinski's questioning statements in its decision of Rice v. Cayetano, but they remain in the record for later courts to interpret, and the Supreme Court's distinguishing and use in dissent of Mancari in its recent decision of Rice can be read either to support or weaken the questionable status of Mancari.

Rice involved a restriction of voting rights to Native Hawaiians for a special board to administer trust funds. The majority distinguished Mancari from Rice by arguing that the elections for Office of Hawaiian Affairs (OHA) trustees were State elections rather than elections for a separate quasi-sovereign, and therefore were subject to the Fifteenth Amendment protection against discrimination in voting, and not to the Mancari exceptions. Justice Stevens dissented, joined in part by Justice Ginsburg, arguing that the federal government had a trust relationship to Native Hawaiians and the OHA was a legitimate program under power delegated to the State of Hawaii by Congress. Justice Stevens accordingly used Mancari to support the argument that Hawaii, as the representative of the federal government in the trust relationship with Native Hawaiians, could establish a board to oversee the use of trust funds for Native Hawaiians, whose composition would be decided by Native Hawaiians. Justice Stevens argued:

116. Williams, 115 F.3d at 666 n.8.
117. The Ninth Circuit stated:
   Although we questioned Mancari's continuing vitality in the light of Adarand in Williams v. Babbitt, 115 F.3d 657, 663 (9th Cir. 1997), and Rice believes Adarand trumps both [Mancari and its Ninth Circuit associate, Alaska Chapter, Associated Gen. Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982)], we are bound by Supreme Court authority and our own precedent until overruled which neither Mancari nor Pierce has been.
Rice v. Cayetano, 146 F.3d 1075, 1081 n.17 (9th Cir. 1998), rev'd on other grounds, 120 S. Ct. 1044 (emphasis added).
Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the sine qua non of governmental power in the realm of Indian law; Mancari itself, the majority contends, makes this proposition clear. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in Mancari; the hiring preference at issue in that case not only extended to non-tribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood. Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government — a possibility of which history and the actions of this nation have deprived them.\(^\text{119}\)

Justice Stevens thus argues cogently that although Mancari made the political aspect of Indians' relationships with the government paramount, the case did not prohibit all consideration of race as a defining aspect of Indians' political relationships with the government. Other sections of Justice Stevens's opinion confirm this interpretation: "this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates."\(^\text{120}\) Even though the voting qualification had a racial requirement, its function was rooted in the political empowerment of indigenous people: "any 'racial' aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class."\(^\text{121}\)

Justice Stevens makes compelling arguments for the recognition of a federal trust relationship with Native Hawaiians, delegated to the State of Hawaii, and for the upholding of the OHA election restrictions. Others have argued for\(^\text{122}\) and against\(^\text{123}\) the recognition of a trust relationship with Native Hawaiians; presenting such an argument is not the purpose of this work. My concern is that Justice Stevens's willingness to recognize that Mancari was not exactly what the Court claimed it to be — that the federal

\(^\text{119. Id. at 1066 n.11.}\)
\(^\text{120. Id. at 1068 n.12.}\)
\(^\text{121. Id. at 1070 n.14.}\)
\(^\text{122. John M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998).}\)
\(^\text{123. Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996).}\)
government uses race as well as political status to define and relate to American Indians — may unfortunately work to the advantage of those who wish to interpret Adarand as implicitly overruling Mancari. Circuit Judge Kozinski's cryptic, opposed comments on Mancari and Adarand leave Adarand's effects uncertain, with the way open for the Court to interpret Adarand as weakening or overruling Mancari. Some recent lower federal court cases seem to follow Mancari, but others seem to interpret Adarand as altering the principles set forth in Mancari.

The recent case of United States v. Keys124 exemplifies the way in which some lower courts have continued to follow Mancari and its progeny in spite of the so-called "logical implications" of Adarand. Nathaniel Earl Keys, an African-American, had a daughter ("Jane Doe") with an enrolled member of the Colorado River Indian Tribe. Jane Doe's mother was listed as having one-half Indian blood in her enrollment certificate. About two years later the mother, who lived apart from Keys, discovered evidence that Keys had abused the child. Keys was convicted of assault on Jane Doe, "an Indian," by a federal magistrate. The judge noted that Jane Doe had one-quarter Colorado River Indian blood, but was not an enrolled member. Keys appealed, claiming that the Federal Enclaves Act,125 under which he was convicted, was unconstitutional because his conviction was based on the race of the child. The district court upheld the magistrate judge's finding that the distinction between Indians and non-Indians for the purposes of the Federal Enclaves Act was political and not racial, and affirmed Keys's conviction.

Keys appealed to the Ninth Circuit Court of Appeals, arguing that his daughter was not an Indian because she was not enrolled, and if enrollment was not required for one to be Indian then his prosecution in federal court violated equal protection. The court of appeals rejected Keys's argument, pointing out that "enrollment is not the only means to establish membership in a trib[e]."126 Jane Doe's membership, said the court, was based not on her race but on her institutional recognition by the Tribe, such as by the Tribe's child welfare workers, as a member. In this case the court saw that Jane Doe satisfied the blood quantum requirement for tribal enrollment, but was not enrolled because she was too young to make such a decision. Following Mancari (though citing United States v. Antelope127), the court held that Jane Doe's Indian status was due to the Tribe's recognition of her as a member, not her race, in spite of the blood quantum requirement. The decision of the case, should Jane Doe have had one-eighth Indian blood instead of one-quarter (and therefore been racially unqualified for membership in the Tribe), may have been a much more complex process.

124. 103 F.3d 758 (9th Cir. 1996).
126. Keys, 103 F.3d at 761.
A case decided by the District Court for the District of Columbia a few months after the Supreme Court's *Rice* decision, *American Federation of Government Employees v. United States*, involved a situation analogous to that in *Adarand* except that the preference at issue specifically applied to American Indian-owned businesses. A group of unions and individual union members sought a preliminary injunction to prevent the Air Force from hiring an American Indian-owned contractor, under a policy of preferential treatment for firms owned by Indians, to do some civil engineering and maintenance work at bases in New Mexico and Florida. Since the district court was only explaining its decision to dismiss the application for a preliminary injunction, the court did not actually decide the issue of whether the Air Force's preference violated equal protection. The court did rule that it did not find "substantial likelihood" that the unions' challenge to the preference would succeed based on its merits. In so arguing, the court found that it was "likely to conclude that the . . . preference is subject to strict scrutiny because it burdens a fundamental right." In an associated footnote the court noted that its interpretation of *Mancari* could play a large role in determining whether [it] finds the . . . preference to be a racial classification or a political classification. In turn, this categorization of the preference would determine the level of scrutiny the court applies to the preference. Specifically, if the court found the preference is racial, it would apply strict scrutiny; if the court found the preference is political, it would apply rational-basis review.

In the same footnote, the court cited the Supreme Court's and the Ninth Circuit's decisions in *Rice* as implying that the applicability of *Mancari* has become more limited since *Adarand*. With regard to the Supreme Court's holding, the district court viewed the majority's summary of *Mancari* as placing a great emphasis on its applicability being limited to the BIA. With regard to the Ninth Circuit's holding in *Rice*, the district court took note of the footnote that referred to "question[ing] the continued vitality of *Mancari*" in *Williams*. The district court also found, however, that the preference could be "reasonably construed as narrowly tailored to serve the compelling governmental interest in assisting economically disadvantaged Native-American enterprises," thus meeting the requirements of strict scrutiny.

In *American Federation of Government Employees*, then, the district court considered the application of strict scrutiny as in *Adarand*, and found that it

129. Id. at 70-71 n.7.
130. Id. at 71 n.7.
131. Id. (citing *Rice* v. Cayetano, 146 F.3d 1075, 1081 n.17); see supra note 119.
would probably hold the preference for "Native-American enterprises" narrowly tailored enough to withstand strict scrutiny. The district court also read *Rice* as supporting the Ninth Circuit's earlier allegations in *Williams* that *Adarand* has changed the scrutiny applicable to racial classifications for federal purposes relating to Indians.

Another recent case, *Harrison v. Department of the Interior*, further clouds the issue of what is a racial criterion and what is a political criterion, by raising the difficult question of the precise definition of "Indian blood." Sheron Harrison applied for a Certificate of Degree of Indian Blood (CDIB) from the BIA based on her descent from Cyrus H. Kingsbury, an enrolled member of the Choctaw Tribe listed on its final membership roll. The Choctaw Nation and the BIA denied Harrison's request based on the fact that Kingsbury, though a Tribe member, was a white man who had become a member by adoption. The BIA and the Choctaw Nation rejected Harrison's claim that Kingsbury became an Indian by joining the tribe, just as Chief Justice Taney did Rogers's claim. Harrison appealed to federal district court, which affirmed the BIA's decision.

The Tenth Circuit Court of Appeals affirmed, noting that under the Administrative Procedure Act, it owed no deference to the district court and could set aside the BIA's decision only if it were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The court offered little explanation as to why it held that the finding that the descendent of a Tribe member was not an Indian was not arbitrary, capricious, or an abuse of discretion. As this case was a summary order and judgment, the court probably wished to avoid complicated arguments concerning the legality of considering a tribe member to not be an Indian for some purposes. My concern is that the disposition of this case confirms the necessity of racial criteria in American Indian law, in accordance with *Simmons v. Eagle Seelatsee*. Under the prevailing mode of thought, which discourages all consideration of racial characteristics, this case provides additional ammunition with which proponents of termination can erode away tribal sovereignty and the trust relationship under the pretense of equal protection. This particular case goes even beyond the usual assumption that blood quantum is the ultimate racial criterion; it alludes vaguely to some undefined whiteness of Kingsbury, that could not be converted into Indian-ness by joining the Choctaw Nation. How, precisely, can "Indian blood" be defined? Does it refer to having an ancestor who was a member of a recognized tribe?

134. *See supra* Part I.B.
136. *Id.* at *6* (citing Mt. Simmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170 (10th Cir. 1997)).

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at the time its final rolls were prepared? If so, Harrison carries some quantum of Indian blood. Does it refer to having an ancestor who was a member of a tribe (that was later recognized) at the time of first contact with Europeans? Such a definition of "Indian blood" would be identical to the definition of "Native Hawaiian" employed by the OHA in *Rice.* Does it refer to having one or more recognizable physical characteristics, living in a particular location, or living by a particular lifestyle? I find it hard to imagine that a reasonable person would not recognize this final definition as one of the most offensive ways of defining an already offensive term. That human beings should be pedigreed to determine if they belong to a group is regrettable, to say the least; but I find it equally if not more regrettable that they should be deprived of their land, their culture, and their sovereignty.

The *Harrison* case seems to implicate the most baldly racist of the definitions of "Indian blood": that of physical characteristics and lifestyle. Cyrus Kingsbury was, by any of the suggested definitions of Indian-ness, a white man at one time. How he came to be a member of the Choctaw Nation is irrelevant; he was accepted by the Choctaw Nation and by the BIA as member, and listed on the final roll. The Choctaw Nation and the BIA did not argue, as the OHA did with regard to Harold Rice, that Kingsbury (or Harrison) failed to meet a requirement of descending from a person who was a member at a certain time. Instead, they argued that Kingsbury was "white" and his membership in the tribe did not confer Indian blood on his descendants. If his descendants do not legally carry Indian blood as a result, it is because of racial criteria of the most starkly apparent kind.

**Conclusion**

Another issue is, however, at stake in cases involving tribal membership, and in every case involving American Indians. Tribes continually experiment with federal courts, attempting to regain portions of their sovereignty of which Congress and the courts have chosen to divest them in the past. The Choctaw Nation, like most other tribes, would ideally prefer, undoubtedly, to determine its own membership. The conflict between racial criteria and equal protection could well be avoided in that fashion; if Congress so chose it could permit tribes to determine their own memberships. Indeed, Congress and the courts could recognize that tribes are fully sovereign polities, and do away with such constructs as "quasi-sovereignty," "domestic dependent nations," "aboriginal title," and "plenary power" to legislate with regard to Indians. Congress could confine its powers to regulating trade with Indians, the Executive Branch could confine its powers to treating with tribes, and the courts could confine their jurisdiction to resolving disputes between U.S. citizens and tribe members, or between tribes and states, all as clearly provided in the Constitution.137 Racial criteria used in determining tribal membership would...

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137. U.S. Const. art. I, § 8, cl. 3 ("[Congress shall have the power] to regulate commerce ..."
not be subject to the Constitution, as tribes would not be subject to the Constitution. A basic knowledge of history and a healthy dose of cynicism, however, lead one to the recognition that the probability of Congress taking such a normatively commendable step is extremely low.

A less agreeable alternative solution exists to the problem presented by the continuing use of racial criteria in defining the federal relationship to Indians. Congress, the courts, and the executive have had their collective eye on this solution intermittently but inexorably for about the last 225 years. It is the complete dispossession, assimilation, termination, and divestment of sovereignty of all American Indian tribes.

The current Court and Congress seem to have no such intention. The majority in Rice considered Mancari an important and stable enough precedent, and enough of a threat to their decision against the OHA voting restriction, to distinguish it from Rice. If the majority wanted to overrule Mancari, Rice was the wrong situation, but Rice was an ideal situation in which to weaken Mancari by ignoring it instead of distinguishing it. Three distinct developments may arise in the future: (1) a differently comprised Court could overrule Mancari altogether; (2) the Court could explain Mancari or follow it integrally in a major case, affirming it; or (3) the Court could partially overrule Mancari, overhauling its principles in some way to better resist the continuing disassembly of affirmative action and other such "special" programs.

Lower courts have meanwhile interpreted the situation in many different ways. The District Court for the District of Columbia stated quite clearly in American Federation of Government Employees that if it found the Indian preference racial, it would apply strict scrutiny. The district court interpreted Adarand as changing Mancari to make strict scrutiny applicable to federal programs for Indians in at least some cases. Contrarily, the Ninth Circuit Court of Appeals held in the Keys case that Jane Doe was an Indian even though she was not an enrolled member of the Tribe. The court emphasized that Jane Doe's status as an Indian was due to her recognition by Tribal authorities as a member, but in the background a blood quantum requirement, which Jane Doe fulfilled, operated. Thus in Keys the Ninth Circuit followed Mancari in a way much the same as Fisher v. District Court did: by disregarding the racial criteria implicit in the federal government's determination of tribal membership. None of the courts in the cases I have considered have attacked the use of racial criteria to determine tribal membership. This lack of questioning of the most widespread use of racial

with the Indian tribes"; id. art. II, § 2, cl. 2 ("[The President] shall have the power, by and with the Advice and Consent of the Senate, to make Treaties"); id. art. III § 2, cl. 1 ("The judicial Power shall extend to... controversies... between a state, or the [c]itizens thereof, and foreign States, Citizens, or Subjects.")

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criteria seems to indicate a tacit distinction between racial criteria used to
determine tribal membership, and racial criteria used for preference programs.

Assuming this distinction between tribal membership and preference
programs, and assuming that it has a clear boundary, I see one other way the
federal government could try to make its programs for Indians consistent with
the ideals of equal protection. The federal government could expurgate all use
of racial criteria except for purposes such as determining tribal membership,
which are so essential as to provide to foundation for the very trust relation-
ship itself. This solution has the unfortunate externality of removing American
Indians who are members of federally unrecognized tribes from the trust
relationship altogether. That result would do nothing to improve the efficiency
and justice of the federal government's administration of its trust relationship
with American Indians, because a tribe's status as federally unrecognized
frequently conveys no substantive information about whether it is actually an
American Indian tribe or not. Indians who do not happen to be members of
federally recognized tribes have a legitimate claim on inclusion in the trust
relationship.138

As many scholars have noted, federal Indian law as a field is contradictory
at best.139 Specifically,

Tribes are quasi-sovereigns, yet Congress possesses plenary
control over Indian affairs. The government is responsible for
tribal lands and resources, but it can extinguish both at will. The
government asserts that it possesses a political relationship with
federally recognized tribes, yet it maintains relations with a host
of nonrecognized tribes and administers many programs on the
basis of racial criteria.

The government's inability to acknowledge or rectify these
inconsistencies in administering its relationship with American
Indians has led to inequitable treatment among tribes and Indian
peoples, has resulted in the courts continuing divestment of tribal
authority in an era of self-determination, and has placed the
United States in the position of violating evolving international
legal norms of indigenous rights.140

138. See Wayne R. Farnsworth, Bureau of Indian Affairs Hiring Preferences After Adarand
consider themselves affiliated with a Tribe, whether or not the Tribe or their membership in the
Tribe is federally recognized, have one definable interest vis-a-vis the federal and state
governments:[.] . . . to retain some degree of their political autonomy, their cultural identity, and
separateness as peoples.").

139. E.g. Vine Deloria, Jr., Laws Founded on Justice and Humanity: Reflections on the

140. Sharon L. O'Brien, Tribes and Indians: With Whom Does the United States Maintain
a Relationship?, 66 Notre Dame L. Rev. 1461, at 1462-1463.
As Professor Sharon O'Brien noted, the United States government created this contradictory mess of statutes, court decisions, and regulations for itself, and all too frequently Indians and tribes are the losers when courts try to harmonize inconsistencies in federal policies relating to them. As regards the conflict between racial criteria in federal Indian law and equal protection, if the federal government wants to have its federal Indian law cake and eat it too, it must somehow eradicate the use of racial criteria in most areas. Courts may not continue to support racial criteria for purposes other than tribal membership; they may not continue to support racial criteria for tribal membership purposes, either. Removing all use of racial criteria from federal Indian laws not related to tribal membership would exclude members of unrecognized tribes, and individual Indians who are not members of tribes, from the trust relationship. Complete termination would be even more disastrous for Indians nationwide, but termination is, fortunately, an unpopular solution to the problem of federal Indian law; gradual assimilation probably enjoys more widespread support among non-Indians. Be the underlying strategy termination or assimilation, the end result is the same. The federal government has a more ethical alternative — one that it claims to be working for.\[141\] The placement of Morton v. Mancari within the overarching federal relationship to Indians after the Adarand, Williams, and Rice decisions will be worked out by the courts in the years to come. I can only hope that the Supreme Court will retain or reacquire enough of its former liberal character to uphold the exemplary ideals expressed in the Indian Self-Determination Act:

The prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.\[142\]


\[142\] Id.