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Defending *Morton v. Mancari* and the Constitutionality of Legislation Supporting Indians and Tribes

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Introduction

Forty-five years ago, the Supreme Court decided in *Morton v. Mancari*[1] that federal laws specifically benefiting Indian tribes are based upon a classification of tribes as political or governmental units – and are not racial classifications. The Court recognized that without this principle, almost the entire body of federal legislation relating to Indian and Alaska Native tribes could be found unconstitutional as racially discriminatory. This fundamental principle in the framework of federal Indian law is still intact, but it is now under serious attack based on recent trends in discrimination law. In a series of "reverse discrimination" cases, the Supreme Court has invalidated affirmative action regulations, though enacted in good faith to remedy past or current discrimination, because they are explicitly racial, ancestral or ethnic.[2]

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[1] 417 U.S. 535 (1974).

[2] *See, e.g., Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) and cases discussed *infra*.

The *Mancari* decision has been challenged for decades by anti-Indian and extreme conservative groups, and it has recently been twice called into question by the Trump Administration, once by the President in a formal signing statement last year and again in 2018 by an agency of the Department of Health and Human Services. Most recently, a federal district court declared major parts of the Indian Child Welfare Act unconstitutional by reading the *Mancari* decision in an exceedingly restrictive manner. The decision would, if upheld, greatly narrow the range of federal legislation the *Mancari* decision protects.

Further challenges to *Mancari* will probably arise in the form of federal administrative action or litigation. The stakes for tribes are very high, because the ability of the federal government to carry out its trust responsibilities to tribes, particularly to provide programs and financial assistance to tribes, could be greatly diminished if these challenges succeed. Indian and Alaska Native tribes and organizations are already addressing these challenges, but new attacks could arise almost anywhere.

Supporting and defending the *Mancari* decision and the rule that it stands for – that laws benefiting tribes are not unconstitutional racial classifications – is a very high priority, perhaps the most urgent and important Indian law issue of our time. This paper reviews the decision in *Mancari* and the law leading up to and following it. We then turn to a discussion of the present challenges to the *Mancari* rule. In Part V, we suggest possible ways to support the decision and its rationale, and we discuss some additional legal arguments and approaches for defending the constitutionality of legislation benefiting tribes.

We conclude that there are three strong theories for preserving the constitutionality of legislation and administrative action benefiting Indian tribes and individuals. The paper develops these theories and closes with a list of selected references to some of the most useful articles, cases, and resources.

I. The Federal Government's Relationship to Tribes Before *Morton v. Mancari*

A brief look at the legal evolution of federal authority in the field of Indian affairs is helpful in understanding the significance and vitality of *Morton v. Mancari*. Chief Justice John Marshall first articulated in American jurisprudence the existence of a unique legal relationship, established through treaties, between the federal government and Indian tribes. In the *Cherokee* cases, Justice Marshall affirmed the legal vitality of Indian treaties, holding that the laws of the State of Georgia could have no effect within

the treaty-protected lands of the Cherokee.[3] As explained by Marshall, "The treaty of Holston . . . explicitly recognizing the national character of the Cherokees, and their right of self-government, thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force." At the same time, Marshall, relying on the Indian Commerce Clause of the Constitution, distinguished tribes from foreign nations, denominating them "domestic dependent nations," and stating, "Their relation to the United States resembles that of a ward to his guardian."[4] Marshall's formulation of the unique legal relationship between the Indian nations and the United States government thus recognized the right of tribes to govern themselves on their own lands as "domestic dependent nations," as well as a federal "duty of protection" to safeguard tribal treaty rights.

In the century that followed the *Cherokee* cases, the courts vacillated between Marshall's formulation of a federal "duty of protection" largely to safeguard Indian self-government and a much broader application of congressional powers over Indian affairs. Rather than a coherent unified theory of Indian law, two lines of contradictory cases developed during this period. In one line of cases, Marshall's federal duty to protect tribal self-governance is central. For example, in *Ex Parte Crow Dog*,[5] the Supreme Court deferred to specific treaty provisions and tribal justice systems in upholding tribal criminal jurisdiction to the exclusion of the federal courts and the federal criminal code. "The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation, thereafter to be framed and enacted, necessarily implies . . . that among the arts of civilized life, *which it was the very purpose of all these arrangements to introduce and naturalize among them*, was the highest and best of all, that of *self-government*, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs."

The second group of cases can be called the "plenary power" line. These cases are characterized by *United States v. Kagama*,[6] *United States v. McBratney*,[7] and *Lone Wolf v. Hitchcock*.[8] In *Kagama* – which is essentially the judicial inverse of *Ex Parte*

[3] *Worcester v. Georgia*, 31 U.S. 515, 519 (1832).

[4] *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

[5] 109 U.S. 556, 568 (1883) (*emphasis added*). *See also, Talton v. Mayes* (1896) (holding that the Fifth Amendment -- requiring that federal indictments be initiated by grand jury -- does not apply to the criminal laws of the Cherokee Nation as applied to their members).

[6] 118 U.S. 375 (1886).

[7] 104 U.S. 621 (1881).

[8] 187 U.S. 553 (1903).

Crow Dog -- the Court upheld the authority of Congress to adopt and implement the Major Crimes Act in Indian Country. In so doing, the Court relied on the "unique obligation" of the federal government to tribes to extend federal law over them, rather than to protect tribal self-governance. As stated by the Court:

> It seems to us that [the Major Crimes Act] is within the competency of Congress. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . [This power] must exist in [the federal] government, because it has never been denied, and because it alone can enforce its laws on all the tribes."[9]

The Court in *McBratney* held that state courts, rather than tribal or federal courts, have jurisdiction over the crime of murder as between non-Indians committed on a reservation. In *Lone Wolf* – perhaps the most notorious of this line of cases – the Court held that Congress may unilaterally abrogate treaties and that tribes had no recourse to the courts. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[10] These cases, rather than identifying constitutional provisions as a source of authority, rely instead on the locus of tribes within the boundaries of the nation and the "necessity" that the federal government deal with them.

The "plenary power" understanding of the federal government's "unique obligation" to tribes predominated in the period from the late 1800s to 1934. During this time, Congress passed the General Allotment Act, accelerating the break-up and loss of Indian lands,[11] and the federal government, through its policies and actions, inflicted deep and lasting damage on Indian tribes and peoples.

In 1934, Congress passed the Indian Reorganization Act, in part to stem the obvious damage done by the allotment of Indian reservations and to revivify tribal self-government.[12] The Act came about as a result of the efforts of John Collier and other reformers under President Franklin Roosevelt. The new policy of support for Indian self-government found solid legal support in Felix Cohen's seminal *Handbook of Federal Indian Law*, published in 1942. In his *Handbook*, Cohen would -- like Marshall over a

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[9] 118 U.S. at 384-85.

[10] 187 U.S. at 565.

[11] Act of February 8, 1887, c. 119, 24 Stat. 388.

[12] 25 U.S.C. § 461 et seq.

century before -- ground the federal legal relationship with tribes primarily in the treaty-making power of Congress and the Executive: "The first and chief foundation for the broad powers of the Federal Government over the Indians is the treaty-making provision which received its most extensive early use in the negotiation of treaties with the Indian tribes. . . . To carry out the obligations and execute the powers derived from those treaties became a principal responsibility of Congress, which enacted many statutes relating to or supplementing treaties."[13]

In addition to the treaty power, Cohen identified the Commerce Clause, the war powers provisions, and the property clause of the Constitution as sources of federal legal authority regarding tribes. The Indian Commerce Clause is the only affirmative grant of power in the Constitution that explicitly mentions tribes.[14] Congress is authorized to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Cohen recognized that in the century since the *Cherokee* cases, the scope of the Commerce Clause grew to include more than just commerce:

> The congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between the states. . . . The commerce clause in the field of Indian affairs was for many decades broadly interpreted to include not only transactions by which Indians sought to dispose of land or other property in exchange for money, liquor, munitions, or other goods, but also aspects of intercourse which had little or no relation to commerce, such as travel, crimes by whites against Indians or Indians against whites, survey of land, trespass and settlement by whites in the Indian country, the fixing of boundaries, and the furnishing of articles, services, and money by the Federal Government.[15]

Cohen, however, expressed serious doubt about the validity of any doctrine of congressional authority arising from "necessity":

> While the decisions of the courts may be explained on the basis of express constitutional powers, the language used in some cases seems to indicate that decisions were influenced by a consideration of the peculiar relationship between Indians and the Federal Government . . . . Reference to the so-called 'plenary' power of Congress over the Indians, or, more qualifiedly, over 'Indian Tribes' or 'tribal Indians,' becomes so frequent in recent cases that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power

[13] *Handbook*, Ch. 5, §2.

[14] U.S. CONST. Art. I, § 8, cl. 3.

[15] *Handbook*, Ch. 5, §3.

> over Indians except what is conferred by the commerce clause and other clauses of the Constitution . . . . Whatever view be taken of the possibility or danger of federal power arising from 'necessity,' it is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government's powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as 'plenary.' This does not mean, however, that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights.[16]

Despite Cohen's admonition and the work of the Roosevelt reformers, Congress in the 1950s gave free reign to its tendency towards unrestrained "plenary power." Beginning in 1953 and lasting until roughly 1960, Congress passed multiple acts terminating 109 tribes and bands. These acts ended the unique relationship between the federal government and the terminated tribes. Their trust lands were no longer protected, programs supporting these tribes and Indians were eliminated, and state and local taxes were imposed. The 1950s also included the infamous decision in *Tee-Hit-Ton Indians v. United States*,[17] where the Supreme Court held that the Fifth Amendment right to just compensation for the taking of property did not apply to the aboriginal lands of the Tee-Hit-Ton clan of Tlingit Indians. In so holding, the Court stated:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[18]

Tee-Hit-Ton and the termination acts embody the doctrine of plenary power authorized and justified only by "necessity," and neither anchored in, nor restrained by, the U.S. Constitution.

In the 1960s, however, Indian policy changed course. President Johnson began, through his Great Society programs, to invest public funds in reservations. In 1970, President Nixon declared any policy of forced termination to be wrong. Soon thereafter, Congress began exercising its unique obligation to tribes in a manner more in conformity with Marshall's original articulation, passing, for example, the Indian Education Act of 1972, the Indian Financing Act of 1974, the Indian Self-Determination and Education

[16] *Handbook*, Ch. 5, §1.

[17] 348 U.S. 272 (1955).

[18] 348 U.S. at 289-90.

Assistance Act of 1975, the Indian Child Welfare Act of 1978, and the American Indian Religious Freedom Act of 1978.[19]

II. The *Morton v. Mancari* Decision

By the time of the Supreme Court's decision in *Morton v. Mancari* in 1974, the modern civil rights era had been active for more than two decades. *Brown v. Board of Education* was decided in 1954.[20] In various acts beginning in 1957 and extending to 2006, Congress protected voting rights, including the voting rights of American Indians. The Civil Rights Act of 1964[21] prohibited discrimination in public accommodations and created the Equal Employment Opportunity Commission to monitor employment discrimination in the private sector. The Civil Rights Act of 1968[22] prohibited discrimination in the sale or rental of housing. The 1972 Equal Employment Opportunity Act amended the 1964 Civil Rights Act to prohibit discrimination in federal employment.[23]

The 1968 Civil Rights Act is interesting for the purposes of this paper. In addition to prohibiting discrimination in housing, the 1968 Act included several pieces of Indian-specific legislation: (1) the Indian Civil Rights Act (ICRA), Title II of the 1968 Act, prohibited tribal governments from violating the rights of tribal members to equal protection of the laws and due process; (2) Title III of the Act directed the preparation of a model tribal court code; (3) Title IV of the Act amended Public Law 280 to prohibit any further extension of state jurisdiction over tribes without tribal consent; and (4) Title VII of the Act directed that the Secretary of the Interior revise and republish Cohen's *Handbook of Federal Indian Law*, "[i]n order that the constitutional rights of Indians might be fully protected." The 1968 Act thus captures both congressional intent to prohibit racial discrimination in housing, and the congressional expectation that tribes would continue to be self-governing, free of unwanted state jurisdiction, but subject to the restraints of the ICRA as applied to their own tribal members.

In *Mancari*, the Supreme Court faced a seeming conflict between congressional policies supporting tribal self-government and those prohibiting discrimination in public

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[19] Indian Education Act of 1972, Pub. L. No. 92-318, 86 Stat. 235; Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq.; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq.; Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; American Indian Religious Freedom Act, 42 U.S.C. § 1996.

[20] 347 U.S. 483.

[21] 78 Stat. 241.

[22] 82 Stat. 73.

[23] Pub. L. No. 92-261, 86 Stat. 103.

employment. Section 12 of the Indian Reorganization Act establishes a hiring preference for Indian appointments to the "Indian Office." In 1972, the Commissioner of Indian Affairs directed that this hiring preference apply when Indians and non-Indians compete for promotion within the Bureau (as opposed to only the initial hiring process). Non-Indian BIA employees in the Albuquerque office sued, claiming the preference was repealed by the 1972 Equal Employment Opportunity Act. The Court first observed that the Civil Rights Act of 1964 as amended specifically exempted from its coverage the preferential hiring of Indians by tribes or by industries on or near reservations.[24] There was thus clear congressional intent to continue the Indian hiring preference, even in the new era of nondiscrimination legislation and jurisprudence. The Court then went on to hold that the preference did not, in any case, constitute invidious racial discrimination. The reasoning of the Court is worth quoting extensively:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, *singles Indians out as a proper subject for separate legislation*. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian 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. . . . 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. . . . As long as the special treatment can be *tied rationally to the fulfillment of Congress' unique obligation toward the Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[25]

[24] 417 U.S. at 545.

[25] 417 U.S. at 551-55 (*emphasis added*).

In reaching its conclusion, the Court held that the preference was not directed at a racial group at all, but at members of federally recognized tribes. "In this sense, the preference is political rather than racial in nature."[26]

The Court in *Morton v. Mancari* anchored the federal-tribal relationship in the Constitution and imbued it with Marshall's concept of a "duty of protection" shielding tribal self-government – while at the same time accounting for the modern norm of nondiscrimination. Cohen's view of broad federal authority to protect tribal self-government, at once rooted and constrained by the Constitution, seemed to have been fulfilled.

III. Legal Developments after *Mancari*

a. Pre-*Adarand* Supreme Court Jurisprudence

The federal courts, including the Supreme Court, have continued to uphold and apply the "political not racial" rule set forth in *Mancari*.[27]

In *Moe v. Confederated Salish & Kootenai Tribes,*[28] and *Fisher v. District Court of Rosebud County,*[29] both decided in 1976, the Court applied *Mancari* to shield tribal self-government from intrusive state laws and rejected arguments of invidious racial discrimination. In *Moe*, the Court held that the State of Montana could not impose its tax statutes on the sale of cigarettes between Indian vendors and tribal members on the Flathead Reservation. Montana asserted that tribal tax immunity constituted invidious racial discrimination and violated the due process clause of the Fifth Amendment. The Court disposed of the argument, relying on *Mancari*. In *Fisher*, the Supreme Court rejected an attempted assertion of state court jurisdiction over an Indian adoption proceeding on the Northern Cheyenne Reservation. The Court rejected the adoptive couple's argument that being denied access to state courts constituted invidious racial discrimination.

United States v. Antelope[30] considered whether prosecution of tribal members

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[26] 417 U.S. at 553, n. 24.

[27] *See*, Gregory Smith and Carolyn Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari,* April 2013 The Federal Lawyer 47 (2013) for a very helpful review of decisions after *Mancari*.

[28] 425 U.S. 463 (1976).

[29] 424 U.S. 382 (1976).

[30] 430 U.S. 641 (1977).

under the Major Crimes Act and a related federal felony murder statute violated due process and equal protection. The Court cited to *Mancari* for the proposition that the federal scheme applied to Indians not because of their race but because of their political classification. As stated by the Court, "the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[31]

Delaware Tribal Business Committee v. Weeks[32] upheld the exclusion of the Kansas Delaware Indians (a non-federally recognized tribal entity) from the distribution of an Indian Claims Commission judgment award. In so holding, the Court disposed of the canard enunciated in *Lone Wolf v. Hitchcock* that all Congressional action in the arena of Indian affairs constituted a political question beyond the scope of judicial scrutiny. The Court then upheld the exclusion of the Kansas Delawares from the judgment fund as tied rationally to the fulfillment of Congress' unique obligation to the Indians and therefore not in violation of the Fifth Amendment.

Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.[33] upheld Indian treaty rights to harvest salmon against the argument of Washington State that the treaties violated equal protection principles. The Court again referenced *Mancari*, holding that the "constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'"[34]

In *Washington v. Confederated Bands and Tribes of the Yakima Nation*,[35] the Court relied on *Mancari* and its rational basis framework to uphold the application of Public Law 280 to the Yakima Reservation. "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."

b. The *Adarand* Decision

In *Adarand Constructors, Inc. v. Pena*,[36] an equal protection claim was brought

[31] 430 U.S. at 641, 646-47.

[32] 430 U.S. 73 (1977).

[33] 443 U.S. 658 (1979).

[34] 443 U.S. at 673 n. 20.

[35] 439 U.S. 463, 501 (1979) (citing *Mancari*).

[36] 515 U.S. 200, 227 (1995).

against the federal government challenging the government's practice of financially incentivizing its contractors to use minority-owned subcontractors. The Court held that all racial classifications, even those that are benign or remedial, imposed by any federal, state or local government, are subject to strict scrutiny analysis. "Strict scrutiny" requires that the classification or legislation serve *a compelling government interest* and that the government's action be specifically and *narrowly tailored* to achieve the government's purpose.[37]

Both *Adarand* and an earlier equal protection case, *Regents of the University of California v. Bakke*,[38] reference *Morton v. Mancari*. In *Bakke*, the Court assessed the use of affirmative action quotas in college admissions. In a split decision, the Court struck down racial quotas but upheld the use of race in the admissions process. In *Bakke* and *Adarand*, the regents and later the federal government relied in part on *Mancari* to argue that racial classifications were not subject to strict scrutiny when done to benefit disadvantaged minorities. The Court responded in *Bakke* that the legal status of the BIA was *sui generis* and that the classification in *Mancari* was not in any case racial.[39] In *Adarand*, Justice Stevens (joined by Justice Ginsburg), referenced *Mancari* and the BIA hiring preference in his dissent, arguing that there was no moral equivalence between government policies designed to eradicate racial subordination, and those meant to perpetuate such subordination.[40] Justice Stevens presciently noted that *Adarand's* overly formal concern with "consistent" application of equal protection would equate American Indian hiring preferences with invidious discrimination against African Americans.

c. Post-*Adarand* Supreme Court Jurisprudence

Since *Adarand*, the Supreme Court has maintained *Mancari's* central formulation of tribes as political or governmental rather than racial entities. The Court has declined, therefore, to characterize Indian-specific federal legislation or policy as a racial classification.

In *Rice v. Cayetano*,[41] the Court distinguished between federal law and policy concerning tribes, and state law and policy concerning tribes. Applying that distinction, the Court struck down a state-based voting restriction, holding that *Mancari* did not apply to the state action at issue. In so holding, the Court implicitly reaffirmed *Mancari* as

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[37] *Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003).

[38] 438 U.S. 265 (1978).

[39] 438 U.S. at 304, n. 42.

[40] 438 U.S. at 304, n. 42.

[41] 528 U.S. 495, 520 (2000).

applied to federal law and policy: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens. . . . If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign."[42] In other words, a federal law or policy limiting the right to vote in tribal elections to tribal members would pass muster under *Mancari*.

In *United States v. Lara*,[43] the Court held that a tribe and the federal government could separately prosecute a nonmember Indian for the same crime committed on a reservation, without violating the prohibition on double jeopardy. The defendant Indian argued that after the Supreme Court decided in *Duro v. Reina*[44] that a tribe did not have criminal jurisdiction over nonmember Indians, Congress delegated federal authority to tribes to prosecute such nonmember Indians pursuant to 25 U.S.C. § 1301. The Indian defendant argued there could be but one prosecution commenced under one federal authority. The Court held, however, that the tribal prosecution proceeded under its own authority as a sovereign rather than authority delegated to it by the federal government. The federal statute in question merely lifted previously imposed restrictions on inherent tribal authority to address misdemeanor crimes committed by nonmember Indians. In upholding the authority of the tribe, the Court cited to *Mancari* as support for the basic proposition that Congress has broad authority rooted in the Treaty and Commerce Clauses to legislate in the field of Indian affairs, including passage of 25 U.S.C. § 1301.

In *Adoptive Baby Couple v. Baby Girl*,[45] the Court held that the biological Cherokee father of an Indian child could not obtain custody of the child under the Indian Child Welfare Act (ICWA) after the child had been adopted by a non-Indian couple. The Court based its decision on straight statutory interpretation. Justice Thomas did, however, discuss the potential equal protection implications of the application of ICWA in such situations. "As the State Supreme Court read [ICWA], a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns . . .."

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[42] 528 U.S. at 520.

[43] 541 U.S. 193, 199, 200-202 (2004).

[44] 495 U.S. 676 (1990).

[45] 133 S. Ct. 2552, 2565, 2584-85 (2013).

But Justice Sotomayor in her dissent (joined by Justices Kagan, Ginsburg and Scalia (in part)), rejected the suggestion of an equal protection problem:

> It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. See *United States v. Antelope*, 430 U. S. 641, 645-647, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Morton v. Mancari*, 417 U. S. 535, 553-554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). The majority's repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here. See *ante*, at ___, ___, 186 L. Ed. 2d, at 735, 739; see also *ante*, at ___, 186 L. Ed. 2d, at 744 (stating that ICWA "would put certain vulnerable children at a great disadvantage solely because an ancestor — *even a remote one* — was an Indian" (emphasis added)). I see no ground for this Court to second-guess the membership requirements of federally recognized Indian tribes, which are independent political entities. See *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 72, n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). I am particularly averse to doing so when the Federal Government requires Indian tribes, as a prerequisite for official recognition, to make "descen[t] from a historical Indian tribe" a condition of membership. 25 CFR §83.7(e) (2012).[46]

We can conclude, at least for the present, that *Mancari* remains good law even in light of *Adarand*, and there are strong arguments for the continuing vitality of its political/racial distinction. The Supreme Court has thus far adhered to the core construct of *Mancari* in assessing federal law and policy: tribes are governments, not racial classifications. However, what appears to be a settled body of law is under attack from a number of sources, and the composition of the Supreme Court is changing such that the rule of *Mancari* may not be secure.

IV. Present Challenges to the Rule of *Morton v. Mancari*

The present challenges to *Mancari* are not entirely new but they are breaking some new ground and taking on a very disturbing character because the challenges are by the federal government itself – the Trump Administration and a Federal District Court in Texas. If the attack on *Mancari* eventually succeeds in substantially narrowing the rule or possibly overturning the decision, it could mean the end of federal programs and

[46] 133 S.Ct. at 2584-85

support for Indian tribes and the end of many federal statutes that protect tribes and their resources. Anti-Indian groups and extreme conservative groups opposing affirmative action generally have challenged and opposed legislation and treaties favoring Indian tribes for decades on equal protection grounds.[47] But the challenges to legislation benefiting Indian tribes took on a more ominous character in 2017 when President Trump, in a signing statement, said that programs and grants for tribal governments and others are constitutionally suspect because, in his opinion, they allocate benefits on the basis of race, ethnicity, or gender.[48]

No previous administration has ever characterized statutes or programs benefiting tribal governments as racial preferences. The signing statement was issued when the President signed the 2017 Consolidated Appropriations Act on May 5, 2017. The statement identified the provision appropriating funds for Native American Housing Block Grants as one of the provisions that supposedly allocate benefits on the basis of "race, ethnicity, and gender." The Statement says that these provisions will be treated by the Administration "in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment." As discussed further below, if such laws benefiting tribes are racial preferences, then they must be subjected to "strict scrutiny." Such laws would be found constitutionally valid by a reviewing court only if they are narrowly tailored to further compelling government interests. The statement appears to be an unmistakable announcement that the White House does not accept the rule of *Mancari* that laws benefiting tribes are not racial preferences. What this may mean for future White House action remains unknown.

A further indication of how the Administration may act in the future came in early 2018 when the Centers for Medicare and Medicaid Services, an agency of the Department of Health and Human Services, ruled that tribes cannot be exempted from state work requirements as a condition of receiving Medicaid benefits. Several states had requested that tribes in their state be exempted. The reason given for the denial was that such an exemption "would raise constitutional and federal civil rights concerns." While no further explanation was given, it appears certain that the denials were based on the theory that an exemption for tribes would be a racial preference. After months of advocacy and pressure by the National Indian Health Board and many Indian leaders, the issue came to a crisis in May as consultations with tribal leaders were scheduled. Then

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[47] Gregory Smith and Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari,* April 2013 The Federal Lawyer 47 (2013); Carole Goldberg, *American Indians and "Preferential Treatment*", 49 UCLA L. REV 1, 1-13 (2002).

[48] Statement by President Donald J. Trump on Signing H.R. 244 into Law, 2017 U.S.C.C.A.N. S22, 2017 WL 8116422 (Leg. Hist.).

on May 7th, Seema Verma, Administrator of the Centers for Medicaid and Medicare Services, announced that the agency would give states the flexibility and discretion to implement the requirements with respect to tribal members.[49] This backing away from the constitutional concerns about racial preferences appeared to relieve the crisis at least for the present.

The most recent development that may affect the future of *Mancari* is the decision of a Texas Federal District Court in *Brackeen v. Zinke* finding major parts of the Indian Child Welfare Act unconstitutional on a number of grounds, including the ground that the Act did not meet the requirements of the *Mancari* case.[50] The suit was brought on behalf of three couples, each seeking to adopt an Indian child, and each claiming to face heightened barriers and increased uncertainty in the finality of any adoption due to the Act and to the Indian identity of the child. The Plaintiffs also include three states, Texas, Louisiana, and Indiana. The Plaintiffs claim that major portions of the Indian Child Welfare Act are unconstitutional on several grounds:

1. that the Act violates the Fifth Amendment's guarantee of equal protection of the laws because the Act relies upon racial classifications;

2. that the Act delegates congressional power to Indian tribes in violation of the non-delegation doctrine;

3. that the Act violates the Tenth Amendment because it requires state courts and agencies to apply federal standards and directives to state created causes of action; and

4. that the Act denies the individual Plaintiffs substantive due process in violation of the Fifth Amendment's Due Process Clause.

Plaintiffs also claim that the regulations adopted by the BIA pursuant to the Act are in violation of the Administrative Procedure Act. The District Court granted all the claims except for the substantive due process claim.

The Order of the District Court does not directly challenge *Mancari*, but rather reads and applies *Mancari* in an exceedingly narrow and restrictive fashion to the Indian

[49] Remarks by CMS Administrator Seema Verma at the American Hospital Association Annual Membership Meeting, May 7, 2018. The relevant portion reads: "While on the topic of community engagement, you may have heard how this impacts local tribes. We believe we can give states flexibility and discretion to implement the community engagement requirements with respect to local tribal members. We look forward to working with states and tribes to try to help them achieve their goals and determine how to best apply community engagement to serve their populations." See, https://www.cms.gov/newsroom/fact-sheets/speech-remarks-cms-administrator-seema-verma-american-hospital-association-annual-membership-meeting.

[50] *Brackeen v. Zinke*, Civil Action No. 4:17-cv-00868-O, Order (October 4, 2018).

Child Welfare Act and seems to say that the *Mancari* decision is so narrow that it applies only to the particular facts of the *Mancari* case. Such a narrow reading is inconsistent with the treatment of the decision by the Supreme Court itself and out of keeping with the character of Supreme Court decisions as precedent. The District Court's decision leaves the *Mancari* rule intact though read extremely narrowly.

In *Brackeen*, the District Court reasoned that the preference in *Mancari* applied only to members of federally recognized tribes, whereas the Indian Child Welfare Act applies to enrolled members of federally recognized tribes *and* to Indian children who are *eligible* for membership in a federally recognized tribe though they are not yet members. The scope of the Indian Child Welfare Act – applying both to enrolled children and children eligible for enrollment – is, of course, necessary to effectuate its purpose of supporting the continued existence and integrity of tribes against state laws and policies that have long facilitated the removal of Indian children from Indian families. However, the court, without any examination of the interests of tribes or of Indian children in their eligibility as future members of tribes, found that distinction alone was sufficient to find much of the Act unconstitutional as a racial preference. Whether there is a meaningful distinction between a child who is a member and one who is eligible for membership was not discussed. The court's reasoning suggests that its understanding of tribal membership and the purposes of the Indian Child Welfare Act was scant and perhaps mistaken in some major ways. The decision, in its narrow and technical application of *Mancari* to the Act, discounts the purpose of the Act of supporting the continued existence and integrity of tribes as distinct entities.

V. Defending the Constitutionality of Laws Benefiting Indians

Based on the foregoing analysis and an examination of the Constitution's explicit language on Indians and tribes, there are at least three substantial theories or approaches for defending and supporting *Mancari* and the constitutionality of federal legislation and agency action benefiting tribes: (1) support *Mancari*'s distinction between political and governmental classifications, to which strict scrutiny has not been applied, and racial classifications, to which strict scrutiny has been applied; (2) defend legislation and agency action on the ground that it satisfies the requirements of strict scrutiny; and (3) argue that the Constitution explicitly establishes an exception for laws benefiting Indians and tribes based on Article I and other constitutional provisions. These approaches are not inconsistent; they can be argued in the alternative, complement one another, and are likely most effective if presented together.

a. Supporting and Defending *Mancari* With Updated Facts and Education

The *Mancari* decision is based on the premise that tribes are political and governmental bodies, but the Supreme Court did not give extensive or detailed attention to the history and facts about tribes and tribal governments nor to the political, government-to-government relationship between the federal government and tribes that support this premise. Most government officials, judges, policy makers, and members of the public are unlikely today to be familiar with this history or with the political and governmental character of tribes. Yet the facts about tribes as governmental units and their relationships with the federal government are stronger today than when *Mancari* was decided.

The notion asserted by extreme conservative groups and by the Administration that tribes are simply racial groups is one that appeals to the ignorance and stereotypes of today, but it is not in keeping with the facts. This suggests that one important means of supporting and reinforcing the *Mancari* decision is to educate, communicate widely, and demonstrate that tribes are indeed not racial groups but important and functional governing units in this country that have always had a political, government-to-government relationship with the federal government. The crucial, factual basis of the decision, which was written almost 45 years ago, needs to be updated, more fully described, and supported with present day evidence and factual descriptions of tribes, tribal governments, and their relationship to the federal government. The historical and factual basis for the trust relationship and the entire, unique relationship between the tribes and the federal government, especially the treaty relationship, could be more fully described and supported with more modern evidence and understandings about the relationship.

To be most effective, an educational effort to support the factual basis for *Mancari* should be national in scope and carried on by many tribes using many different methods. But all tribes and Indian organizations can play a role by taking opportunities to educate government officials and members of the public about tribes as important governments and political units, along with states, local governments, and the federal government. Perhaps such a campaign could be associated with real and immediate needs, such as the national work of defending the Indian Child Welfare Act and the work of eliminating violence against Native women. The success of Native women in calling attention to the epidemic of violence against them and spurring legislation [51] in 2013 restoring limited tribal criminal jurisdiction over non-Indians shows that organizing actions and events to educate law makers, government officials, the public, the media, and others, using international human rights advocacy to raise awareness and bring about

[51] Violence Against Women Reauthorization Act, Pub. L. No. 113-4 (3/7/2013).

federal action domestically, building networks, enlisting the support of non-Natives, and using diverse social media tools can be effective strategies.

b. Surviving Strict Scrutiny

If a court finds, as the federal district court in Texas did in *Brackeen*, that a statute or regulation is a racial preference or racial classification, that is not the end of the matter. Such a finding means that the statute or regulation must be given "strict scrutiny" by the reviewing court. The strict scrutiny standard, as we noted earlier, requires that the legislation serve *a compelling government interest* and that the government's action be specifically and *narrowly tailored* to achieve the government's purpose.[52]

It is a heavy burden to show that the requirements of strict scrutiny are met. The Supreme Court found not long ago that an affirmative action program in education met the strict scrutiny standards.[53] Indeed, because of the unique and very different nature of federal legislation relating to Indian and Alaska Native tribes, there may be good opportunities for demonstrating the compelling interest and showing that the "narrowly tailored" test is met without modifying current law and trends.[54]

Dealing with strict scrutiny in a federal lawsuit usually or always requires both factual, evidentiary support as well as legal analysis and argument. A strong argument can be made that support for tribal self-governance and self-determination, the federal government's treaty obligations and trust obligations to tribes, and other such support should always be regarded as compelling government interests. Proving that there is a compelling government interest in any particular case will, of course, require building a strong evidentiary record on this issue, particularly because it will probably be necessary to argue the matter on appeal. Similarly, the facts in the particular case will be very relevant to demonstrating that the law or action in question is narrowly tailored to serve the compelling interest. Litigators may find it advisable to present a strict scrutiny defense in the alternative in order to create a full evidentiary record. It is worth noting that in the *Brackeen* case, the United States did not attempt to present a case (at least if we are to believe the court's decision) to meet the strict scrutiny standard but relied

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[52] *See, Adarand*, 515 U.S. 200; *Shaw v. Hunt*, 517 U.S. 899, 908; *Grutter v. Bollinger*, 539 U.S. 306, 326-327 .

[53] It is possible to survive strict scrutiny; it is not always fatal. *See, Fisher v. University of Texas at Austin*, 136 S.Ct. 2198, 2208 (2016); *Grutter v. Bollinger*, 539 U.S. at 327. Affirmative action in education has generally fared better than affirmative action in employment. *See, Richmond v. Croson*, 488 U.S. 469 (1989).

[54] Carole Goldberg's discussion of dealing with strict scrutiny is very helpful, though it was written before some of the pertinent decisions by the Supreme Court. Carole Goldberg, *American Indians and "Preferrential" Treatment*, 49 UCLA L. Rev. 1, 13 (2002).

exclusively on the *Mancari* rule to defend against the equal protection challenge to the Indian Child Welfare Act.

c. The Constitution Itself Authorizes Legislation Supporting Indians

Probably the most important and potentially useful strategy for supporting *Mancari* is the observation of the Supreme Court in *Mancari* itself[55] that the Constitution authorizes Congress to legislate in support of tribes and individual Indians even if such legislation might otherwise be regarded as a racial preference.[56] There are three provisions in the text of the Constitution that together support this theory.

First, Congress is specifically authorized by the Indian Commerce Clause to legislate specifically with respect to commerce with Indian tribes and, by implication, with respect to Indian individuals where the legislation is directed at tribal interests or where there is a connection between benefiting Indian individuals and benefiting a tribe.[57] Legislation supporting Indian tribes and individual Indians is not prohibited nor suspect – it is constitutionally authorized.

Second, the "Indians not taxed" clause explicitly singles out Indians not taxed for special treatment and again demonstrates that "Indians" is not a suspect classification but one embraced and used by the Constitution.[58]

Third, the Fourteenth Amendment in Section 2 repeats the "Indians not taxed" phrase and also excludes Indians from citizenship.[59]

Thus, the language of the Fourteenth Amendment explicitly affirms the exceptional status of Indians; the Indian Commerce Clause states the constitutional

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[55] 417 U.S. at 551-552.

[56] There is a great deal of scholarly writing on this topic. Some of the helpful articles include: Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025 (2018); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Calif. L. Rev. 1165 (2010); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan. L. Rev. 979 (1981); Carole Goldberg, *Decent Into Race*, 49 UCLA L. Rev. 1373 (2002); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. Rev. 943 (2002); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. Rev. 169 (1991);

[57] *Cohen's Handbook of Federal Indian Law*, § 5.01[3] at 388 (Nell Jessup Newton ed., 2012); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. Rev. 1, 28-32 (2002).

[58] U.S. CONST. art. I, § 2 excludes "Indians not taxed" from "free Persons" to be counted for purposes of apportionment of representation in House of Representatives and direct taxation.

[59] U.S. CONST. amend. XIV, § 2; Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 Cardozo L. Rev. 1185 (2016).

authorization respecting legislation regarding Indians; and the Indians not taxed clauses specifically state how Indians are to be treated.[60] Legislation benefiting tribes and Indian individuals cannot be in violation of the Equal Protection Clause and the Fifth Amendment, because such legislation is specifically authorized by the Constitution itself. Even if challengers succeed in persuading a court that legislation or related federal action relating to Indians or tribes is a racial preference, it cannot for that reason alone be unconstitutional, because it is authorized by the Constitution itself.

Further, strict scrutiny is applied to racial classifications in order to assure that they do not violate the Fourteenth Amendment and Fifth Amendment.[61] Strict scrutiny is therefore unnecessary for legislation that the Constitution itself authorizes and thus exempts from the Equal Protection provision of the Fourteenth Amendment and the Fifth Amendment Due Process Clause.

Federal legislation that singles out tribes or Indian individuals for *adverse or harmful* treatment could nevertheless be subject to the Equal Protection prohibitions of the Fourteenth and Fifth Amendments.[62] The Supreme Court has repeatedly held that tribes and tribal property as well as individual Indians are protected by the Constitution from confiscation and other adverse government action in violation of the Bill of Rights.[63] As we quoted earlier, Felix Cohen observed in 1942, "This [Congress's broad power over Indian affairs] does not mean, however, that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights."[64]

As we noted previously, the legal argument based on Article I of the Constitution for supporting the constitutionality of Indian legislation is not new but is rooted in the Supreme Court's opinion in *Mancari*. The key part of the opinion is:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl.

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[60] Ablavsky, *supra* note 56, at 1032; Clinton, *supra* note 56, at 1009-1018; Goldberg-Ambrose, *supra* note 56, at 174-175.

[61] *Grutter*, 539 U.S. at 326.

[62] *See*, Clinton, *supra* note 56, at 1013-1014.

[63] *See, e.g.*, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-08 (1987); *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919). *See also*, *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

[64] *Handbook*, Ch. 5, § 1, at 91.

> 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, *singles Indians out as a proper subject for separate legislation.* Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes.[65]

Federal Indian legislation is a limited, constitutionally created exception to the Equal Protection guarantee of the Fourteenth and Fifth Amendments and is not subject to strict scrutiny. Professor Carole Goldberg makes a strong case that this limited exception extends to congressional legislation favoring Indian individuals, under certain circumstances, including individuals who are not members of federally recognized tribes.[66] She argues with ample authority that the Indian Commerce Clause authorized Congress to legislate with respect to Indian individuals where the legislation is directed at tribal interests or where there is a connection between benefiting an individual Indian and benefiting a tribe.[67]

Conclusion

The challenges to *Morton v. Mancari* are formidable, and they hold the potential to affect practically all tribes and many Indian and Alaska Native individuals. This examination of some of the current challenges, the relevant law, and some possible legal strategies may serve as a starting point for lawyers and Native leaders who could face these issues and legal attacks in the future. Further study is needed to deepen and develop the legal strategies for defending the rights of tribes and the framework of federal Indian law that protects and benefits tribes. Other strategies for building political support and for organizing opposition to the campaigns to do away with the rights of tribal sovereignty are equally important, perhaps more important. The leadership of tribal governments will, of course, be central to creating the political and legal strategies for turning back the attacks on tribal rights.

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[65] 417 U.S. at 551-552 *(emphasis added).*

[66] Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. Rev. 943, at 969 – 970 (2002).

[67] Id at 29–32.

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