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Convenience and Necessity in the Inconsistent Legal Treatments of Indian Status

Sterling Paulson*

INTRODUCTION

A. The Cherokee Freedmen Experience

The Cherokee, Creek, Seminole, Choctaw, and Chickasaw Nations were historically referred to by the U.S. Government as the "Five Civilized Tribes of Indian Territory."[1] Recognition as a "civilized" people was largely based on these tribes' proficiency in adopting and "[practicing] the white man's ways and [having] their customs."[2] Some of the important touchstones of perceived civilization included centralized governments, formal education, conversion to Christianity, adoption of the white man's vesture, individual land ownership, and agricultural and industrial production.[3] Industry among the tribes occurred subsequent to adoption of the white man's pattern of individual land holdings. The advancement of these civilized tribes, in the eyes of the U.S. Government, was also driven by the "great aid" of "negro slave labor, and since the [Civil War] the freedmen."[4] Of the Five Civilized Tribes, the Cherokees

* J.D., The University of Chicago Law School, 2018. Many thanks to the IJLSE staff for their diligence and thoughtful feedback. Any correspondence can be sent to sterlingpaulson@yahoo.com.

[1] Thomas Donaldson, U.S. Dep't. of Interior, Eighth Census of the United States: Indians. The Five Civilized Tribes of Indian Territory, Cherokee Nation, Creek Nation, Seminole Nation, Choctaw Nation, and Chickasaw Nation (1893).

[2] *Id.* at 38.

[3] *See id.*

[4] *Id.* The transatlantic slave trade and European practice of African slavery introduced "negro slave labor" to Indian tribes. The African slave trade was implemented only after indigenous Indian slave labor was found to be insufficient for the needs of European colonists. The commercial aspect and sheer scale of this form of slavery was novel to North America. However, "[s]lavery was not new to North Americans Indians at contact and most native groups practiced an indigenous form of slavery" in which slaves were taken by victorious tribes as spoils of war, or otherwise as direct objectives of military action—i.e., for the very purpose of obtaining slaves. THE OXFORD HANDBOOK OF AMERICAN INDIAN HISTORY 47 (Frederick E. Hoxie ed., 2016). Various tribes also included enslavement as a punishment for certain crimes committed by their own tribal members. The role of slaves differed between and within tribes. Some slaves were put to the work of forced labor. Others were adopted into the tribe, to replace fallen warriors or otherwise increase population. Still others were used as sacrifices for religious ceremonies, or became concubines of tribal members. *See generally* CHRISTINA

held the largest number of said "negro slaves," possessing 4,600 slaves by the time of the American Civil War.[5] In one of the lost sagas of American history, the Cherokee militia, under the direction of the Cherokee National Council, hunted down a group of thirty-five such escaped, Cherokee-owned "negro slaves" headed for the Mexico border in 1842. As a result of this failed escape from bondage, five of the escapees were sentenced to death.[6] The escape of the slaves was blamed on the influence of free blacks living in and around the Cherokee Nation and led to a December 1842 Cherokee law that commanded all free blacks to leave the lands of the Cherokee Nation.[7]

During the early months of the American Civil War, various Cherokee contingencies sided with either the Union or Confederate Armies.[8] The Cherokee Nation itself initially remained neutral. However, after early Cherokee-aided Confederate victories, including the Battle of Bull Run, the Cherokee Nation issued its *Cherokee Declaration of Causes* on October 28, 1861.[9] This declaration announced the Cherokee decision to unite fortunes with the Confederacy, like the other Five Civilized Tribes, and to declare war on the United States.[10] When the Principal Chief, John Ross, turned tide and expressed support for the Union, he was forced into exile by Cherokee Confederates. However, a group of his loyal supporters called an emergency session of the Cherokee National Council in 1863, at which they removed Confederates from office, revoked their treaty with the South, pledged loyalty to the Union and the United States, and officially emancipated their African

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SNYDER, SLAVERY IN INDIAN COUNTRY: THE CHANGING FACE OF CAPTIVITY IN EARLY AMERICA (2010). For a less-than-authoritative overview of the topic, see also Tony Seybert, *Slavery and Native Americans in British North American: 1600 to 1865* https://web.archive.org/web/20040804001522/http://www.slaveryinamerica.org/history/hs_es_indians_slavery.htm (last visited Sept. 7, 2018).

[5] *See* Art T. Burton, OKLAHOMA HISTORICAL SOCIETY, *Slave Revolt of 1842*, http://www.okhistory.org/publications/enc/entry.php?entry=SL002 (last visited Sept. 7 2018); *see also* Daniel F. Little Field Jr. & Lonnie E. Underhill, *Slave "Revolt" in the Cherokee Nation, 1842*, AMERICAN INDIAN QUARTERLY NO. 2 (Summer 1977) 121–31.

[6] Burton, *supra* note 5.

[7] *Id.*

[8] *See The Cherokee and the Civil War*, http://www.cherokee.org/About-The-Nation/History/Facts/The-Cherokee-and-the-Civil-War (last visited Sept. 6, 2018). For a more in-depth treatment, see Clarissa W. Confer, THE CHEROKEE NATION AND THE CIVIL WAR (2007).

[9] *Cherokee Declarations of Causes (Oct. 28, 1861)*, http://www.cherokee.org/About-The-Nation/History/Events/Cherokee-Declaration-of-Causes-October-28-1861.

[10] *Id.*

slaves.[11] Nonetheless, Confederate Brigadier General Stand Watie, a Cherokee, and his command of combined Cherokee and non-Cherokee soldiers persisted in their fight against the Union. Brigadier General Watie was in fact the last Confederate General to surrender to the Union.[12] In 1866, the Cherokee Nation entered into a post-war treaty with the U.S. Government, by which they agreed to legally define former slaves as tribal citizens.[13] The Treaty of 1866 provided that:

> All freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants shall have the rights of native Cherokees.[14]

The Cherokee Constitution was then amended to read:

> All Native Born Cherokees, all Indians and Whites Legally Members of the Nation by Adoption, *and all Freedmen* who have been liberated by Voluntary Act of their Former Owners or by Law*, as well as Free Colored Persons* who were in the Country at the Commencement of the Rebellion, and are now Residents therein … *and their Descendants* who Reside within the Limits of the Cherokee Nation, *shall be taken, and deemed to be, Citizens of the Cherokee Nation*.[15]

The freed slaves, termed "Cherokee Freedmen," were long thereafter considered members of the Cherokee Nation, even if not considered "Cherokee," and their labor continued to drive the agriculture of the Cherokee.[16] Even as

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[11] *See The Cherokee and the Civil War, supra* note 8. This may have largely been an act of self-survival, as it occurred after a series of Confederate losses and amidst a sweeping Union invasion of the Indian Territory.

[12] See *id.*

[13] *See* S. Alan Ray, A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants, 12 MICH. J. RACE & L. 387, 404 (2007).

[14] CHARLES J. KAPPLER, 2 INDIAN AFFAIRS: LAWS AND TREATIES 944 (1904), http://digital.library.okstate.edu/kappler/Vol2/treaties/che0942.htm.

[15] CONST. OF THE CHEROKEE NATION, art. III, § 5 (amended 1866 version) (emphasis added).

[16] *See* DONALDSON, *supra* note 1, at 38, 41. Freedmen were similarly recognized as vital cogs of the economies of the other Civilized Tribes after the American Civil War.

amended in 1975, Article III of the Cherokee Constitution left open tribal membership to these Freedmen:

> All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.[17]

The Dawes Commission Rolls included as citizens not only those who were "Cherokee by Blood," but also "Cherokee Freedmen," "Delaware Cherokee," and "Intermarried Whites."[18] The Delaware Cherokee had Delaware Indian blood but, along with the Shawnee Indians, had been adopted into the Cherokee Nation as part of the same treaty with the U.S. Government that extended Cherokee citizenship to Freedmen.[19] Intermarried whites and Cherokee Freedmen, however, lacked any Indian blood but were recorded as citizens of the Cherokee Nation nonetheless.[20] Both the 1866 and 1975 versions of the Cherokee Constitution thus seemingly permitted Cherokee Freedmen and their descendants to be citizens of the Nation.[21] However, in 1993, the Cherokee Nation enacted 11 C.N.C.A. § 12, which states:

> A. Tribal membership is derived only through proof of Cherokee blood based on the Final Rolls.
> B. The Registrar will issue tribal membership to a person who can prove that he or she is an original enrollee listed on the Final Rolls by blood or who can prove to at least one direct ancestor listed by blood on the Final Rolls.[22]

Under 11 C.N.C.A. § 3, "Definitions," the Act further clarified that such

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[17] CONST. OF THE CHEROKEE NATION, art. III, § 1 (amended 1975 version), available at http://www.cherokee.org/Our-Government/Commissions/Constitution-Convention/1975-Cherokee-Nation-Constitution.

[18] Ray, *supra* note 13, at 391.

[19] *Id.* at 395.

[20] *Id.* at 391–92 n.15.

[21] *See* CONST. OF THE CHEROKEE NATION, art. III, § 5 (amended 1866 version); see also CONST. OF THE CHEROKEE NATION, art. III, § 1 (amended 1975 version).

[22] 11 CHEROKEE NATION CODE ANNOTATED [C.N.C.A.] § 12 (1993), available at http://www.cherokee.org/Portals/AttorneyGeneral/Users/213/13/213/Word%20Searchable%20Full%20Code.pdf?ver=2015-10-22-083614-130.

membership could only be traced to the "Cherokees by Blood," "Cherokee Minors by Blood," "Delaware Cherokees," and "Shawnee Cherokees" sections of the Dawes Final Rolls.[23]

The language of the legislation reflected a clear attempt to limit tribal membership to only those with some lineal Indian ancestry and corresponding amounts of Indian blood. This Act was challenged by Lucy Allen, a descendant of several individuals listed on the Dawes Commission Rolls as "Cherokee Freedmen."[24] Allen claimed that the legislation was in conflict with Article III of the 1975 Cherokee Nation Constitution and the earlier 1866 treaty with the U.S. Government that extended Cherokee citizenship to the Freedmen.[25] Allen thus sought a declaration that the provision was unconstitutional and that she, like other Freedmen descendants, was entitled to Cherokee citizenship.[26] In its 2006 decision, the Cherokee Nation's highest court sided with Allen and ruled that 11 C.N.C.A. § 12 was in conflict with Article III of the Cherokee Constitution and was thus unconstitutional.[27] The court further ruled that the 1866 treaty between the Cherokee Nation and the U.S. Government otherwise precluded the Cherokee Nation from foreclosing Cherokee citizenship to descendants of the Cherokee Freedmen, writing that:

> [I]f the Cherokee Nation is going to make a decision not to abide by a previous treaty provision, it must do so by clear actions which are consistent with the Cherokee Nation Constitution. A treaty provision cannot be set aside by mere implication. . . . If the Cherokee people want to change the legal definition of Cherokee citizenship, they must do so expressly.[28]

Taking the Nation's court up on its words, then-Principal Chief Chad Smith immediately called for a popular vote upon the definition of tribal citizenship "once and for all."[29] Chief Smith advocated for the exclusion of

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[23] *Id.* at § 3.
[24] Lucy Allen v. Cherokee Nation Tribunal Council, JAT-04-09, at 1 (Cherokee Nation Judicial Appeals Tribunal March 7, 2006), https://turtletalk.files.wordpress.com/2010/12/allen-v-cherokee-nation.pdf.
[25] *See id.* at 2.
[26] *See id.* at 1.
[27] *Id.* at 21.
[28] *Id.* at 20.
[29] *See* Ray, *supra* note 13, at 392.

the Freedmen descendants from the tribal rolls and succinctly described his position as a belief "that an Indian nation should be composed of Indians."[30] Meanwhile, Marilyn Vann, President of the Descendants of Freedmen of the Five Civilized Tribes, launched a campaign against the measure. Vann emphasized the role of the Freedmen in the history of the Cherokee tribe[31]. She characterized the dispute in question form, asking: "Is the Cherokee Nation a 'race' or a 'nation'?"[32] By a March 2007 special election, 77% of voters sided with Chief Smith and against the Freedmen descendants in declaring "that an Indian nation should be composed of Indians."[33] The Cherokee Nation proceeded to decline the processing of any Cherokee Freedmen citizenship applications and later brought suit for a declaration that Cherokee Freedmen descendants are not entitled to tribal citizenship.[34] The named "Freedmen Defendants" then counterclaimed for a declaration that denial of their citizenship violates the U.S. and Cherokee constitutions, various federal laws, and the Treaty of 1866 between the Cherokee Nation and U.S. Government.[35] The Nation's position was subject to criticism in the media and the general public, and the fight of the Freedmen for recognition was the subject of a 2016 documentary film.[36] After several years of litigation, a federal court ultimately sided with the Freedmen but largely refrained from offering any insight into the larger issues raised by the dispute.[37] Rather, the court simply held that the Cherokee Nation was bound by the contractual language of its 1866 Treaty with the United States, which required that the Freedmen and their descendants be granted "all the rights of native Cherokees"—up to and including citizenship in the Nation.[38]

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[30] *Id.*
[31] *Id.*, at pg. 397 n. 41.
[32] *Id.*
[33] *Id.* at 394.
[34] *See* Cherokee Nation v. Nash, No. 11-CV-648-TCK-TLW, 2013 U.S. Dist. LEXIS 35996 (N.D. Okla. March 15, 2013).
[35] *See id.* at *10–11.
[36] *See, e.g.*, Nadine Ajaka, *Descendants of Cherokee Freedmen Are Being Denied Tribal Rights*, THE ATLANTIC (Dec. 21, 2016). https://web.archive.org/web/20171022005336/https://www.theatlantic.com/video/index/510728/descendants-of-cherokee-freedmen-are-being-denied-tribal-rights/.
[37] Cherokee Nation v. Nash, 267 F. Supp. 3d 86 (D.D.C. August 30, 2017).
[38] *Id.*

B. Races, Nations, and Indians

The representative quotations from Chief Smith and Marilyn Vann in the Cherokee Freedmen dispute raise points of thought that transcend the citizenship of the Cherokee Freedmen. Chief Smith declared his belief "that an Indian nation should be composed of Indians," and a majority of Cherokee voters endorsed this belief. Vann, meanwhile, questioned whether the Cherokee Nation was a "'race' or a 'nation'?" and emphasized the role of the Freedmen in the Nation's history. Defining "Indian" status—that is, deciding who is an Indian for legal purposes—and categorizing such status as a political or racial classification is central to federal criminal jurisdiction in Indian country, the Bureau of Indian Affairs (BIA) and the Indian Health Service hiring preferences, and a bevy of legislation providing for special treatment of Indians, such as the Indian Child Welfare Act. However, legal treatment of "Indian" status in each of these contexts is less than uniform. There is support in the legal treatment of both Indian tribes and their Indian citizens for the idea that an Indian nation is at times a race, at times a nation, and at times a combination of the two. Similarly, the classification of individuals as "Indian" in different contexts seems to depend on shifting views of Indian tribes as races, nations, or hybrids. Seemingly, the only consistent theme in formulation of "Indian status" is convenience and necessity in reaching or upholding the policy preferences of individual judges and legislatures.

The way in which society defines and classifies Indian status is of great importance. Government action that utilizes racial classifications—even when seeking to "benefit" a given racial group through affirmative action—must withstand strict scrutiny analysis.[39] Strict scrutiny is the highest standard of Equal Protection and Due Process review, and it requires that the government prove that its racial classifications "are narrowly tailored measures that further compelling government interests."[40] If Indian status is treated as a race-based distinction under current precedent, the government would carry a heavy burden in each instance that it utilizes Indian status as a legal classification. To the extent that Indian status is considered a political classification, however, the

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[39] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[40] *Id.* at 227.

challenged law need only satisfy the more relaxed rational basis review. Indeed, under rational basis review, legislation bears a presumption of constitutionality, and courts are instructed to exercise "judicial restraint" in reviewing governmental action.[41]

Section II of this Article will examine treatment of Indian status in the sphere of criminal law, and Section III will examine Indian status as it has been treated in the context of civil law. Section IV will discuss implications of the differing ways in which the law has treated Indian status, and suggest two alternative approaches.

I. "INDIAN" STATUS IN CRIMINAL LAW

A. Federal Jurisdiction, the Two-Prong Rogers *Test, and* United States v. Antelope

In *Ex parte Crow Dog*, a Sioux Indian named Crow Dog sought a writ of habeas corpus after being imprisoned by a federal marshal for the murder of another Sioux Indian, Spotted Tail, in Indian country.[42] The Supreme Court granted Crow Dog's writ and held that, unless expressly authorized by Congress, federal courts have no jurisdiction over crimes committed by Indians, against Indians, in Indian country.[43] In response to the Court's decision, Congress passed the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153.[44] The General Crimes Act extends federal law and federal jurisdiction to offenses committed in Indian country by Indians against non-Indians and vice versa.[45] Meanwhile, the Major Crimes Act extends federal jurisdiction to certain Indian-on-Indian offenses

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[41] *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–314 (1993) (describing rational basis review as "a paradigm of judicial restraint").

[42] 109 U.S. 556, 557 (1883).

[43] *Id.* at 571–72. (holding that it was inappropriate to extend the law of United States over Indians—"aliens and strangers"—for: "[i]t tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.").

[44] Daniel Donovan & John Rhodes, *To Be or Not to Be: Who is an "Indian Person"?*, 73 MONT. L. REV. 61, 62–63 (2012).

[45] *Id.* at 62.

in Indian country, including murder, manslaughter, kidnapping, arson, burglary, and robbery.[46] The Major Crimes Act was upheld by the Supreme Court in *United States. v. Kagama*.[47] As an early formulation of Congress's plenary power over the affairs of the Indian tribes, the *Kagama* Court held that Congress necessarily has a virtually unchecked power to enact legislation that governs the Indian tribes as a result of the tribes' statuses as "wards of the nation" and "communities dependent on the United States."[48]

Neither the General Crimes Act nor the Major Crimes Act provides a definition of who is an "Indian," but status as an "Indian" is central to federal criminal jurisdiction in each act. For instance, when the government prosecutes an individual under the Major Crimes Act, they must allege in the indictment and prove beyond a reasonable doubt at trial that the defendant is indeed an "Indian."[49] Indian status has become in some cases a tangled issue of fact. When framed in the context of the Cherokee Freedmen controversy, legal treatment of Indian status in the criminal law arena can perhaps be generalized as embracing Chief Smith's declaration that "an Indian nation should be composed of Indians," while reserving that Indian blood, alone, does not make one an Indian.

One of the early treatments of status as an Indian is found in the peculiar case of *United States v. Rogers*.[50] Therein, the Supreme Court was presented with a defendant who challenged his indictment under the laws of the United States, because he had:

> voluntarily removed to the Cherokee country, and made it his home, without any intention of returning to the United States, that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the

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[46] 18 U.S.C. § 1153.
[47] 118 U.S. 375 (1886).
[48] *Id.* at 383–84.
[49] Donovan & Rhodes, *supra* note 42, at 63. *See also* United States v. LaBuff, 658 F.3d 873, 877 (9th Cir. 2011).
[50] United States v. Rogers, 45 U.S. 567 (1846).

> Cherokee nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf made and provided.[51]

The Court rejected the man's plea because "[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption . . . he was still a white man, of the white race, and therefore not within the exception in the act of Congress."[52]

The dated *Rogers* decision stands for the idea that Indian status has both a racial and a political prong. And courts continue to rely on and apply *Rogers* for purposes of proving Indian status in a criminal prosecution by "ask[ing] whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government."[53]

Federal jurisdiction in Indian Country, combined with the two-prong *Rogers* test, means that certain criminal defendants deemed "Indians" will be subjected to federal laws, prosecution, and penalties on the basis of their Indian status, whereas similarly situated non-Indians would otherwise be subject to state criminal law. In *United States v. Antelope*, a group of criminal defendants belonging to the Coeur d'Alene tribe brought a Fifth Amendment challenge to this scheme.[54] The Indian defendants committed a robbery and burglary in Idaho but were also charged with and convicted of first-degree murder under federal felony murder provisions, as the elderly homeowner died during the robbery. The defendants were subject to federal jurisdiction and federal law by way of their Indian status and the Major Crimes Act. However, Idaho state law lacked an analogous felony murder provision.[55] Thus, in a prosecution involving a similarly-situated non-Indian, the prosecution would have had to prove premeditation and deliberation to support a first-degree murder charge under Idaho state law.[56] But by no reason other than their Indian status, the defendants in this case were subject to a federal felony murder provision that allowed them to be convicted of first-degree murder in the absence of premeditation

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[51] *Id.* at 571.
[52] *Id.* at 573.
[53] *See, e.g.*, United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).
[54] United States v. Antelope, 430 U.S. 641 (1977).
[55] *Id.*, at 643-44.
[56] *Id.*, at 644.

or deliberation—the federal prosecution need only show that a death occurred during the commission of their crime.[57] On this basis, the defendants challenged the Major Crimes Act as unconstitutional and violative of due process, reasoning that they were subject to a stricter federal statutory scheme on the basis of an impermissible racial classification—that is, their status as "Indian." The Ninth Circuit was inclined to agree, holding that the difference between Idaho and federal law "put [the defendants] at a serious racially-based disadvantage."[58] However, the Supreme Court reversed and rejected the defendants' challenge. The Court first reasoned that "federal regulation of Indian affairs is not based upon impermissible [racial] classifications," but rather "is rooted in the unique status of Indians as a 'separate people' with their own political institutions."[59] By this understanding, the defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene tribe."[60] The Court then concluded that, because the federal statutory scheme was applied evenhandedly and equally to all those subject to it—Indian or non-Indian—the defendants' challenge was invalid.[61]

B. Uneven Approaches To Indian Status

Given the Supreme Court's decision and reasoning in *Antelope*, one might expect for courts to treat the racial prong of *Rogers* as a cursory exercise or abandon it all together. And one might also expect that the political prong requires that a criminal defendant be an "enrolled member of . . . [a] tribe."[62] Neither has held true, however, and courts have taken inconsistent approaches and reached inconsistent results under the two-prong *Rogers* test.

Case law indicates that tribal enrollment is neither necessary nor sufficient for Indian status.[63] The Ninth Circuit, for example, holds that the

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[57] *Id.* at 644.
[58] United States v. Antelope, 523 F.2d 400, 406 (9th Cir. 1975).
[59] *Antelope*, 430 U.S. at 646.
[60] *Id.*
[61] *Id.* at 648–49.
[62] *Id.* at 646.
[63] *See* United States v. Broncheau, 597 F.2d 1260, 1262–63 (9th Cir. 1979) (noting that tribal enrollment is not "an absolute requirement . . . [n]or should it be").

political prong can be established "in declining order of importance," by evidence of: "(1) tribal enrollment; (2) government recognition formally *and informally* through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal *affiliation*; and (4) *social recognition* as an Indian through residence on a reservation and participation in Indian *social life*."[64]

The Eighth Circuit adopted this same framework in *United States v. Stymiest*.[65] There, it upheld a set of jury instructions that provided relevant factors in determining whether the second prong of *Rogers*—recognition as an Indian—is met, including:

> [E]nrollment in a tribe . . . government recognition formally or informally through providing the defendant assistance reserved only to Indians . . . tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction . . . enjoying the benefits of tribal affiliation; and . . . *social recognition* as an Indian through living on a reservation and participating in Indian social life, including whether the defendant *holds himself out as an Indian*.[66]

The court further noted that "there is no single correct way to instruct a jury on this issue." [67] In other words, there is no definite set of factors that conclusively make a defendant an Indian or non-Indian.

The Eighth Circuit has accordingly adopted a loose approach to Indian status. In *United States v. Dodge*, it held that defendants who presented themselves socially as Indians and possessed Indian blood were "Indians" for the purpose of federal jurisdiction, independent of tribal affiliation.[68] And in *United States v. Pemberton*, it upheld the Indian status of a criminal defendant who was not enrolled in any federally-recognized tribe.[69] The court relied on evidence that the defendant's mother was an enrolled tribal member, he was born and attended school on the tribal reservation, he presented as an Indian in social contexts, and he had a daughter who lived

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[64] United States v. Bruce, 394 F.3d 1215, 1223–24 (9th Cir. 2005) (emphasis added).
[65] 581 F.3d 759, 763 (8th Cir. 2009).
[66] *Id.* at 763 (emphasis added).
[67] *Id.* at 764.
[68] 538 F.2d 770, 786 (8th Cir. 1976).
[69] 405 F.3d 656 (8th Cir. 2005).

with her mother on the reservation.[70]

In *United States v. Cruz*, the Ninth Circuit, however, took a relatively stricter approach to Indian status and concluded that Indian blood, without *conclusive* tribal recognition of a defendant as an Indian, does not make one an "Indian."[71] The defendant, Cruz, had 22% Blackfeet and 25% total Indian blood and was the son of an enrolled member of the Blackfeet Tribe. Though not enrolled in the Blackfeet Tribe himself, Cruz held "descendant" status, which entitled him to use of Indian Health Services, certain educational grants, and fishing and hunting rights on the tribal reservation. Cruz also lived on the Reservation as a child, was subject to the jurisdiction of the tribal court as an "Indian" in prosecution for an offense, attended school, and worked on the tribal reservation.[72] However, because Cruz was not an officially enrolled member of the tribe and had otherwise not taken advantage of "descendant" status privileges, participated in cultural ceremonies, voted in tribal elections, or held a tribal identification card, the court held that Cruz had not been proven to be an Indian for purposes of a prosecution under the Major Crimes Act.[73] The court otherwise noted the importance of demonstrating a "sufficient non-racial link to a formerly sovereign people," lest Indian status be transformed into a "simple blood test."[74]

Even if the Indian status inquiry involves *more* than a "simple blood test," the maintenance of the *Rogers* racial prong means that all cases necessarily rise, and some fall, on the basis of such a test. The Tenth Circuit's opinion in *United States v. Diaz* accordingly stands for the idea that tribal recognition and affiliation, without the *racial* aspect of *Indian blood*, is an insufficient basis for Indian status.[75] In *Diaz*, the Indian defendant argued that the government had failed to prove the non-Indian status of the victim, and thus federal jurisdiction under the General Crimes Act—which applies to Indian-on-non-Indian (and vice versa) crimes in Indian country—was lacking. The court overruled Diaz's objection and found evidence that the victim was descended from "Sephardic" or "Hispanic

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[70] *Id.* at 658–61.
[71] 554 F.3d 840, 846 (9th Cir. 2009).
[72] *Id.* at 846–47.
[73] *Id.*
[74] *Id.* at 849 (internal citations and quotations omitted).
[75] 679 F.3d 1183 (10th Cir. 2012).

Jews," and lacked any Indian ancestry. This apparent absence of Indian descent was sufficient to demonstrate non-Indian status, even though the victim was an enrolled member of an Indian pueblo, with active tribal affiliation.[76] The decision in *Diaz* relied on an earlier Tenth Circuit decision, *United States v. Prentiss*, wherein the court held that stipulation and testimony that two victims were members of the Tesuque Pueblo did not meet the standard for proving their Indian status, as it "[did] not establish that either of them had any Indian blood."[77] Moreover, courts treat the racial prong as wholly independent of the political prong—requiring only "proof of some quantum of Indian blood, whether or not that blood derives from" an ancestor who was a member of *any* federally-recognized tribe, let alone the tribe upon which the political prong has been satisfied.[78] These results seemingly undercut the basis for the decision in *United States v. Antelope*—that federal jurisdiction results from political affiliation with a tribe, as opposed to the defendant's racial status and Indian heritage.[79]

The two-prong test of *United States v. Rogers* nonetheless remains, by all judicial accounts, good law in establishing the Indian status of a defendant. However, one must wonder why official tribal recognition and affiliation, as in the cases of *Diaz* and *Prentiss*, or Indian blood combined with significant tribal ties that apparently fall just short of official recognition, as in *Cruz*, are not independently sufficient demonstrations of Indian status. The reality is that both the political and racial formulations of Indian status are necessary to fulfill the prerogatives of federal jurisdiction over Indian defendants. The *Rogers* test persists out of convenience and necessity.

The racial prong of the *Rogers* test—Indian blood—provides a convenient litmus test from which to begin proof of Indian status. It is also convenient—or, perhaps, necessary—in fulfilling Congress's intent in asserting jurisdiction over certain crimes and certain defendants in Indian country. This is apparent from the very outset of the test in *United States v. Rogers* itself. The Supreme Court there noted the necessity of certain forms of federal jurisdiction in Indian country, as prescribed by Congress, in order to maintain peace and order in and among the Indian tribes. In

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[76] *Id.* at 1187–88.

[77] 273 F.3d 1277, 1283 (10th Cir. 2001).

[78] United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015). Note, however, that the *political* prong requires that the defendant be affiliated with a tribe that enjoys current federal recognition (as opposed to terminated tribes, tribe with mere state recognition, or loose historical status as a tribe). *See id.*; LaPier v. McCormick, 986 F.2d 303, 304–06 (9th Cir. 1993).

[79] 430 U.S. at 646.

rationalizing the necessity of the racial prong of Indian status, the Court reasoned that:

> [I]t would perhaps be found difficult to preserve peace among [the tribes], 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 who will generally be found the most mischievous and dangerous inhabitants of the Indian country.[80]

Fears of tribally-adopted White outlaws, "the most mischievous and dangerous inhabitants of the Indian country," evading federal law are unfounded in modern times. However, the racial prong of the *Rogers* test still serves the congressional intent of the modern General Crimes Act. A racial non-Indian who commits a non-Major Crimes Act offense against an Indian in Indian country, for instance, cannot avoid federal jurisdiction under the General Crimes Act by claiming to have been adopted, recognized by, or otherwise affiliated with an Indian tribe. The critic might note that *Rogers* is outdated, in the sense that recordkeeping is much more standardized and rigorous now than in our earlier history. But given the loose approach to political affiliation that courts have adopted, one could see the non-Indian spouse or longtime resident of Indian Country claiming to be so involved in tribal society and culture as to have acquired legal "Indian" status. The racial prong of *Rogers* preemptively forecloses any such inquiry.

The political prong of the *Rogers* test—tribal or governmental recognition as an Indian—is also necessary to fulfill congressional intent. Indeed, without including the political prong of the *Rogers* test, Indian status for the purpose of federal jurisdiction would violate due process and equal protection rights as a pure racial classification or "simple [racial] blood test."[81] The political prong serves as a fallback provision that

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[80] 45 U.S. 567, 573 (1846).

[81] United States v. Cruz, 554 F.3d 840, 849 (9th Cir. 2009).

preserves the Major Crimes Act and General Crimes Act against constitutional challenges. The Supreme Court's decision in *Antelope* is instructive on this point.[82]

Taken together and as applied by subsequent courts, the racial and political prongs of the *Rogers* test serve a further practical convenience. As *United States v. Cruz* demonstrates, proving Indian status in a prosecution can be a fact-intensive, uncertain endeavor. However, once the government has offered objective evidence that a defendant satisfies the racial prong—that is, has Indian blood—and the political prong—that is, recognition as an Indian by a tribe or government—they have met their burden. A defendant cannot then turn their prosecution into a mini-trial on their subjective self-identification that otherwise negates federal jurisdiction. Such was the underlying basis for the result in *United States v. Juvenile Male*.[83] There, a juvenile defendant appealed his conviction under the Major Crimes Act to the Ninth Circuit. The juvenile admitted to having Indian blood. The juvenile also admitted that he was an enrolled tribal member, lived on a tribal reservation, received tribal assistance, and otherwise enjoyed the benefits of tribal affiliation.[84] The juvenile contended, though, that he did not see himself as "Indian" and was not socially recognized as such.[85] The court overruled these arguments and held that although "[s]ocial and subjective non-recognition as Indian may prove to be relevant in a closer case," it could not outweigh the substantial proof in favor of each *Rogers* prong as applied in Ninth Circuit precedent.[86]

The racial and political prongs make sense when viewed as providing flexibility and legality to the Major Crimes Act and General Crimes Act. When viewed in the context of individual cases however, it becomes difficult to identify consistency and logical coherency. For instance, use of Indian status for purposes of the federal criminal jurisdiction scheme was upheld in *Antelope* as involving a political classification rather than a racial one. However, in applying this scheme and Indian status in *United States v. Pemberton*, the Eighth Circuit held that a defendant with Indian blood—even though not an enrolled member of any federally-recognized tribe—was

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[82] 430 U.S. 641 (1977).
[83] United States v. Juvenile Male, 666 F.3d 1212 (9th Cir. 2012).
[84] *Id.* at 1215.
[85] *Id.*
[86] *Id.*

an Indian for purposes of federal jurisdiction because testimony showed that he had presented himself as an Indian in social contexts.[87] This focus on blood, ancestry, and self-identification—despite lack of tribal government recognition—sounds of pure racial classification as compared to a political classification. Similarly, in *Martin v. United States*, a federal court refused the defendant's challenge to his Indian status, even though he was not enrolled in a tribe and apparently did not meet the necessary blood quantum requirements for such enrollment in the Red Lake Band of Chippewa Indians.[88] And the Tenth Circuit's decisions in *Prentiss* and *Diaz* are based on the idea that, even where official political recognition exists, Indian status hinges on race and heritage.[89] Such decisions might make sense from a realist perspective—that is, in accomplishing policy goals and tabbing an Indian as an Indian—but they undercut the very logic of the precedential foundation from which they extend. The decisions in this arena are hard to square with one another and often consist of questionable factual distinctions and resulting conclusions. Compare, for instance, the *Pemberton* decision and the *Cruz* dissent against the *Cruz* majority opinion that treated a defendant who had 22% Blackfeet and 25% total Indian blood, attended a reservation school, was prosecuted as an Indian in tribal court, and committed his crime on the tribal reservation, as a non-Indian.[90]

II. "INDIAN" STATUS IN CIVIL LAW

A. Upholding Differential Treatments: Mancari *and its Progeny*

The Indian Reorganization Act of 1934 (Wheeler-Howard Act) represented a progressive-era paradigm shift in U.S. policy towards Indians and tribes, emphasizing Indian self-government and tribal sovereignty.[91]

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[87] United States v. Pemberton, 405 F.3d 656, 662 (8th Cir. 2005).

[88] Martin v. United States, No. 12-206(1) (DWF/LIB); 15-2210 (DWF), 2017 U.S. Dist. LEXIS 25508 (D. Minn. Feb. 17, 2017).

[89] United States v. Prentiss, 273 F.3d 1277, 1283 (10th Cir. 2001); United States v. Diaz, 679 F.3d 1183, 1187–88 (10th Cir. 2012) (Kozinski, J., dissenting).

[90] United States v. Pemberton, 405 F.3d 656 (8th Cir. 2005); United States v. Cruz, 554 F.3d 840 (9th Cir. 2009).

[91] *See* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 14–15 (2015) (noting that the Wheeler-Howard Act represented a major shift in federal policy

One statutory provision that was introduced as part of the Act, 25 U.S.C. § 5116 (formerly 25 U.S.C. § 472), codifies a preference for employment of Indians over non-Indians in the BIA. The statute provides, simply, that the Secretary of the Interior: is directed to establish standards . . . without regard to civil-service laws, to the various positions maintained . . . by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.[92] Thus, the Indian Health Service website states that:

> The Indian Health Service is *required by law* to provide *absolute* preference in employment to American Indians and Alaska Natives who are enrolled in a federally recognized tribe as defined by the Secretary of the Interior. *Indian preference requirements apply to all actions involved in filling a vacant position* (e.g., initial hiring, reassignment, transfer, competitive promotion, reappointment or reinstatement), no matter how the vacancy arises.[93]

Similarly, the BIA provides that:

> Indian Preference affords *absolute* hiring preference to qualified Indian individuals . . . . Indian Preference applies to the initial hiring, reassignment, transfer, competitive promotion, reappointment, reinstatement, or any personnel action intended to fill a vacant position.
> When one or more qualified Indian Preference applicants apply for an advertised vacancy, non-Indian applicants will not be initially rated nor referred to the selecting official for

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and "attempted to revitalize tribal self-government by providing for formal adoption of tribal constitutions, tribal corporations, and formal tribal membership enrollment procedures").

92 25 U.S.C. § 5116 (Supp. IV 2013–2017).

93 INDIAN HEALTH SERVICE, https://www.ihs.gov/careeropps/indianpreference/ (last visited Aug. 22, 2018) (emphasis added).

consideration.[94]

Indian preference not only gives absolute preference to Indians over non-Indians, but also supersedes any other federal government hiring preferences, such as those reserved for military veterans.[95]

The Supreme Court was faced with a challenge to such Indian employment preferences in *Morton v. Mancari*.[96] There, a group of non-Indian federal employees challenged the preference as violative of the Due Process Clause, and otherwise impliedly repealed by the 1972 Equal Employment Opportunity Act. In a questionable analysis, the Court jumped from noting the plenary power of Congress in dealing with Indian tribes, to the "special relationship" between the federal government and Indian tribes, to its holding that:

> [T]his 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 preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.[97]

Arguably, though, responsiveness to the needs of such constituent groups and an understanding of the BIA's role in governing tribal entities could serve as the basis for evaluating, hiring, and promoting employees, without regard to Indian or non-Indian status. The Court further noted that "[t]he preference is not directed towards 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

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94 BUREAU OF INDIAN AFFAIRS, *The Indian Preference Law Fact Sheet*, https://www.bia.gov/sites/bia.gov/files/assets/public/webteam/pdf/idc1-025252.pdf (emphasis added).
95 See id.
96 Morton v. Mancari, 417 U.S. 535, 535 (1974).
97 *Id.* at 553–54.

nature."[98]

To determine the scope of *Mancari*, it is important to look at how the Court reached its result. In emphasizing "the unique legal status of Indian tribes under *federal* law and upon the plenary power of *Congress*," the Court drew "both explicitly and implicitly from the Constitution itself."[99] "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."[100] Meanwhile, "Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties."[101] The Court thus recognized that, acting under these two constitutional clauses, Congress and the Executive had established a "historical and legal context" for "singl[ing] out Indians for particular and special treatment."[102]

The Supreme Court has applied *Morton v. Mancari* in a number of cases. In *Delaware Tribal Business Committee v. Weeks*, the Court noted that although "[t]he power of Congress over Indian affairs may be of a plenary nature . . . it is not absolute."[103] Relying on *Mancari*, it stated that the appropriate standard of review is that "legislative judgment[s] should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'"[104] In *United States. v. Antelope*, discussed above, the Court stated that *Mancari* extends to federal legislation involving both "preferences [and] disabilities," and to Congress' broader power of "federal regulation" over Indian affairs, as opposed to a narrower power to promote "tribal self-regulation" through supportive legislation.[105]

The Supreme Court was soon faced with the question as to whether *Mancari* extends to differential treatments of Indians under state law. In *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, it first noted *Mancari* had "settled that 'the unique legal status of Indian

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98 *Id.* at 553 n.24.
99 *Id.* at 551–52 (emphasis added).
100 *Id.* at 552.
101 Id.
102 *Id.* at 553, 554–55.
103 Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion)).
104 *Id.* at 85 (quoting *Mancari*, 417 U.S. at 555).
105 430 U.S. 641, 646 (1977).

tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."[106] It then recognized that "[s]tates do not enjoy this same unique relationship with Indians."[107] But it found that the legislation at hand was "not simply another state law," but rather one "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians."[108] It thus upheld a scheme of limited state jurisdiction over Indian Country pursuant to Congress' authorization through Public Law 280. In its conclusion, the Court suggested that, in the arena of Indian affairs, states may "[legislate] under explicit authority granted by Congress" without running afoul of the Equal Protection Clause, provided that Congress has properly "exercise[d] . . . federal power" in its authorization.[109]

B. Inconsistent Treatments of Mancari *in the Lower Courts*

The racial-political distinction in *Morton v. Mancari* has since been applied to uphold preferences and special treatment of Indians in various arenas against Due Process and Equal Protection challenges. The distinction serves as a continuing basis for upholding Indian status determinations for purposes of federal criminal jurisdiction (since *United States v. Antelope*, discussed above), even though a number of cases have allowed for federal jurisdiction over defendants with Indian blood, but no tribal enrollment or significant tribal affiliation.[110] It was the basis for rejecting the State of Montana's claim that a sales tax immunity for Indians, not available to non-Indians under parallel circumstances, violated the Due Process and Equal Protection clauses.[111] It was also used in rejecting a North Carolina criminal defendant's Equal Protection argument, where he was charged and convicted of conducting a video gambling operation that

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106 Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) (quoting *Mancari*, 417 U.S. at 551–52).

107 *Id.* at 501.

108 *Id.*

109 *Id.*

110 *See* United States v. Pemberton, 405 F.3d 656, 659–60 (8th Cir. 2005); Martin v. United States, 2017 U.S. Dist. LEXIS 25508, at *12–13 (D. Minn. 2017). *See supra* text accompanying notes 76–77.

111 Moe v. Confederate Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479–81 (1976).

was identical to legal gambling enterprises conducted by Indians in the state.[112] *Mancari* was also featured in an interesting Fifth Circuit decision on the subject of peyote use, *Peyote Way Church of God, Inc. v. Thornburgh.*[113] There, the court upheld the enforcement of federal and state drug laws against a peyote church that mirrored the beliefs of the Native American Church, used peyote as a sacrament in bona fide religious ceremony, maintained detailed records, and sincerely regarded peyote as appropriate for religious, and only religious, ceremony.[114] This holding was made despite the fact that the Native American Church was the only church expressly exempted from the same peyote laws, and it only afforded membership to those with a specified Indian blood quantum, without regard to tribal membership. Because of *Mancari*, the court was able essentially to sidestep the issue of sincerity of religious beliefs and Equal Protection.[115] In short, *Mancari* is central to a number of legal decisions that uphold the differential treatment of Indian and non-Indian individuals in a variety of contexts and for a variety of purposes.

It follows, both naturally from *Mancari* and more specifically from *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, that rational basis review extends to state-law classifications existing because of and pursuant to congressional authorization—states can be useful partners (or agents) in carrying out federal prerogatives. Perhaps the best example of this is the federal Indian Gaming Regulatory Act (IGRA), which affords states some role in the regulation of gaming and gambling in Indian Country, and establishes a framework for states and tribes to enter into cooperative compacts by which tribes conduct Class III gaming in Indian Country.[116] Accordingly, courts have rejected challenges to these underlying

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[112] United States v. Garrett, 122 Fd. App'x 628 (4th Cir. 2005).

[113] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

[114] *Id.* at 1212–13.

[115] *See id.* at 1214–16.

[116] 25 U.S.C. §§ 2702–2703 (2012); *contra* California v. Cabazon Band of Mission Indians, 408 U.S. 202, 216–22 (1987) (rejecting state regulatory jurisdiction over tribal gaming) *superseded by statute,* 25 U.S.C. § 2701, *as recognized in* Michigan v. Bay Hills Indian Cmty., No.12-515 (May 27, 2014). Thus, IGRA was enacted as a congressional compromise that sought to allow "cooperative federalism" in the field of Indian gaming, balancing the competing interests of federal, state, and tribal governments. IGRA thus allows Indian tribes to conduct casino-style gambling under tribal-state compacts, but allows states some oversight in order to prevent the perceived threat of outside influence from organized crime that such gaming attracts.

state-tribal compacts from non-Indians as violative of Equal Protection by relying on *Mancari*.[117]

Lower courts remain split, however, as to the circumstances in which *Mancari* insulates differential state-law treatments of Indians and non-Indians beyond those explicitly authorized by federal legislation. Courts have also struggled with classifications that advance the general interests of individual Indians as opposed to tribal interests within the scope of the unique federal-tribal relationship.

As with the case law on Indian status for purposes of federal criminal jurisdiction, the treatment of Indian status classification in these circumstances is difficult to rectify with any consistent theme. For instance, in *Livingston v. Ewing*, the Tenth Circuit upheld the application of *Mancari* in the context of Indian artists and craftsmen selling wares at the Museum of New Mexico and Palace of the Governors in Santa Fe.[118] There, non-Indians brought an Equal Protection claim against a state program extending preference to Indian artists, and to the complete exclusion of similarly situated non-Indians, who were allowed the special, sole right to sell crafts and jewelry on the state-owned grounds.[119] The court held that this was not racial discrimination per *Mancari* and rejected an attempt to differentiate *Mancari* as applying only to employment practices.[120] The result reached by the Tenth Circuit in *Livingston* is remarkable in that it extended *Mancari*—which was based on the unique political relationship between the federal government and Indian tribes—to state-law classifications that were not explicitly authorized by federal legislation from Congress and that lacked any substantial connection to tribal interests in self-government.[121] Meanwhile, the federal court in *Tafoya v. Albuquerque* held that an Indian preference ordinance, which extended vending licenses only to members of federally recognized tribes or pueblos in New Mexico and members of the Navajo Nation, was founded on a suspect-racial

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[117] *See* Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003); Flynt v. Cal. Gambling Control Comm'n, 104 Cal. App. 4th 1125 (Cal. Ct. App. 2002); United States v. Garrett, 122 F. App'x. 628 (4th Cir. 2005).

[118] Livingston v. Ewing, 601 F.2d 1110 (10th Cir. 1979).

[119] *Id.*

[120] *Id.* at 1113–15.

[121] *Id.* This is in conflict with the court's later decision in *Navajo Nation v. New Mexico*, where it treated New Mexico's actions directed at the political entity of the Navajo Nation as a racial classification subject to strict scrutiny. 975 F.2d 741, 743–45 (10th Cir. 1992).

classification and thus subject to strict scrutiny—under which it failed and was struck down as violative of the Equal Protection Clause.[122] And the Tenth Circuit in *Navajo Nation v. New Mexico* struck down the State of New Mexico's decision to cut funding from a program providing home care to members of the Navajo Nation in order to cover a budget shortfall for more general state programs.[123] Although it avoided the district court's clear treatment of the Navajo Nation as a racial group, the Tenth Circuit nonetheless framed the state action within the context of impermissible, race-based discrimination. No mention of *Morton v. Mancari* or its general principle was made. Indeed, the court concluded that:

When a state begins with a system in which funds are being distributed equitably among various racial groups, and then cuts one group's funding discriminatorily without showing that that group's need has lessened, the undeniable result is a disparity in the adequacy of services provided among the groups. . . . [T]he state may not continue its disparately low funding based on the unconstitutional cut.[124]

Further, the court referred to the Navajo Nation as a "race or nationality-based organization," and members of the Navajo Nation as a "racially identifiable population."[125]

Uneven logic and results are not confined to the federal courts of the Tenth Circuit. The federal court for the District of Minnesota, citing to *Livingston v. Ewing*, upheld a state housing program that offered special funding to individual Indians in urban (off-reservation) settings.[126] The court interpreted the federal-tribal trust doctrine as applying on an equal basis to state action, and concluded that the Minnesota legislature was "not barred by the equal protection clause or civil rights statutes" from providing special funding and programs for individual Indians to the exclusion of non-Indians.[127] Relying on this federal case, a Minnesota appellate court upheld the preferential treatment of Indian teachers with less seniority than non-Indian teachers.[128] During a budget shortfall, a number of non-Indian

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[122] Tafoya v. Albuquerque, 751 F. Supp. 1527, 1531 (D.N.M. 1990).
[123] Navajo Nation v. New Mexico, 975 F.2d 741, 745–46 (10th Cir. 1992).
[124] *Id.* at 745–46.
[125] *Id.* at 743.
[126] *See* St. Paul Intertribal Housing Bd. v. Reynolds, 564 F. Supp. 1408, 1412–13 (D. Minn. 1983).
[127] *Id.* at 1413.
[128] Krueth v. Independent Sch. Dist. No. 38, 496 N.W. 2d 829 (Minn. Ct. App. 1993).

teachers were fired or placed on unpaid leave while Indian teachers retained their position.[129] The court held that the "trust doctrine also applies to state action," so the preferential treatment of Indian teachers did not violate equal protection for the non-Indian teachers—it was deemed "rationally related" to interests in increasing the number of Indian teachers and responding to cultural and academic needs of Indian students.[130]

Meanwhile, a Florida appellate court reached an opposite result in a situation much more analogous to *Mancari*.[131] Faced with an Indian employment preference, the court held "that Indian preference is legal under Federal law is irrelevant; what is legal under Federal law is not the same as what is legal under Florida law."[132] The court's logic rested on the idea that the federal-tribal trust doctrine did not translate to the state of Florida, and the Florida preference did not otherwise touch on any unique aspect of the federal-tribal relationship—even though the preference promoted Indian employment on a state council for Indian affairs.[133]

The inconsistent application of *Morton v. Mancari* and differing treatment of the racial/political distinction by lower federal courts was acknowledged by the federal district court in *KG Urban Enterprises, LLC v. Patrick*.[134] There, the court reluctantly applied rational-basis scrutiny to a state Indian preference law. The decision made various statements critical of *Morton v. Mancari*, including that:

> The government's power to regulate Indian affairs, which implicates weighty constitutional issues, should not rise or fall on a facile distinction. "Federally recognized Indian tribes" are quasi-sovereign political entities, to be sure, which is why some courts characterize the classification as political. Their members, however, share more than a like-minded spirit of civic participation; they share the same

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[129] *Id.*, at 836-37.

[130] *Id*. Had the policy been examined under strict scrutiny, it hardly could have been deemed narrowly tailored to the asserted interests. Nor is it clear that increasing the representation of a single racial group in a given occupation is a "compelling" governmental interest, particularly when it overrides the accrued seniority and tenure of non-Indians.

[131] Tuveson v. Fla. Governor's Council on Indian Affairs, Inc., 495 So. 2d 790 (Fla. Dist. Ct. App. 1986).

[132] *Id.* at 793-94.

[133] *See id.*

[134] 839 F. Supp. 2d 388, 403 (D. Mass. 2012).

> racial heritage. . . . *Mancari* ignores this crucial fact and proceeds from the irrational assumption that race is "nothing more than a politically meaningless classification based on ancestry" and that "tribal membership is purely a matter of voluntary civic participation."[135]

The court also stated that, if "addressing the issue as one of first impression, it would treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake."[136] However, it found itself bound to honor *Mancari*, based on its interpretation of language from certain Supreme Court holdings. On appeal, however, the First Circuit reversed this ruling, and held that:

> [I]t is quite doubtful that *Mancari*'s language can be extended to apply to preferential *state* classifications based on tribal status. *Mancari* itself relied on several sources of federal authority to reach its holding, including the portion of the Commerce Clause relating to Indian tribes, the treaty power, and the special trust relationship between Indian tribes and the federal government. The states have no equivalent authority.[137]

The First Circuit then relied on the Supreme Court's decision in *Rice v. Cateyano*—in which the Court declined to extend its holding *Mancari* to Native Hawaiians, despite a similar special trust relationship—and indicated that a state Indian preference statute is subject to strict scrutiny, because "[a]ncestry can be a proxy for race."[138]

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[135] *Id.* at 403–04.

[136] *Id.* at 404.

[137] KG Urban Enters.v. Patrick, 693 F.3d 1, 18–19 (1st Cir. 2012). The First Circuit referenced the Supreme Court's application of strict scrutiny to a Native Hawaiian preference in *Rice v. Cateyano*, where the Supreme Court limited its holding in *Mancari* to Indian tribes—despite various similarities between U.S.-Indian and U.S.-Hawaiian relations, including a similar trust doctrine—applied strict scrutiny, and struck down the preference, noting that "[a]ncestry can be a proxy for race." 528 U.S. 495 (2000). The First Circuit thus remanded the case, and said that summary judgment disposition of the Equal Protection claim was actually premature, and essentially sanctioned lower courts in differentiating *Morton v. Mancari* as only applying to federal laws, not state laws.

[138] *Id.* at 19–20 (quoting Rice v. Cateyano, 528 U.S. 495, 514 (2000)).

In *Malabed v. North Slope Borough*, three courts combined to speak on *Mancari*'s application to state-law preferences.[139] The case involved a political subdivision of Alaska, North Slope Borough. Six of the seven members of the Borough's council, along with its mayor, were Inupiat Eskimos. Armed with a favorable opinion letter from the federal EEOC, the mayor introduced and the Borough adopted a strong Indian employment preference code for all Borough hiring. The plaintiff in the case brought suit after he was hired but had his position abruptly terminated, then reopened and filled by an Indian candidate.[140] The federal district court held that the employment preference was subject to strict scrutiny and violated equal protection principles. It stated that the Borough had "no constitutional mandate" nor "constitutional authority to enact remedial ordinances designed to cure general societal discrimination."[141] And it rejected any attempt to apply *Mancari* to the case at hand. The court noted that states do not have the same trust relationship toward Indians as the federal government, and otherwise explained that an employment preference with the Borough did not protect any unique tribal or cultural interests.[142] On appeal, the Ninth Circuit certified a question to the Alaska Supreme Court: whether the employment preference violated any provision of Alaska statutory or constitutional law.[143] The Alaska Supreme Court also refused to apply *Mancari* and rejected the "notion that the Alaska Constitution radiates implied guardianship powers allowing the state or its boroughs to treat Alaska Native as if they were wards."[144] The court further noted that the "federal government's . . . powers . . . spring directly from the express powers granted to Congress in the United States Constitution's Indian Commerce and Treaty clauses."[145] There is no such authority to "implicitly grant parallel powers to state and municipal governments" in the regulation of Indian affairs.[146] On this basis, the court concluded that the Borough

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[139] Malabed v. North Slope Borough, 42 F. Supp. 2d 927 (D. Alaska 1999).
[140] *Id.* at 929.
[141] *Id.* at 939.
[142] *Id.* at 937–39.
[143] Malabed v. North Slope Borough, 70 P.3d 416, 418 (Alaska 2003); Malabed v. North Slope Borough, 335 F.3d 864, 866 (9th Cir. 2003).
[144] Malabed, 70 P.3d at 422 (Alaska 2003).
[145] *Id.*
[146] *Id.*

lacked any "legitimate interest in enacting the disputed preference."[147] Having received the court's response, the Ninth Circuit rested its decision on the conclusion that the employment preference violated the Alaska guarantee of equal protection.[148] But the Ninth Circuit made the point, in a footnote, that "*Mancari* held only that when Congress acts to fulfill its unique trust responsibilities toward Indian tribes, such legislation is not based on suspect classification"; extending the racial-political classification beyond this context of the federal-tribal relationship "puts more weight on *Mancari* than it can bear."[149]

Morton v. Mancari, and its general holding—that Indian status is a political classification tied to the sovereign Indian tribes, not a racial one—remains foundational to modern Indian legislation and case law. However, just as with the criminal cases discussed in the above section, a number of lower courts have made factual and legal distinctions in deciding whether Indian status is a racial or political classification. Thus, the issue of when lower and state courts—and individual judges—will apply *Morton v. Mancari* to state and local classifications based on Indian status remains unresolved. In the absence of a definitive Supreme Court ruling that modifies or clarifies the scope of *Mancari*, this unsettled status is necessary in affording judges some level of flexibility. Of course what the "right" or "wrong" use of this discretion and flexibility may be is highly subjective and depends on individual preferences. But requiring that *Morton v. Mancari* be applied liberally, to all state and local laws, ordinances, regulations, and rules of any subject matter, and to all manner of government action, would raise serious questions in fringe cases. This also applies to some federal legislation, because even Congress' "plenary power" must be moored to the federal-tribal relationship. The Ninth Circuit recognized as much in *Williams v. Babbitt*.[150] The case involved an agency's interpretive rule on the federal Reindeer Act of 1937. The interpretive rule would have effected a virtual monopoly on reindeer purchases and sales for Indians, and prohibited any non-Indian entry into the reindeer industry. The court ultimately struck down the agency interpretation as an unreasonably broad

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147 *Id.* at 422–23.
148 Malabed, 335 F.3d at 874 (9th Cir. 2003).
149 *Id.* at 868 n.5.
150 Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997).

reading of the Reindeer Act. Along the way, the court surveyed *Mancari* and its progeny, and stated that "[w]hile *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests."[151] The court continued:

> For example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts. At oral argument, counsel for the government conceded that granting natives a monopoly on all Space Shuttle contracts would not pass *Mancari*'s rational-relation test. Counsel could only distinguish the Space Shuttle preference from a reindeer preference by noting that, in 1937, natives were heavily involved in the reindeer business whereas they aren't involved in the Space Program. The casino example defies this distinction, but is equally unrelated to "Congress' unique obligation toward the Indians."[152]

By this reasoning, the court suggested that the agency's interpretation would subject the Reindeer Act to strict scrutiny as a racial classification, and indicated that it would be struck down as unconstitutional.[153] The analysis in this case seems to be consistent with both the holding and reasoning behind the *Mancari* decision. But, as set forth above, other courts have used *Mancari* more broadly, treating it as a rubber stamp to insulate a variety of laws, rules, and programs that rely on Indian status classifications—often to extend preferential treatment to individual Indians over members of other racial groups.[154]

The general takeaway here, as in the above section, is inconsistent reasoning and results. Once outside the realm of federal legislation touching on core tribal interests, courts have found freedom to treat Indian status as a racial classification subject to strict scrutiny, or treat it as a political classification (that is, apply *Morton v. Mancari*) subject only to rational-basis review, to reach a desired outcome or uphold a preferred policy. There

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[151] *Id.* at 665.
[152] *Id*.
[153] *Id.* at 665–66.
[154] *See, e.g.*, *supra* notes. 119-122, 127-131, and accompanying text.

is not a consistent underlying logic beyond this. Treating, for example, preferences and special programs for individual Indians—members of a U.S. Census Bureau-designated race—as a political classification, but then treating a state's funding to the Navajo Nation—one of the tribal entities that justifies the racial/political distinction—as a decision impermissibly made based on racial categorization in *Navajo Nation v. New Mexico*, can only be rectified by looking to preferences for certain policies and outcomes.[155]

C. "Indian" Status in ICWA

The Indian Child Welfare Act (ICWA) is deserving of individual treatment in this section, as it represents a situation where Indian status is more appropriately cast as a political classification.

ICWA is a remedial statute that "establish[es] minimum Federal standards for the removal of Indian children from their families."[156] ICWA uses the Indian status of a child involved in custody, adoption, and removal proceedings as a trigger for its provisions. It was enacted to combat the "wholesale removal of Indian children from their homes," after Congress found that "an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[157] Among other provisions, ICWA dictates a preference for placement of an Indian child with a family member, a member of the child's tribe, or other Indian families.[158]

Indian status under ICWA is appropriately viewed as a political classification, because the Indian status classification is a means by which the interests of Indian tribes and the larger Indian community are represented. ICWA serves Indian tribes—political entities. Leading up to the creation of ICWA, Congress had found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[159] This is evidenced in the Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*.[160] In tracing the purposes and background of ICWA, the Court quoted Congressional hearing testimony that emphasized the tribal interests at stake:

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[155] *See* Livingston v. Ewing, 601 F.2d 1110, 1116 (10th Cir. 1979); Navajo Nation v. New Mexico, 975 F.2d 741, 743 (10th Cir. 1992).
[156] 25 U.S.C. § 1902.
[157] 25 U.S.C. § 1901(4) (2012).
[158] Adoptive Couple v. Baby Girl, 570 U.S. 637, 643 (2013).
[159] 25 U.S.C. § 1901(3).
[160] 490 U.S. 30 (1989).

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[161]

The Act was recognized as not only "protecting the rights of the Indian child as an Indian," but also the "rights of the Indian community and tribe in retaining its children in its society."[162] The case that called for application of ICWA in *Holyfield* involved twin children born to an Indian mother and father, two-hundred miles from the parents' tribe's Mississippi Choctaw Reservation on which the parents resided. The mother of the children intentionally gave birth to the children off of the reservation, voluntarily surrendered custody of the children, and, along with the father, gave written, advanced consent to adoption of the children by the prearranged, non-Indian adoptive mother, Vivian Holyfield.[163] The adoption proceedings were conducted in state court. When the tribe tried to intervene in the adoption, both birth parents affirmed their desire that Holyfield adopt their children.[164] All of this was done in an apparent attempt to place the children with Holyfield, and escape the application of ICWA.[165] Nonetheless, the Court's majority held that the Mississippi Choctaw tribe had exclusive jurisdiction over the children's adoption.[166] The Court explained that:

> Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian

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[161] *Id.* at 34 (internal citations omitted).
[162] *Id.* at 37 (internal citations omitted).
[163] *Id.* at 37-38.
[164] *Id.* at 54 (Stevens, J., dissenting).
[165] *Id.*, at 39-40 (Brennan, J., majority opinion).
[166] *Id.*, at 53-54.

> children adopted by non-Indians. . . . The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves. . . . Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish.[167]

Thus, *Holyfield* stands for the idea that ICWA affords Indian tribes, themselves, a set of vested rights that are unique and tailored to their interests, and separate from the rights and interests of individual, tribal-member Indians. ICWA's use of Indian status is what gives Indian tribes the opportunity to exercise their unique rights, and pursue interests of the Indian tribe and Indian community as a whole, not just the interests of individuals with Indian blood who happen to be members of an Indian tribe.

Viewing Indian status as a political classification under ICWA is also appropriate because of the act's definition of "Indian" and "Indian child." Some legislation leaves terms like "Indian" undefined, or otherwise offer no substantive guidance in determining Indian status. Determination of Indian status under the Major Crimes Act and General Crimes Act is not guided by a clear definition, and decisions on Indian status under these acts are made by non-exhaustive, multi-factor balancing tests that are formulated and applied in different manners by different courts and in different cases.[168] Under ICWA, an "Indian" is "any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation," and an "Indian child" is a "person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[169] These definitions make specific reference to the political prong of Indian status—tribal membership. Under ICWA, only tribal members, or enrollment-eligible children of tribal members, qualify for Indian status.

Given the clear expression of an Indian tribe's—not just an Indian individual's—interests represented in ICWA, along with definitions that hinge on tribal affiliation and not just Indian blood, challenges to ICWA

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[167] *Id.* at 49, 52.
[168] *See supra* text accompanying notes 34–79.
[169] 25 U.S.C. § 1903(3)–(4) (2012).

appear to be prime candidates for application of *Morton v. Mancari*. In comparison to other cases that have followed *Mancari*, Indian status in ICWA presents more clearly as a political, rather than racial, classification, as the distinction has been made and understood by courts. This may come up in the next few years, as a number of criticisms have recently been directed at ICWA.[170] In fact, a handful of cases—including a class action funded, directed, and highly publicized by the Goldwater Institute—have challenged ICWA on grounds of Equal Protection and racial discrimination. However, they have largely been dismissed for lack of standing.[171] Although ICWA has not been conclusively tested on the merits in this new round of challenges, it appears that ICWA exemplifies characteristics that justify treating its use of Indian status as a political classification, rather than a racial one. These characteristics can be applied to inform future congressional acts making use of Indian status—such as clear definitions that reference tribal membership or affiliation; congressional testimony, reports, and purpose statements that highlight the representative interests of Indian tribes and the general Indian community; and an active role for tribal governments in representing their own interests and furthering the statutory scheme.

III. THE SENSIBILITY OF CURRENT INDIAN-STATUS DETERMINATIONS AND ALTERNATIVE APPROACHES

A. Merits of the Current Scheme

Marilyn Vann framed her position in the Cherokee Freedmen debate as the question of whether the Cherokee Nation is "a race or a nation?"[172] This presentation of the question as a true dichotomy may have been a heartfelt contention on the part of Vann and the Freedmen. Perhaps it is more appropriate under the unique circumstances of the Freedmen debate, given that it involves an internal racial classification, to be made within a single Indian tribe. However, if taken as a question of the treatment of Indian status as a whole, it represents a gross oversimplification of the

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[170] *See also* George Will, *The Indian Child Welfare Act Puts Identity Politics Above Children's Safety*, NATIONAL REVIEW, Sept. 3, 2015, http://www.nationalreview.com/article/423460/indian-child-welfare-act-puts-identity-politics-above-childrens-safety-george-will; Clint Bolick, *The Wrongs We Are Doing Native American Children*, NEWSWEEK, Nov. 2, 2015, http://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771.

[171] *See* Nat'l Council for Adoption v. Jewell, 156 F. Supp. 3d 727, 733 (E.D. Va. 2015); A.D. v. Washburn, No. CV-15-01259-PHX-NVW, 2017 U.S. Dist. LEXIS 38060, at *3 (D. Ariz. Mar. 16, 2017), *vacated*, No. 17-155839, 2018 U.S. App. LEXIS 21721 (9th Cir. Aug. 6, 2018).

[172] *See supra* notes 31-32 and accompanying text.

history and policy of U.S.-Indian relations, and the flexibility needed in legal treatment of said history and policy.

The two-prong categorization of Indian status serves both convenience and necessity. It allows the government to regulate, burden, or extend benefits and preferences to Indians and Indian tribes, where it would not be appropriate to do so with other groups of citizens. When a desirable program is challenged, courts can uphold Indian status as a political classification. If actions are taken to the detriment of Indians or Indian tribes, courts can engage in mental gymnastics, or ignore prior case law altogether, in reaching a decision that nonetheless reflects reality—that is, that Indian status is inherently racial, even if tied to smoldering embers of a former sovereignty.[173] Courts and legislatures alike are able to conveniently define Indian status in racial terms, while simultaneously asserting that their actions are consistent with equal protection principles because Indian status is political, rather than racial. What this means, however, is that Indian status is a non-uniform, contextual, and shifting classification; from case to case, its application may turn on questionable factual distinctions and conclusions. And it is far from guaranteed that an individual judge will hold a positive view of tribal sovereignty and interests.

For the time being, the seemingly incoherent legal treatment of Indian status is coherent in what it accomplishes—namely: convenience, flexibility, and necessity in reaching desired outcomes or upholding policy preferences. Flexibility and convenience, however, do not provide long-term security. By affording courts and Congress the ability to mold conceptions of Indian status based on policy preferences and convenience, tribes and individual Indians are subject to potential shifts or inconsistencies in the preferences of individual judges and subsequent legislatures.

B. An Alternative Approach: Emphasizing the Federal Relationship to the Sovereign Tribes that Justified the Political Classification in Mancari

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[173] On the wavering and diminished nature of tribal sovereignty possessed by the "domestic, dependent [Indian] nations," *see* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance . . . by treaty or statute, or by implication as a necessary result of their dependent status.") *superseded by statute*, 25 U.S.C. §§ 1301–1303 (1983 & Supp. 1998), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

An alternative approach would be to rely more heavily on the status of tribes as sovereign political entities and less on racial conceptions of Indian status. Accordingly, criminal jurisdiction would hinge solely on official recognition of the defendant as an Indian by the tribe, and civil legislation would have to be related to tribal interests and directed at tribal members to enjoy insulation from review, under *Mancari*. This would better respect the Supreme Court's landmark yet illusory holding in *Williams v. Lee*, recognizing "the right of the Indians to govern themselves" as sovereign nations.[174] Of course, skeptics may note that tribes could gain significant non-Indian membership and place a strain on the federal government in requiring more federal funding and federal attention. Opponents might otherwise conjure up ideas by which tribes game a newfound discretion to determine membership, free of worries about continuing political vitality and average blood-quantum. These claims, however, are likely rebuked by reality. Although some tribes require only a showing of lineal descent from an original tribal member for enrollment, a number of other tribes restrict the enrollment of those with lineal descent from original tribal members and some degree of Indian blood by imposing ranging levels of minimum blood quantum requirements.[175] Many tribal governments now operate just as much (or more) as business conglomerates, as they do sovereign rulers.[176] The recent trend has been for tribes to move beyond already lucrative gaming and mineral enterprises and into manufacturing plants, commercial real estate leasing, pharmaceutical companies, and factories.[177] Tribes

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[174] Williams v. Lee, 358 U.S. 217, 223 (1959); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

[175] *Compare Membership/CDIB*, THE OSAGE NATION, https://www.osagenation-nsn.gov/what-we-do/cdib-membership ("The Osage Nation Membership Department issues membership cards for individuals showing lineal descent from an Osage listed on the base roll created pursuant to the Osage Allotment Act of 1906.") (last visited Sept. 6, 2018), *with Enrollment,* THE MISSISSIPPI BOARD OF CHOCTAW INDIANS, http://www.choctaw.org/government/tribalServices/members/enrollment.html (explaining that the Mississippi Band of Choctaw Indians requires that a prospective enrollee have one-half or more Choctaw blood quantum, and be born to an enrolled member of the tribe) (last visited Sept. 6, 2018). Tribes employing a minimum-blood quantum typically range from one-half to one-sixteenth blood requirements.

[176] *See* Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 1–2 (Harvard University. Faculty Research, Working Paper No., RWP04-016, 2004); David H. Getches, Charles F. Wilkinson, Robert A Williams, Jr., Matthew L.M. Fletcher, Cases and Materials on Federal Indian Law 24 (6th ed., 2011).

[177] See id.

likely have an interest in limiting their membership, to limit the dispersion of the funds generated from casinos, oil and gas leases, lumber and mineral resources, and tribal enterprises. This tribal interest likely coincides with federal interests in limiting the amount of federal funds expended as part of the unique federal government relationship with Indian tribes, and the Indians within them. Indeed, the more recent concern has been tribal *dis*enrollment of members—with some cases bringing allegations of economic and financial motives behind the disenrollment.[178]

In the criminal context for individual defendants, this would mean getting rid of the *Rogers* racial/political prongs and relying more simply on tribal enrollment or other official recognition (which usually itself requires some quantum of racial "Indian blood"). For the Supreme Court's decision in *United States v. Antelope* to mean what it says, the only proper inquiry is whether a criminal defendant is officially affiliated with a tribe.[179]

In the civil context, federal legislation, in order to be subject to rational basis review as a political classification under *Mancari*, would have to bear relation to Congress' authority to deal with tribes, and tribal members, under the Indian Commerce Clause and federal trust relationship. This would preserve legislation that regulates tribal economic development/enterprises,[180] serves tribal continuity and vitality,[181] or promotes self-government.[182]

Federal legislation that extends differential treatment to Native Americans more generally and lacks a strong tie to tribal interests would be subject to heightened scrutiny. This was the basis for the Ninth Circuit's

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[178] *See, e.g.*, Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 409 (2015).

[179] 430 U.S. 641, 646 (1977) (holding that the defendants "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are *enrolled members of the Coeur d'Alene tribe*.").

[180] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216–217 (1987) (recognizing that encouraging tribal economic development is an "important federal interest" and promotes larger goals of tribal self-government and independence), *superseded by statute*, 25 U.S.C. § 2701, *as recognized in* Michigan v. Bay Hills Indian Cmty., No.12-515 (May 27, 2014).

[181] *See supra* text accompanying notes 137–149 (explaining that ICWA is such an act, ensuring that tribes can maintain their population base and cultural life).

[182] In *Mancari*, the Supreme Court found that the BIA employment preference furthered self-government, given the role of the BIA in managing tribes and Indian affairs. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974). The more clear-cut example of self-government would be legislation that shifts jurisdiction and regulation from state/federal government, to the tribes themselves.

decision in *Williams v. Babbitt*—that *Mancari* only shields "uniquely Indian interests."[183] For example, a program that extends benefits to individuals that identify as Native American but live off-reservation and are not enrolled in federally-recognized tribes, might draw a heightened standard of review. The "tribal" or "sovereign" interests in such a situation are tenuous, as the individuals benefitting from the classification would lack a non-racial link to tribal governments.

Any independent state legislation that does not descend from a federal program or federal treaty obligation would be subject to strict scrutiny, because states do not possess the same plenary authority over Indian affairs as U.S. Congress.[184]

This approach would limit the realm in which Congress and states can legislate. Critics would likely argue that it overlooks the legitimate interest that government may have in remedying past injustices that operate against individual Native Americans, as members of a racial group. The basis for such a claim is founded upon the role of federal government as a trustee, within the federal-tribal trust relationship. But the Supreme Court has been increasingly skeptical of the idea that special treatment of a racial group is consistent with the Due Process and Equal Protection principles.[185]

C. An Alternative Approach: Transparent Balancing that Reflects the Unique Quasi-Sovereign, Quasi-Racial Aspects of Indian Status

Criticizing the Supreme Court's decision in *Mancari*, the federal district court in *KG Urban Enterprises* offered that, if approaching the issue as one of first impression, it would:

> treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at

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[183] Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997) (showing that this perceivably would limit the ability of government to engage in differential treatment of individuals identifying as Native American who live outside of tribal reservations and are not enrolled in federally-recognized tribes). *But see* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1041 (2008) (arguing that such treatment would fall within Congress' power as a trustee, in the scope of the federal-tribal trust relationship).

[184] *See* Malabed v. N. Slope Borough, 70 P.3d 416, 422 (Alaska 2003).

[185] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

> stake. Federal laws relating to native land, tribal status or Indian culture would require minimal review because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs. Laws granting gratuitous Indian preferences divorced from those interests . . . would be subject to more searching scrutiny.[186]

This aside from the court picked up where the Ninth Circuit left off in *Williams v. Babbitt*, holding that only legislation involving "uniquely Indian interests" is shielded from searching review.[187] Perhaps the more feasible approach, reflecting the broad context in which federal and state governments interact with tribes and their citizens, is a flexible framework of multifactor balancing. And the Supreme Court's adoption of a flexible level of scrutiny to accommodate unique circumstances would not be a novel break from its existing caselaw.[188]

Three factors seem pertinent in this framework. The first, and heaviest, would be the strength of the tribal interests at stake—whether the classification involves uniquely Indian interests in self-government, economic development, or continuity of tribal culture. The second factor would be whether the classification is aimed at remedying specific aftereffects of federal mismanagement towards tribes and Indians, or simply confers a benefit upon those with Native American ancestry. This gives due heed to the idea that the federal government, in the exercise of its trust obligation, should have the authority and flexibility to correct the error in its past policies.[189] The third factor, related to the second, involves the

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[186] KG Urban Enters., LLC v. Patrick, 839 F. Supp. 2d 388, 404 (D. Mass. 2012), *aff'd in part, rev'd in part by* KG Urban Enters., LLC v. Patrick, 693 F.3d 1 (1st Cir. 2012). The First Circuit did not otherwise raise objections to the district court's criticism of *Mancari*.

[187] 115 F.3d at 665.

[188] *See* Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1057, 1046–47 (2017) (identifying five de facto tiers of scrutiny employed by the court, such as the use of "strict scrutiny lite" in upholding explicit racial classifications in the context of higher education affirmative action).

[189] *See, e.g.*, Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. L.J. 1, 64 (1995); Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 HAW. L. REV. 1, 34 (1997) (supporting the idea that the government might have an interest in special housing and land acquisition programs for urban Indians that recognize the impact that assimilation and allotment policies had on the individual Indian, separate and apart from any modern connection to the tribe).

impact that the legislation has on individuals who belong to other racial groups—is it a program tailored to Indians and tribal interests, or is it a classification within a broader program or regulatory scheme that confers a competitive benefit on Indians, to the detriment of similarly-situated non-Indians? This strikes a compromise between the history and continuing need for special legislation aimed at tribes and Indians as a unique, quasi-racial quasi-political group, while still accounting for the core dictate of equal protection—that special attention is required when government engages in differential treatment, particularly on the basis of race.[190] As one court has put it, the "breadth of the Federal power over Indian tribes and its resulting conflicts with equal protection theory require that the power be exercised with regard to its effect on non-Indians as well as Indians."[191]

This approach may be preferable to that of the preceding subsection, because it is more sensitive to the idea of government—federal, and perhaps state, in some contexts—enacting remedial legislation to address inequalities rooted in historical treatment of tribes and their citizens at the hands of government. This allows for a broader role of the federal government in executing its role as a trustee to Indian tribes. But perhaps the most attractive aspect of this approach is that it would inject judicial transparency into the legal analysis of classifications based on Indian status. As the Ninth Circuit did in *Williams v. Babbitt*, courts would be required to take an open and honest inventory of the nature of the classification and the interests at stake.[192] This could lead to more reasonable analysis—and thus allow legislators and tribes more predictability—than the current regime, which has treated the single political entity of the Navajo Nation as a racial classification, while treating individual Indians as the subject of a political classification, without any clarity of analysis. Perceivably, in these cases, courts have already been conducting this kind of balancing and weighing of interests—the calculus has just occurred behind the scenes.

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190 *E.g.*, Kornhass Constr. Inc. v. Okla. Dep't of Cent. Serv., 140 F. Supp. 2d 1232, 1249 (W.D. Okla. 2001). There, the court applied strict scrutiny to a state "bidding preference to American Indians," as it was not clearly tied to Congress' unique obligation toward the Indian tribes" or "furthering tribal self-government." *Id.*

191 State v. Zay Zah, 259 N.W. 2d 580, 591 (Minn. 1977).

192 *See* 115 F.3d at 665.

CONCLUSION

Whether correct or incorrect, consistent or incoherent from a legal perspective, applying both a racial and political prong to Indian status makes sense from a realist view. Divorced from the Cherokee Freedmen debate and applied generally, Chief Smith's statement that "an Indian nation should be composed of Indians" seems inherently correct, even if the specific reasons cannot be fully articulated. The political prong is a nod to the fact that Indian tribes were once sovereign nations that contracted and made treaties with the United States (along with the Spanish, British, and French), in government-to-government relations. Initially by strategic or tactical choice, this sovereignty was never "extinguished" by, say, a decisive military conquest. This continuous (but modified and limited) sovereignty, and the resulting political prong of Indian status, differentiates Indians from other minority groups who, though subject to historical mistreatment and perhaps otherwise deserving of remedial legislation, have no such tie to a continuing sovereign entity—American descendants of Irish immigrants or Black slaves, for example, are subject to the political sovereignty of the United States alone, and have been so since the entrance (by force or by choice) of their ancestors into the borders of the United States. On the other hand, the continuing political sovereignty of Indian status is founded upon the existence of the racial prong. The history of each tribe is a history of the ancestors of its modern members, and without genealogical ties to these ancestors and their experiences, the basis for a special relationship between the federal government and Indians is lost. After all, it is not the Lakota Tribe that was massacred by U.S. soldiers at Wounded Knee, but rather 150 individual Lakota tribal members. Nor was it the Navajo tribe that turned limited government provisions of flour, salt, and lard into the now-iconic frybread, but rather individual members of the Diné trying to survive the forced relocation march, or "Long Walk," across the deserts of the Southwest. It is this genealogical and cultural heritage that lives on in individual Indians, and it is the decision of these individuals to maintain an "existence . . . as a separate and distinct people," that fans the flames of continued tribal sovereignty.[193]

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[193] Worcester v. Georgia, 31 U.S. 515, 583 (1832) (M'Lean, J., concurring), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).