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# Bureau of Indian Affairs Hiring Preferences After *Adarand Constructors, Inc. v. Peña*

## I. Introduction

The recent Supreme Court decision in *Adarand Constructors, Inc. v. Peña*[1] raised the constitutional standard of review for all federal government racial classifications to strict scrutiny.[2] Prior to this ruling, the Supreme Court had held that federal government racial classifications, when "benign," were subject only to intermediate scrutiny.[3] In the 1974 case *Morton v. Mancari*,[4] the Court established an even lower standard for hiring preferences given to Indians within the federal Bureau of Indian Affairs (BIA).[5] These preferences were held to be constitutional "[a]s long as [such] special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[6]

This Note examines the effect of the new *Adarand* standard of review on BIA hiring preferences. Part II explains Congress' unique historical obligation toward the Indians and its authority to legislate on Indians' behalf. Part III examines the *Mancari* Court's rationale for holding that the Indian

1. 115 S. Ct. 2097 (1995).

2. *Id.* at 2113 ("All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"). The majority in this five-to-four decision was composed of Justice O'Connor, writing for the Court, joined in whole or in part by Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

3. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990) (holding that "benign [federal racial classifications]—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"), *overruled by* Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995).

4. 417 U.S. 535 (1974).

5. This preference is authorized by the Indian Reorganization Act of 1934 (preference codified at 25 U.S.C. § 472 (1994)).

6. *Mancari*, 417 U.S. at 555.

hiring preference was constitutional as well as the issues raised by the Court's analysis. Part IV briefly reviews a change in the BIA preference made subsequent to the *Mancari* decision, noting that the new preference lacks the political component upon which the *Mancari* Court relied. Part V then reviews the *Adarand* decision. Part VI.A examines whether *Adarand*'s standard of review properly applies to the BIA's new hiring preference. Part VI.B then considers the results if *Adarand* is applied to the new preference, and whether a failure to meet the *Adarand* standard could be cured by returning to the old preference declared constitutional in *Mancari*. Part VI.B lastly examines the possible outcome if *Adarand* were found not to apply and the new preference were challenged under the *Mancari* standard of review.

This Note concludes that *Adarand* is inapplicable in the Indian preference context because the preference seeks to further tribal self-government rather than to remedy past discrimination. Further, even if *Adarand* is found to be applicable to the current Indian hiring preference, it is constitutional, since self-government is an objective unique to Native Americans and Native Americans can ultimately be defined only by race.

## II. "CONGRESS' UNIQUE OBLIGATION TOWARD THE INDIANS"

The current Indian hiring preference is contained in one statute of a title of the United States Code that is devoted entirely to regulating Indian affairs. Congress has a long history of directing legislation specifically toward Indians, and this unique treatment naturally raises equal protection concerns. One author has characterized these equal protection concerns thus: "If Title 25, the title of the United States Code that governs Indians, used the term 'African-American' everywhere that it used the word 'Indian,' the Court would surely waste little time in striking down the whole volume as part of the lingering vestiges of past discrimination."[7] Yet the laws contained in Title 25 have remained constitutional—indeed, congressional enactments toward Indians have never been held unconstitutional.

7. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 764 (1991).

Title 25 carries a unique status because the Constitution specifically empowers congressional legislation to single out Indians. The Indian Commerce Clause states that "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."[8] Apart from the Indian Commerce Clause, Congress is deemed to have a duty to the Indians, and with that duty comes the power to fulfill it.[9] Congress' plenary power over the Indians was established in federal common law by a trilogy of early Supreme Court decisions.[10] These three cases helped define the political status of Indians as well as the relationships among the various tribes, the individual states, and the federal government. In the second case of the trilogy, *Cherokee Nation v. Georgia*,[11] Chief Justice Marshall explained that

> the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.
>
> . . . .
>
> . . . [The Tribes] may . . . be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will [as determined in the first case of the trilogy, *Johnson v. M'Intosh*], which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[12]

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8. U.S. CONST. art. I, § 8, cls. 1, 3.

9. *See* United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

10. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Although at the time, these decisions were not seen as independent sources of Congressional authority over the Indians, later cases looked back to these cases as sources of this authority. *See* Williams v. Lee, 358 U.S. 217 (1959); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886).

11. 30 U.S. (5 Pet.) 1 (1831).

12. *Id.* at 16-17.

A year later, Chief Justice Marshall expounded on the concepts of a "domestic dependent nation" and the ward-guardian relationship in the third case of the trilogy, *Worcester v. Georgia.*[13] After reviewing the federal treaties with the Cherokee nation, Chief Justice Marshall explained that

> the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. . . . "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."[14]

The Court's reasoning in these cases established the Indian Tribes' continuing sovereignty and interest in self-government. In its essence, this Indian tribal status has remained undisturbed.[15] The application of these concepts under modern-day equal protection analysis, however, is less clear.

## III. REVIEW AND ANALYSIS OF *MORTON V. MANCARI*

### *A. The Court's Decision*

At the time of *Mancari*, the BIA granted a hiring and promotion preference to qualified persons who were both "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe."[16] *Mancari* arose when non-Indian

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13. 31 U.S. (6 Pet.) 515 (1832).

14. *Id.* at 560-61.

15. While Chief Justice Marshall's concept of the Tribes' right of self-government is just as relevant today, it must be remembered that it was thought at the time that the Indians would soon assimilate into the new American population and culture. As Justice McLean noted in his concurrence in *Worcester*:

> The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . .
>
> If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

*Id.* at 593-94 (McLean, J., concurring).

16. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

BIA employees brought a class action, claiming that the BIA employment preference was contrary to the Equal Employment Opportunity Act of 1972 and that the preference violated due process requirements of the Fifth Amendment.[17]

In deciding these claims, the Court explained that their "[r]esolution . . . turns on the unique legal status of Indian Tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[18] Regarding past preferences granted to Indians in governmental positions that deal with Indians, the Court stated:

> The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834. Since that time, Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.[19]

These three purposes—Indian self-government, the trust obligation, and the negative effect of non-Indian administration—are the guiding principles of *Mancari*.

After rejecting the statutory claim,[20] the Court addressed whether the "[hiring] preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment."[21] Before proceeding with a formal analysis, Justice Blackmun briefly reviewed the historical sources of congressional power over the Indians, then signaled the Court's result: "If these laws, derived from historical relation-

17. *Id.* at 539.

18. *Id.* at 551.

19. *Id.* at 541-42 (footnotes omitted).

20. The plaintiffs contended that the Equal Employment Opportunity Act of 1972 implicitly repealed the hiring preferences granted in the Indian Reorganization Act (IRA). The Court found that the Equal Employment Opportunity Act did not repeal the IRA, based on the policies of the IRA and on the subsequent legislative history which demonstrated that the same Congress that passed the employment act continued to assume that the IRA preferences remained intact. *Id.* at 547-48.

21. *Id.* at 551.

ships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[22] As a practical matter, this "consequentialist" argument[23] may be the best organizing principle of the Court's holding.

The Court then provided its equal protection analysis, explaining that the preference criteria did "not constitute 'racial discrimination.'"[24] Indeed, according to the Court, it was "not even a 'racial' preference."[25] The preference was instead

> reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," or that a member of a city council reside within the city governed by the council.[26]

The Court continued to explain that

> [t]he 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. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[27]

Thus, in determining whether the BIA preference was constitutional, the Court's focus was on whether the preference had a political component. The Court stated:

> The 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

22. *Id.* at 552.
23. Williams, *supra* note 7, at 778-79.
24. *Mancari*, 417 U.S. at 553.
25. *Id.*
26. *Id.* at 554 (citation omitted).
27. *Id.* (citation omitted).

> this sense, the preference is political rather than racial in nature.[28]

The Court concluded that "the preference is reasonably and directly related to a legitimate, nonracially based goal"[29] and that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment."[30] The Court then provided the standard of review for the BIA preference: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[31] It thus appears from *Mancari* that the equal protection concerns raised by the race-based component of the preference are negated as long as the preference also has a political component. Yet given the initial consequentialist statement by the Court, it is unclear whether a purely racial criterion would also have been found to be tied rationally to Congress' unique obligation. After all, one of the definitions of "Indian" for purposes of the preference under the Indian Reorganization Act (IRA) is purely race-focused,[32] and the Court itself expressed a reluctance to "effectively erase[]" an entire title of the Code.[33]

### *B. Analysis of the* Mancari *Decision*

Although *Mancari* upheld the now-defunct hiring preference, the Court's analysis presents several difficulties. First, the preference in question required the applicant to be racially Indian and to be a member of a federally recognized Tribe. To say, as the *Mancari* Court did, that the criteria was "not even a 'racial' preference"[34] stretches the imagination, and is comparable to suggesting that discriminating on the basis of pregnancy is not the same as discrimination on the basis of gender.[35] As others have said, the preference was at best "'race-

28. *Id.* at 553 n.24.
29. *Id.* at 554.
30. *Id.* at 554-55 (citing cases).
31. *Id.* at 555.
32. *See* 25 U.S.C. § 479 (1994); *infra* text accompanying note 47.
33. *Mancari*, 417 U.S. at 552.
34. *Id.* at 553.
35. Williams, *supra* note 7, at 802-03 (finding this similarity between the *Mancari* analysis and the Court's gender discrimination analysis in Geduldig v. Aiello, 417 U.S. 484 (1974)). Interestingly, *Mancari* and *Geduldig* were decided on the same day.

plus.'"[36] Despite the clearly racially based nature of the preference, the additional requirement that the applicant be a member of a federally recognized Tribe seemed to alleviate the equal protection concern. That is, since the Court identified the preference's objective as the furthering of the Tribes' ability to govern themselves, requiring a racial Indian to be a member of a Tribe related the preference more compellingly to that objective.

However, the relation of the preference to self-governance is still tenuous, since the tribal membership component made no distinction among the Tribes. For example, it is unclear how a preference recipient who was a Sioux tribal member administering BIA programs on the Hopi reservation in any way furthered the Hopi objective of self-governance. Thus, Justice Blackmun's comparison of the preference to the residential requirement for senators[37] breaks down. A closer analogy might be a requirement that a senatorial candidate be a resident of "a state," but not necessarily the state in which he is running for office, or a requirement that a city council candidate need only live in a city—any city. These examples would seem to correspond more closely to the tribal member who was the recipient of the former BIA preference and yet was not required to have anything in common culturally or socially with the members of the Tribes over which she administrated.

The basic statement by the *Mancari* Court that the preference "is directed to participation by the governed in the governing agency" is generally true, however, and arguably provides a rational tie between the preference and Congress' objective of furthering tribal self-government. On the broadest level, the recipients of the preference, as members of federally recognized Tribes, were all subject to the Bureau of Indian Affairs. Therefore, all preference recipients and those tribal members over whom they administrated were all the "governed" subjects of the BIA. Perhaps then, this is as far as the analogy can be taken. In that case, the analogy is less like the senatorial requirement and more like a requirement that any federal employee charged with administering programs to the states be a citizen of one of the affected states. Even if federal employees administer programs that affect only particular states, it is

36. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1325 & n.80 (1993) (citing sources).

37. *See supra* text accompanying note 26.

irrelevant that the federal employees are not citizens of the affected state as long as they are equally subject to the rules that they make and implement.[38]

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38. This approach to government is not new; whether limits should be imposed on the theory of "virtual representation" in government was an issue that led to the American Revolutionary War. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 173-81 (1969). In England, only some regions of the country and only those possessed of "'certain Species of Property [and] peculiar Franchises'" in those regions were permitted to choose members of the British Parliament. *Id.* at 174. Yet

> [w]hat made this conception of virtual representation intelligible, what gave it its force in English thought, was the assumption that *the English people*, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, *were essentially a unitary homogenous order with a fundamental common interest*. . . . [W]hat affected the whole affected the parts; and what affected the empire ultimately affected every Englishman in it. All Englishmen were linked by their heritage, their liberties, and their institutions into a common people that possessed a single transcendent concern.

*Id.* (emphasis added). The American colonists did not question the theoretical validity of virtual representation, but only whether their interests were sufficiently similar to those of the members of the British Parliament for the theory to function properly. *Id.* at 176-77. The many Tribes and cultures that make up the European-invented grouping "Indian," however, certainly would not see themselves as a unitary homogenous order in the same sense that English political theorists saw themselves. *See* Williams, *supra* note 7, at 803-04. Yet the federal government's tendency has been to view these distinct tribal groups as "essentially a unitary homogenous order with a fundamental common interest."

An example of the government's tendency to view Indians as one group appears in the *Mancari* court's quotation of the Indian Reorganization Act's House sponsor:

> "*The Indians* have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages *their* affairs. . . . The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with *purely local Indian problems*. It should be possible for Indians with the requisite vocational and professional training to enter the service *of their own people* without the necessity of competing with white applicants for these positions. This bill permits them to do so."

Morton v. Mancari, 417 U.S. 535, 543-44 (1974) (emphasis added) (quoting 78 CONG. REC. 11,729 (1934) (statement of Rep. Howard)).

Here, it appears that the House sponsor perceived the issue as one of Indian self-government, not the self-government of distinctive Tribes. Under this concept, if any Indian works for the BIA in the administration of any reservation or Tribe, that Indian BIA employee is participating in the self-government ideal. Thus, all Indian BIA employees, even if they share no common culture or language with the inhabitants of the reservation on which they work, are in "'the service of their own people.'" *Id.* Since the Indian preference recipient is supposedly aware of the needs of "his people," he will therefore aid the Tribes over which he administrates in their self-government.

Although the relationship between the preference at issue in *Mancari* and the rationale of furthering tribal self-government was not an elegant one, the *Mancari* result was probably correct. Even if the preference was simply racial, it was based on a racial distinction that is like no other. Only the racial group of "Indian" identifies the groups of individuals that formerly held a sovereign status in the geographic area now controlled by the United States government.[39] Further, only Indians have cultural traditions that are both independent of European-American culture and only existent in the geographic area of the United States. As Chief Justice Marshall stated in *Cherokee Nation v. Georgia*, the relation between the United States and the Indians "is marked by peculiar and cardinal distinctions which exist no where else."[40] Thus, a unique obligation arises toward the Indians that may act as an exception to standard equal protection jurisprudence.

The *Mancari* preference can also be distinguished from other racial preferences recently instituted by the federal government which have come under the category of "affirmative action." Unlike affirmative action, the rationale of the *Mancari* preference was not strictly the remediation of past wrongs, the encouragement of diversity, or the lifting of a down-trodden class into the social mainstream. Rather, as the Court articulated, the purpose of the preference was self-government.[41]

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Despite its weak points, this line of reasoning does have one central strength. Perhaps all Indians are a single people with one definable interest, as Englishmen were presumed to be. WOOD, *supra*, at 175. Native Americans who consider themselves affiliated with a Tribe, whether or not the Tribe or their membership in the Tribe is federally recognized, have one definable interest vis-à-vis the federal and state governments. As Williams has written, "Only in recent decades have large numbers of Indians begun to identify themselves as Indians and recognize common bonds with other Indians, and they have done so only in response to the continuing tendency of the dominant culture in general and federal policy in particular to lump them together." Williams, *supra* note 7, at 803-04. Thus, Indians' one common interest is to retain some degree of their political autonomy, their cultural identity, and separateness as peoples. This interest by itself might excuse the more specific problems of whether a particular Tribe's objective of self-government is furthered. As the *Mancari* Court mentioned, another objective of Indian preferences generally is to "reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." 417 U.S. at 542.

39. *See* Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge panel), *aff'd*, 384 U.S. 209 (1966), *quoted in* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW CASES AND MATERIALS 99 (3d ed. 1991).

40. 30 U.S. (5 Pet.) 1, 16 (1831).

41. *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the Indian Reorganization Act] was to establish machinery whereby Indian Tribes would be able to

This purpose of self-government is unique to a group that is constitutionally different than the rest of the population.

Indians as a group are different for constitutional purposes because, at least at the time of the Constitution's adoption, they comprised separate nations. The power to enter into a governmental relationship with them was necessarily specified in the Constitution.[42] Yet, reverting to a *Mancari*-type distinction, it also seems apparent that the Constitution's racial classification was not intended to identify a racial group for its own sake, but to identify a political affiliation. The Constitution's Indian Commerce Clause refers not to just "Indians" as a racial group, but to "Indian *Tribes*."[43] This reference to a political status is important because it deals with Indians as members of political entities which maintain identities separate from the United States Government, to the degree that Congress allows the separation. An individual's membership in the Tribe makes the person separate as a member of a domestic dependent nation.

In summary, while *Mancari* was correctly decided, it is important to remember that under the *Mancari* analysis any preference intended to further the purpose of self-government requires the element of tribal membership.

## IV. CHANGES IN THE BIA HIRING PREFERENCE SINCE *MANCARI*

Three years after the *Mancari* decision, the BIA removed the political component of its hiring preference in order to conform to the definition of "Indian" in the Indian Reorganization Act of 1934 (IRA),[44] which had created the preference.[45] The definition which was the subject of *Mancari* stated that a preference would be granted to persons "one-fourth or more degree

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assume a greater degree of self-government, both politically and economically.").

42. *See supra* part II.

43. U.S. CONST. art. I, § 8, cl. 3 (emphasis added). The Constitution also refers to "Indians not taxed." *Id.* art. I, § 2, cl. 3; amend. XIV, § 2. Historically, the phrase "not taxed" described political affiliation: "Only those few Indians who had severed their tribal relations and individually joined non-Indian communities were considered to be subject to ordinary laws in a manner that made it appropriate to count them in the apportionment of direct federal taxes or for representation in Congress." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 388 (Rennard Strickland et al. eds., 1982). Thus, "the phrase 'Indians not taxed' was not a grant of tax exemption; it described an existing status." *Id.* at 389.

44. *See* 25 U.S.C. § 479 (1994); CLINTON, *supra* note 39, at 98.

45. 25 U.S.C. § 472 (1994); CLINTON, *supra* note 39, at 98.

Indian blood and . . . a member of a Federally-recognized Tribe."[46] In contrast, the IRA definition, which is now followed by the BIA, states that the term "Indian"

> include[s] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, *and shall further include* all persons of one-half or more Indian blood.[47]

Under this definition, all persons of one-half or more Indian blood qualify for the preference, regardless of tribal membership.[48] Obviously, the present preference criteria would not allow the Court to resolve the equal protection concern as it did in *Mancari*. By eliminating the exclusive requirement of tribal membership, the BIA may well have gone beyond the protection that *Mancari* afforded the preference. The constitutionality of the current BIA preference is additionally complicated by the Court's recent decision in *Adarand*.

## V. *ADARAND CONSTRUCTORS, INC. V. PEÑA*

### A. *The Facts*

In the 1995 case *Adarand Constructors, Inc. v. Peña*,[49] a subcontractor that was not awarded a portion of a federal highway construction project brought an action challenging the constitutionality of a federal program designed to provide contracts to "disadvantaged" business enterprises.[50] The terms of the government's contract with the prime contractor provided that the prime contractor "would receive additional compensation" if it hired small businesses certified as being "controlled by 'socially and economically disadvantaged individuals.'"[51] Under government regulations, Black, Hispanic, Asian Pacific,

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46. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974); *see supra* text accompanying note 16.

47. 25 U.S.C. § 479 (1994) (emphasis added); *see also* 25 C.F.R. § 5.1 (1995) (defining the preference criteria the same as found in 25 U.S.C. § 479).

48. The federal regulations make it clear that any one of the criteria listed in 25 U.S.C. § 479 and 25 C.F.R. § 5.1 is sufficient to grant the preference: "Preference will be afforded a person meeting any one of the standards of § 5.1." 25 C.F.R. § 5.2 (1995).

49. 115 S. Ct. 2097 (1995).

50. *Id.* at 2102 (referring to 15 U.S.C. § 637(d)(2)-(3) (1988)).

51. *Id.*

Subcontinent Asian, or Native American applicants were presumed socially disadvantaged.[52] The plaintiff was the low-bidder on the subcontract, but a higher bid was accepted from a small business controlled by persons deemed socially disadvantaged under the regulations.[53]

In resolving the case, the lower courts applied the intermediate standard of review set forth in *Metro Broadcasting, Inc. v. FCC*.[54] *Metro Broadcasting* involved a Fifth Amendment challenge to racial preferences granted by the Federal Communications Commission (FCC). The *Metro Broadcasting* Court held that although state and local governments' use of racial criteria would continue to be subject to the strictest level of judicial scrutiny,[55] the federal government's use of racial criteria under some circumstances would be subjected to only an intermediate level of scrutiny.[56] This level of scrutiny requires that

> benign [federal racial classifications] . . . —even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[57]

The *Metro Broadcasting* Court held that the FCC policies served the important governmental objective of enhancing broadcast diversity and therefore upheld the policies.[58] In *Adarand*, the lower courts followed the *Metro Broadcasting*

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52. *Id.* at 2103 (citing 13 C.F.R. § 124.105(b)(1) (1994)).

53. *Id.* at 2102. The prime contractor submitted an affidavit stating that the plaintiff would have been chosen for the contract were it not for the hiring preference. *Id.*

54. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995).

55. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

56. The *Metro Broadcasting* Court repudiated the long held view that "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Adarand*, 115 S. Ct. at 2111 (quoting Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

57. *Metro Broadcasting*, 497 U.S. at 564-65 (1990) (footnote omitted). The *Metro Broadcasting* standard is similar to the *Mancari* standard but appears to be slightly higher. *Metro Broadcasting* requires a *substantial* relation of the means to an *important* governmental end, whereas *Mancari* requires only a *rational* relation of the means to a *legitimate* governmental end.

58. *Adarand*, 115 S. Ct. at 2102 (citing *Metro Broadcasting*, 497 U.S. at 566-67).

analysis, ruling that the federal program in question survived intermediate constitutional scrutiny.[59]

### *B. The Supreme Court's Analysis*

The Supreme Court, however, overruled *Metro Broadcasting*[60] and held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[61] According to the Court, this conclusion was consistent with its pre-*Metro Broadcasting* equal protection decisions which taken together "lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify *any* racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[62]

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59. *Id.* at 2104 (citing Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992); Adarand Constructors, Inc. v. Peña, 16 F.3d 1537 (10th Cir. 1994)).

60. *Adarand* was decided five to four.

> Justice O'Connor writing basically for a majority of the Court reversed and remanded. . . .
>
> . . . .
>
> Justice Scalia concurred in nearly all of Justice O'Connor's opinion but reiterate[d] his view expressed in *J.A. Croson*, that government can never have a compelling interest to discriminate on the basis of race in order to "make up" for past racial discrimination in the opposite direction.
>
> Justice Thomas concur[red] in the opinion of Justice O'Connor but wr[ote] to specifically rebut the "benign" preference that Justices Stevens and Ginsburg would approve and which he term[ed] "racial paternalism."
>
> Justice Stevens wr[ote] the principal dissent but [was] only able to attract Justice Ginsburg's concurrence. He believe[ed] that benign preferences are constitutional, and that *Metro Broadcasting* demands this conclusion, while the holding in *Fullilove* [*v. Klutznick*, 448 U.S. 448 (1980),] actually governs *Adarand*.
>
> Justice Souter's dissent, which [was] joined by Justices Ginsburg and Breyer, basically does not see much distinction between the majority, as explicated by Justice O'Connor, and *Fullilove*.
>
> Justice Ginsburg, joined by Justice Breyer, wr[ote] in dissent not to underscore the differences in the various opinions, but rather what she perceive[d] as the considerable field of common understanding.

John J. Ross, *The Employment Law Year in Review*, LITIGATION & ADMINISTRATION PRACTICE COURSE HANDBOOK SERIES, Sept.-Oct. 1995, at 1-2 (footnotes omitted).

61. *Adarand*, 115 S. Ct. at 2113.

62. *Id.* at 2111 (emphasis added).

Justice O'Connor, writing for the majority, stated that the previous cases "established three general propositions with respect to governmental racial classifications."[63] These three propositions are *skepticism* ("'"[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination"'");[64] *congruence* ("'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment'");[65] and, most importantly in the present context, *consistency* ("'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification'").[66] The basic question that the consistency principle raises in the BIA preference context is whether the race benefited is unimportant even when that race is Indian.

In one of *Adarand*'s dissenting opinions, Justice Stevens asked a similar question. Justice Stevens' dissent, joined by Justice Ginsburg, attacked each of the majority's three principles.[67] Justice Stevens saw as "untenable" the majority's

> concept of "consistency" [which] assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority.
>
> . . . .
>
> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.[68]

One "welcome mat" that Justice Stevens sees as threatened by the majority's decision is the "special preferences that the National Government has provided to Native Americans since

63. *Id.*

64. *Id.* (alteration in original) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion) (quoting Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (plurality opinion))) (also citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hirabyashi v. United States, 320 U.S. 81, 100 (1943)).

65. *Id.* (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)) (also citing Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

66. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1980) (plurality opinion)) (also citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.)).

67. *Id.* at 2120-26 (Stevens, J., dissenting).

68. *Id.* at 2120-21.

1834."[69] The *Mancari* Court relied at least in part on the relevant racial distinction between Indians and non-Indians,[70] and a plain reading of the *Adarand* Court's expansive language suggests that Justice Stevens' fears are warranted as to the potential elimination of federal preferences for Native Americans.

## VI. THE POTENTIAL APPLICATION OF *ADARAND* TO BIA HIRING PREFERENCES

### A. *Analysis of the Court's Decision*

Although the constitutionality of the current BIA hiring preference is uncertain, regardless of the standard of review utilized, two aspects of the *Adarand* decision suggest that it may be constitutional. First, the actual scope of *Adarand*'s three broad propositions[71] may not reach Indian preferences. Second, even if *Adarand* is applicable, the O'Connor opinion advocates a flexible strict scrutiny that would still allow for some racial distinctions.[72]

Regarding *Adarand*'s actual scope, the BIA preference would presumably fall within the decision's language that strict scrutiny applies to "any racial classification" by a governmental actor.[73] Yet it is significant that there are no Indian law cases among those cited by the Court in establishing its three guiding principles for equal protection analysis. While this may mean nothing, it may also suggest that *Adarand* is limited to the conceptually distinct affirmative-action context—those preferences aimed at remedying past discrimination. The concurring opinions of Justices Scalia and Thomas, while advocating a stricter application than the O'Connor opinion, also suggest that *Adarand*'s scope is limited to remedial racial discrimination.

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69. *Id.* at 2121 (citing Morton v. Mancari, 417 U.S. 535, 541 (1974)).

70. In *Mancari*, the Court stated:

> Congress was well aware that the proposed [BIA hiring] preference would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government.

*Mancari*, 417 U.S. at 544-45 (footnotes omitted).

71. *See supra* notes 63-66 and accompanying text.

72. *Adarand*, 115 S. Ct. at 2117.

73. *Id.* at 2111.

Justice Scalia joined O'Connor's opinion "except insofar as it may be inconsistent with the following: In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[74] Further, "under our Constitution there can be no such thing as either a creditor or a debtor race"[75] because it "is alien to the Constitution's focus upon the individual."[76] These statements, while contrary to any elastic application, seem limited to the remedial, affirmative-action context. Similarly, Justice Thomas' opinion seems to be concerned with those racial distinctions that "distribute benefits on the basis of race in order to foster some current notion of equality."[77] This language implies, as does Justice Scalia's opinion, that only a remedial, affirmative-action purpose, and not an intention to further tribal self-government, would trigger strict scrutiny.

Justice Scalia also states that constitutionally "we are just one race here [and i]t is American."[78] Nevertheless, even Justice Scalia might pause in responding to whether his statement applies to the continent's indigenous peoples in their objective to guard the integrity of their society and culture against assimilation. For *Native* Americans, their conquerors may all be one race under the Constitution, but the Constitution cannot make Native Americans part of the conquerors' concept of "the people."[79] With the difference between American society at large and Indians as members of groups dispossessed of their sovereignty—and with Congress' unique obligation to them that arises out of that dispossession—comes the conclusion that we are not all "one race here." Americans are two races: the conquerors and the conquered. The conquered have a unique interest in continuing some level of self-government. If the Court continues to recognize this approach, then the *Adarand*'s strict

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74. *Id.* at 2118 (Scalia, J., concurring in judgment) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989)).

75. *Id.*

76. *Id.* (citing U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection to the person); amend. XV, § 1 (prohibiting abridgment of the right to vote on "account of race"); art. III, § 3 (prohibiting "corruption of blood" by treason); art. I, § 9 (prohibiting titles of nobility)).

77. *Id.* at 2119 (Thomas, J., concurring in judgment).

78. *Id.* (Scalia, J., concurring in judgment).

79. *See* Williams, *supra* note 7, at 803 (citing STEPHEN E. CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 74-76 (1988)).

scrutiny review will generally be considered inapplicable to the Indian preference and most Indian legislation.

A second aspect of the *Adarand* decision suggests that the current BIA preference might survive even if strict scrutiny were applied. Despite the ominous future Justice Stevens predicts for Indian preferences, Justice O'Connor's opinion seeks "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[80] Justice O'Connor explains that "[a]s recently as 1987," the Supreme Court permitted a narrowly tailored race-based remedy to remediate a state agency's "'pervasive, systematic, and obstinate discriminatory conduct.'"[81] Thus, Justice O'Connor concluded, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[82]

The *Adarand* dissent sees this rearticulation of the strict scrutiny standard as hopeful for racial preferences generally. Justice Souter's dissent, for example, states that "the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest."[83] If strict scrutiny under *Adarand* indeed is more elastic, then one can expect at least some members of the Court to stretch it in favor of Indian racial preferences.

The separate concurrences of Justice Scalia and Justice Thomas, however, reject any flexibility in the strict scrutiny standard. Justice Scalia wrote, "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred."[84] Justice Scalia was satisfied to remand the case for further considerations in the lower courts, but noted that "[i]t is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny."[85]

80. *Adarand*, 115 S. Ct. at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

81. *Id.* (quoting United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality opinion)).

82. *Id.*

83. *Id.* at 2132 (Souter, J., dissenting).

84. *Id.* at 2119.

85. *Id.*

Thus, despite Justice O'Connor's reassurances to the contrary, any strict scrutiny review of racial preferences by Justice Scalia would remain fatal in fact.

Justice Thomas' concurrence is no less lethal to an elastic view of strict scrutiny. Justice Thomas wrote separately to counter what he saw as the underlying premise of the dissent—"that there is a racial paternalism exception to the principle of equal protection."[86] Thomas states that although a program may have good intentions, these "intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."[87] And responding to Justice Stevens' hope to distinguish between a welcome mat and a "No Trespassing" sign,[88] Justice Thomas states:

> I believe that there is a "moral [and] constitutional equivalence" between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.[89]

This review of the concurring opinions of Justices Scalia and Thomas demonstrates that it is questionable to call the Court's new standard for federal race-based discrimination, as Justice Stevens does, a "'flexible' approach to 'strict scrutiny' [that] may well take into account differences between benign and invidious programs."[90]

Nevertheless, Justice Stevens makes much of the fact that strict scrutiny, according to the O'Connor opinion, "can accommodate 'relevant differences.'"[91] Seizing upon this language, Justice Stevens states that "surely the intent of a government actor and the effects of a program are relevant to its constitutionality."[92] Although the accommodating propositions of Justice O'Connor's position received only three votes,[93] in any fu-

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86. *Id.* (Thomas, J., concurring in judgment).

87. *Id.*

88. *Id.* at 2121 (Stevens, J., dissenting); *see supra* text accompanying notes 67-69.

89. *Id.* at 2119 (Thomas, J., concurring in judgment) (alteration in original) (quoting *id.* at 2120 (Stevens, J., dissenting)).

90. *Id.* at 2120 n.1 (Stevens, J., dissenting).

91. *Id.*

92. *Id.*

93. Only Chief Justice Rehnquist and Justice Kennedy clearly followed

ture case involving the federal government's use of racial criteria, the four *Adarand* dissenters will likely emphasize the flexibility of the standard announced in this case and that a relevant racial distinction is permissible. However, *Adarand* does not present a clear majority analysis as to what such a preference would be.[94] Furthermore, the simple holding among the five justices that strict scrutiny applies to the federal government's use of race-based criteria, even if that scrutiny is elastic, threatens the constitutionality of the current BIA preference.

### B. *The Application of* Adarand

Having reviewed how the *Adarand* decision may apply to the BIA preference, the remainder of this Note considers the possible results of a constitutional challenge to the preference. The Note first examines the possible result if the *Adarand* standard of review is found applicable to the current preference. Since hypothetically the current preference could fail strict scrutiny review, the Note next assesses the result of applying *Adarand* scrutiny to the former BIA preference upheld in *Mancari*. As a third alternative, the Note considers the result if *Adarand* is found inapplicable to the BIA preference, and the current preference is consequently scrutinized under the *Mancari* standard of review.

#### 1. *Application of* Adarand *to the current preference*

The O'Connor-Rehnquist-Kennedy opinion, along with the four dissenters, leaves room for upholding a racial preference under strict scrutiny. Yet it is unlikely that the current BIA hiring preference can be viewed as a "narrowly tailored measure[] that further[s] compelling governmental interests."[95] It can be easily argued that there is a compelling governmental interest involved and that thus at least the second prong is

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O'Connor's opinion in this respect. Based on the stronger formulations of the standard by Justices Scalia and Thomas, it is unlikely that they would agree.

94. Justice Scalia "join[s] the opinion of the Court except insofar as it may be inconsistent with" the concept that government can have no compelling interest in remedying past racial discrimination. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in judgment). Similarly, Justice Thomas is careful to say that he "agree[s] with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race." *Id.* at 2119 (Thomas, J., concurring in judgment).

95. *Id.* at 2113.

met. As *Mancari* stated, "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment."[96] "This unique legal status is of long standing, and its sources are diverse."[97] As discussed above, cases have long held that the federal government has a fiduciary duty—a moral duty—to act as guardians of the Indians' interests.[98] With the long standing governmental interest in tribal self-government, it will likely be seen by the Court as "compelling."

However, the problem remains that the measure implemented to achieve the objective is not "narrowly tailored," as required by the standard. Absent any political component, the current preference is a purely racial standard that does not further the compelling government interest of fostering *tribal* self-government. As discussed above, the statutory perspective is that any Indian of "one-half or more Indian blood,"[99] regardless of whether she has ever even seen a reservation, should be granted a preference to govern tribal affairs in the BIA. On a spectrum of possible BIA preferences, perhaps the most narrowly tailored would require the preference seeker to be a member of one of the Tribes over which she actually administrates.[100]

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96. Morton v. Mancari, 417 U.S. 535, 554 (1974) (citing cases).

97. *Id.* (citations omitted). The argument that the distinctions are "long standing" echoes Chief Justice Marshall's suggestion in *Worcester* that the case's outcome was influenced at least in part by the "actual state of things." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546, 560 (1832). Both statements imply a need to look to Native Americans' unique historical relationship to the European-American governments in deciding how to apply the assumptions of the conquerors' legal system to them.

98. *See supra* part II. The moral force of this duty may have existed only in the mind of the Court. As to their treatment at the hands of the government, one nineteenth-century political and religious leader said:

> Has there been any one treaty with the Indians fulfilled in good faith by the Government? If there is one, I wish you would let me know. . . . When soldiers have pounced upon these poor . . . creatures, mention a time, if you can, when they have spared their women and children. They have indiscriminately massacred the helpless, the blind, the old, the infant, and the mother.

Discourse by Brigham Young (March 8, 1863), *in* 10 JOURNAL OF DISCOURSES 108 (1967).

99. 25 U.S.C. § 479 (1994); *see also* 25 C.F.R. § 5.1(c) (1995).

100. This is the only way that the preference could be said in any real sense to further a particular Tribe's interest in self-government. After all, it is the individual Tribes that govern themselves, rather than all Indians as a whole.

On a practical level, it is possible that a court could apply the *Adarand* standard and nevertheless hold that the preference is sufficiently narrow. Indeed, the same arguments that would persuade a court not to apply a strict scrutiny review in the first place—Congress' unique obligation and the purpose of the preference, as well as the existence of Title 25—could just as easily persuade a court to find that the preference is sufficiently narrow to meet constitutional requirements. Yet this approach needlessly complicates the analysis. Applying strict scrutiny in this manner would still result in a less strict approach to the "narrowly tailored" test for Indian affairs than for other matters. Thus, if a court decided that the proper result would be to uphold the preference, reliance on the *Mancari* standard would be less problematic than trying to justify the same result under the *Adarand* standard.

### 2. *Application of* Adarand *to the former preference*

Event though the current preference might fail under *Adarand* review, the former preference—containing both a racial and a tribal membership component—would seem to qualify as being narrowly tailored. Thus, a restoration of the former BIA preference's political component would likely be enough to pass strict scrutiny.

While the former preference would not clearly meet the objective of furthering tribal self-government, it would restore a political component to the hiring preference. Restoring the political component would probably allow all the current justices to find that the preference is not solely racial, and therefore strict scrutiny would not be triggered in the first place. It is true that race would still be a component, but race is ultimately the only way that "Indian" may be defined.[101] Moreover, the combination of both a political and a racial component would serve what perhaps is the real objective of Congress' unique obligation—to preserve the culture of conquered peoples.

Thus, the preference which survived *Mancari* would also likely survive *Adarand* strict scrutiny. Such an analysis would likely review the long history of Congress' unique obligation

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101. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge panel), *aff'd*, 384 U.S. 209 (1966), *quoted in* CLINTON, *supra* note 39, at 99.

toward the Indians, identify one facet of that obligation as being to foster tribal self-government, and then further identify that government objective as compelling. As long as the political component were present, a court would probably allow the preference to stand. If that component were missing, the court's decision would likely repeat Justice Thomas' statement that there is no "racial paternalism exception to the principle of equal protection."[102]

Yet the problem remains that the former preference is based on race, and with the political component it is only "race-plus." Once again, this analytical untidiness can be excused with a recognition that ultimately only race identifies those persons toward whom, as Indians, Congress has a unique obligation. Congress can require Tribes to be federally recognized and require individuals to officially enroll if they are to be recognized as tribal members in the eyes of the federal government. But there is little reason to believe that the relationships among these people, whose ancestors lived together here in an ordered society long before the Europeans came, would cease simply because the government defined those relationships some other way. In other words, the federal government can define the Tribe however it chooses, but in reality—to the Tribe—the Tribe is probably first defined culturally and ancestrally (the family, clan, and Tribe), then racially (as Indians as opposed to Europeans), and third, by the political structures imposed by the federal government.[103] Thus, even if the former preference were thought of merely as "race-plus," the practical necessity of referring to race to further tribal self-government would likely allow the *Mancari* preference to survive under *Adarand* review.

This "actual state of things" argument may be persuasive, in light of the concurrences of Justices Scalia and Thomas. By

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102. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in judgment).

103. *See* Williams, *supra* note 7, at 803 (citing STEPHEN E. CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 144-45 (1988)).

An argument can be made that there are many Native Americans who seek to preserve their cultures by intentionally not enrolling as federally-recognized members of their Tribes. In these cases, nonmembers of the Tribes are the keepers of tribal culture, and therefore finding tribal membership to be crucial, as in *Mancari*, is too restrictive and ignores the realities of tribal life. Thus, the federal government seeks to allow Tribes to preserve their culture by a means that is repugnant to those most steeped in that culture. Nevertheless, American society must find a way to treat all of its members equally, even those who claim they are not a part of that society.

explaining the stringency of the strict scrutiny standard, these concurrences signal the limited scope of the *Adarand* decision. Justice Scalia is clear that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[104] Yet the *Adarand* standard may be altogether inapplicable to the *Mancari* preference since its objective would be to further the self-government of indigenous peoples, not to remedy past discrimination. This distinction would also seem to satisfy Justice Thomas' concern about "racial paternalism."[105] Thus, the former preference would likely withstand *Adarand* strict scrutiny.

*3. Application of* Mancari *to the current preference*

If the *Adarand* standard is found altogether inapplicable to the current preference's constitutionality, as is arguably the proper outcome,[106] then a court would likely use the *Mancari* standard of review to decide the issue. Although *Mancari* held that Indian hiring preferences are constitutional, the preference criterion on which the Court focused to support its holding has been eliminated.[107] As others have noted, "[t]he Justice Department has taken the position that the preference is unconstitutional because membership in a federally recognized Tribe is no longer required to qualify for the preference in either the Interior Department or the newly created Office of Indian Education."[108] Furthermore, the adoption of the Indian Reorganization Act definition in another preference scheme led then-president Bush to state that "'racial preferences, divorced from any requirement of tribal membership . . . will not meet judicial scrutiny under the Constitution.'"[109]

Based on the current preference's divergence from the *Mancari* formulation, the conclusions of the Justice Department and President Bush are fairly persuasive. Yet once again, the logic of this criticism would seem to apply to the rest of Title 25 as well. To say that any identification of Indians by

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104. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in judgment) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989)).

105. *Id.* at 2119.

106. *See supra* part VI.A.

107. *See supra* part IV.

108. CLINTON, *supra* note 39, at 98.

109. *Id.* at 98-99.

racial criteria is unconstitutional still raises the consequentialist problem[110]—are we really saying that the Indian Reorganization Act's definition of "Indian" is a bad apple that spoils the entire Title 25 barrel?

An opinion that was affirmed by the Supreme Court in 1966 acknowledges that "if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.' Indians can only be defined by their race."[111] Undoubtedly this statement is correct, but the question remains whether "Congress' unique obligation towards the Indians" extends to Indians simply because of their race or because of their political affiliation—as members of domestic dependent nations. While tribal membership may be simply "race-plus" since most tribal governments will use race, even if only implicitly, as a necessary factor in defining their own membership, a Tribe's use of race is simply a function of its status as a "people." An individual Tribe's separateness from American society and culture, and its own unity in terms of tribal identity and culture, are strengthened by its additional distinctiveness as a race. Thus, one might argue that federal recognition of Tribes and of their right to self-government seems to be simply a shorthand method of allowing these indigenous peoples to retain their own culture. Respecting these historical differences as realities, "[t]he courts have consistently recognized that one of an Indian Tribe's most basic powers is the authority to determine questions of its own membership."[112] Therefore, if the statute were crafted as a purely political preference, the classification would no longer be facially racial but the effect of the preference would likely be no different.

Similar to *Mancari*, the Court held in *United States v. Antelope*[113] that the identification of a person as an Indian for the purposes of differential treatment under the law was a function of the individual's tribal membership, not his race. In

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110. *Cf. Adarand*, 115 S. Ct. at 2121 (1995) (Stevens, J., dissenting); *Mancari*, 417 U.S. at 552; Williams, *supra* note 7, at 778-79.

111. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge panel), *aff'd*, 384 U.S. 209 (1966), *quoted in* CLINTON, *supra* note 39, at 99.

112. COHEN, *supra* note 43, at 20 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Boff v. Burney, 168 U.S. 218 (1897)).

113. 430 U.S. 641 (1977).

*Antelope*, several Indians killed a non-Indian on the reservation and were therefore subject to federal criminal jurisdiction. The applicable federal law carried a felony-murder provision, and the penalties for murder were consequently greater than the state penalties. The defendants brought a due process challenge to the statute, claiming that the "felony-murder convictions were unlawful as products of invidious racial discrimination."[114] The Court held that the distinction between Indians and non-Indians was not based on impermissible racial discrimination.

> Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of Indians." . . . Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the . . . Tribe.[115]

Although the emphasis in *Antelope* is on the individual's political affiliation with the Tribe, the Court left open the possibility that official tribal membership may not really matter:

> It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and "maintained tribal relations with the Indians thereon." Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter.[116]

The Court did not attempt to resolve the matter, but it is significant that a nonenrolled Indian might be subject to criminal jurisdiction if he lives on the reservation and "maintain[s] tribal relations with the Indians thereon." If the individual has no

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114. *Id.* at 643-44.

115. *Id.* at 646 (quoting *Mancari*, 417 U.S. at 553 n.24) (citations omitted).

116. *Id.* at 646 n.7 (quoting *Ex parte* Pero, 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939)) (citations omitted). Unlike the Indian Reorganization Act, 18 U.S.C. § 1153 leaves the term "Indian" undefined. This difference naturally limits the extent to which the *Antelope* case can be compared to the present context. However, the case remains relevant because in both contexts the courts must still decide, as a matter of equal protection, what the proper criteria are in defining "Indian."

official political affiliation with the Tribe, then the Court can only be referring to relations that are social, cultural, and geographic in nature. The Court's suggestion would then seem to be that if social, cultural, and geographic ties to the Tribe exist, then it would make sense for federal Indian criminal jurisdiction to apply.

A pragmatic approach such as this one is consistent with the rationale behind the hiring preference—"to give Indians a greater participation in their own self-government . . . and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[117] The preference, in theory, is part of the effort to preserve the Tribes' individual identities. Ultimately, "the Tribes" at issue here are not the federally recognized political entities, but the social identities of the people. Under this line of analysis, the tribal component of the hiring preference is not particularly helpful to the preference's objectives and does not as a practical matter escape the equal protection concern. Rather, the racial distinction is a necessary part of dealing with Indians, and the lower standard of review is a recognition of that necessity.

Therefore, given a lower *Mancari* standard of review, the reluctance of the Court to trigger a Title 25 downfall, and the lack of utility of a political component, the current preference should be found constitutional.

## VII. CONCLUSION

The precise contours of *Adarand*'s flexible strict scrutiny remain undefined. It is also unclear what application, if any, *Adarand* will have in the area of Indian hiring preferences intended to further the Tribes' self-government. It seems likely, however, that *Adarand* will be found inapplicable to the unique purpose of tribal self-government. Thus, courts may still scrutinize the current preference under the *Mancari* standard of review. Given this lower level of review, and the possible consequences for the rest of Title 25 if the preference were not upheld, the current, purely racial preference would likely survive. However, since the criterion providing the analytical basis upon which *Mancari* was decided no longer exists, a court would have to discard the *Mancari* political-preference distinction in order to uphold the preference.

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117. *Mancari*, 417 U.S. at 541-42 (footnotes omitted).

If the *Adarand* standard were deemed to apply to the current preference, then the current preference would likely fail constitutional review. The racial classification's purpose of furthering tribal self-government qualifies as a compelling government objective. Yet as a bare racial preference, with no political component whatsoever, the BIA preference lacks the narrow tailoring necessary to survive strict scrutiny review.

History has taught the American-European judicial system that race is a fundamentally illegitimate classification. Yet the racial classification "Indian," regardless of whatever else it may mean, identifies those individuals whose ancestors were dispossessed of their political autonomy by the European conquest of the Americas. Stripped of this autonomy, it is now only their culture that binds them together and which federal Indian law's peculiar distinctions must function to preserve.

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