

The special trust doctrine and remedial affirmative action programs:
rethinking the fiction of a political distinction.

Recent decisions in the *Gratz* and *Grutter* cases have attempted to resolve the legality of race based affirmative action programs in public undergraduate and graduate institutions¹. In June 2003, the 9th Circuit in *Doe v. Kamehameha Schools* addressed a related but separate issue of whether a wholly private elementary and secondary school system could implement an admission policy which turned away non-Native Hawaiian students under what could arguably be termed a remedial affirmative action program for indigenous people². This was an issue of first impression before the 9th Circuit and broached the question of what is the proper test for evaluating affirmative action programs of private educational institutions³

This was a moment of particular gravity. It is settled law that strict scrutiny applies to all racial classifications challenged under the 14th Amendment of the Constitution.⁴ And *Runyon v. McCrary*, had already held in 1976 that a private school's policy of denying admission to African American students violated 42 U.S.C. §1981.⁵ The Court found in *Gratz v. Bollinger*,⁶ that under Title VI of the Civil Rights Act of 1964,⁷ strict scrutiny applies to any institution⁷ that accepts federal funds.⁸ However,

¹ *Gratz v. Bollinger*, 539 U.S. 306 (2003); *Grutter v. Bollinger*, 539 U.S. 244 (2003).

² 295 F. Supp. 2d 1141 (9th Cir. 2003) rev'd 470 F.3d 827 (9th Cir. 2006).

³ Id.

⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ 427 U.S. 160 (1976).

⁶ *Gratz*, 539 U.S. 306

⁷ 42 U.S.C. §2000.

⁸ Id.

while the discrimination issue in *Gratz* was decided on 14th Amendment grounds, the Court went the additional step of finding that “the admissions policy also violates Title VI and 42 U.S.C. § 1981.”⁹ This held open the possibility of analyzing future affirmative action cases under §1981 and also the possibility that the affirmative action programs of private institutions may be subject to some degree of constitutional or statutory scrutiny. The *Kamehameha* cases¹⁰ did just this by applying the Title VII burden shifting scheme to the schools’ race based admissions policy.¹¹

The 9th Circuit at the district level, and twice at the appeals level, resorted to using 42 U.S.C. §1981,¹² which guaranteed “[a]ll persons” the “same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens.”¹³ Their reasoning followed the fact that the relationship between a private school and pupil is essentially a contract for services: money for and education.¹⁴ Private racial discrimination as well as racially discriminatory state action is covered by §1981.¹⁵ However, this still left unresolved what level of scrutiny applied to the §1981 analysis in an affirmative action case.¹⁶ Is the appropriate test strict scrutiny, or some lesser standard? And what factors are to be considered in applying the chosen analysis? In the end, the court infused the traditional Title VII framework with “[t]he history of Native Hawaiians and of the Kamehameha schools”, the “unique features [of the schools and of

⁹ *Id.* at 275-76.

¹⁰ *Kamehameha Schools/Bernice Pauahi Bishop Estate*, 416 F.3d at 1030 rev’d 470 F.3d at 835.

¹¹ *Id.*

¹² *Id.*

¹³ 42 U.S.C. §1981(a) (2000).

¹⁴ *Kamehameha*, 470 F.3d at 837.

¹⁵ “The rights protected by this section are protected against impairment by nongovernmental discrimination *and* impairment under color of State law.” 42 U.S.C. §1981 (c). (Emphasis added).

¹⁶ The 9th Circuit in the most recent *Kamehameha* case noted that “The Supreme Court has never applied strict scrutiny to the actions of a purely private [educational] entity. The question remains how best to adapt the Title VII employment framework to an educational context and to the unique historical circumstance of this case.” 470 F.3d at 839.

Native Hawaiians] that Congress has acknowledged”, “the challenges faced by Native Hawaiians in the educational arena”, any “firmly rooted expectation[s] of those lacking Native Hawaiian ancestry”, and the fact of the former political sovereignty of the Hawaiian kingdom.¹⁷ The introduction of these fact intensive variables transformed the once recognizable Title VII analysis into an ad hoc balancing test weighted in favor of the remedial race based program before the court.¹⁸

Judge Fletcher in his concurrence to the most recent 9th Circuit opinion suggested alternative grounds on which to base a holding in favor of Kamehameha Schools, one which he believed would circumvent the labyrinth of constitutional interpretation.¹⁹ Judge Fletcher argued that under *Morton v. Mancari*, the schools would be exempt by application of the “special trust” doctrine,²⁰ also referred to as the “special relationship doctrine.”²¹ Under the special trust doctrine, the federal government is understood as standing in a trust relationship with certain indigenous groups, resulting in various entitlements and obligations and permitting “Indian preferences” in certain situations which would otherwise raise constitutional or statutory objections.²² At first blush, this theory seems to elegantly encapsulate the various historical and social considerations that the majority had welded onto the Title VII analysis.²³ On closer inspection, it appears that the invocation of this doctrine by Judge Fletcher, and most recently in the petitions

¹⁷ Id at 845.

¹⁸ See Id.

¹⁹ Id. At 850

²⁰ Id.

²¹ Id. at 851; *See also Morton v. Mancari*, 417 U.S. 535, 539, 551 (1974).

²² Id.

²³ Judge Fletcher seemed to think so as he explained that “the case before us does not involve an admissions policy generally favoring disadvantaged minorities, or favoring specific racial or ethnic groups such as African-Americans or Hispanics. It involves only an admissions policy favoring “Native Hawaiians,”...A narrower ground for sustaining Kamehameha Schools’ admissions policy is that “Native Hawaiian” is not merely a racial classification. It is also a political classification.” *Kamehameha*, 470 F.3d at 850.

for certiorari,²⁴ simply resurrects and magnifies many of the constitutional and statutory problems which have plagued Indian law in general, and the special trust doctrine in particular, for decades.

This article will analyze the special trust doctrine as applied to equal protection claims involving remedial race based programs for indigenous Americans. In particular, it will attempt to illustrate how the special trust doctrine is not a unified policy, but rather a bundle of distinct though interrelated ways of dealing with Federal relations with indigenous peoples. Many of these objectives stand in opposition to anti-discrimination laws as we commonly conceive of them and to federal Indian policy as it is modernly understood.²⁵ The extant doctrine also opens the door to abuse and misapplication, and denies Native Americans many of the protections that other protected groups possess.²⁶ This paper will advocate for a more honest and critical approach to the special trust doctrine, one which duly acknowledges the role of race in the federal government's assignment of benefits and preferences. Part I will begin with a history of the doctrine and its evolution through treaties, statues, and federal programs. This section will lay out the various justifications for the doctrine such as a co-equal sovereign theory, a welfare program theory, and a cultural conservation theory. Part II will discuss the

²⁴ See Respondents' Brief in Opposition at 24-7 (March 16, 2007).

²⁵ See generally Scott Gould, *Mixing Bodies and Beliefs: The predicament of Tribes*. 101 Colum. L. Rev. 702, 731 (2001). Gould argues that by conflating race and political status, especially in an era of intermarriage and Native America urbanization and diaspora, many laws which seek to benefit Native Americans give such benefits to those who do not have a substantial personal or community tie to a Native American identity. I will point another discrepancies created by the political identity approach, namely that tying these benefits to either a political status or to other externally defined standards of cultural performance, denies Native Americans individual protections in favor of group protections. It also seeks to freeze the development of Indian identity, a policy which is antithetical to fostering self determination. Finally, by placing a condition of federal recognition on Indian identity, this approach also creates an anomaly where private action is afforded less flexibility and state action is accorded more.

²⁶ See supra n.22. Native peoples are treated as tribes as opposed to individuals in the context of employment discrimination or the unequal assignment of benefits. I will also argue in this article that the current jurisprudence allows private groups less discretion to make racial preferences and state actors more leeway, a trend which is contrary to discrimination protecting all other suspect groups.

inconsistencies and voids in the doctrine, especially following the Supreme Court decisions of *Morton v. Mancari*²⁷ and *Rice v. Cayetano*,²⁸ which have been interpreted as being based on the political status theory. These cases have made the application of the special relationship doctrine a matter of judicial line drawing when determining who the doctrine applies to and what type of institutions may act under its color. This section will focus on the race versus political distinction made by the Supreme Court in *Mancari*²⁹ and the federal versus non-federal actor distinctions drawn by these cases and their progeny. Part III will analyze the application of the doctrine to the facts of the *Kamehameha* case and suggest that a race conscious classification is not only consistent with the special trust doctrine and preferable to the political entity theory but that it is also constitutionally and statutorily coherent.

The current trend in interpreting the special trust distinction as being a political class as opposed to a racial class creates an anomaly in discrimination law which allows the state greater leeway and private actors less leeway, a trend which is contrary to the existing understanding of racial discrimination under §1981.³⁰ It also is inapposite to the maxim of treating discrimination cases as a denial of an individual's rights as opposed to an offence against a collective group.³¹ While previous commentators have focused on the need to either expand the definition of "Indian" beyond race,³² to divorce the

²⁷ 417 U.S. at 535.

²⁸ 528 U.S. 495 (2000).

²⁹ 417 U.S. at 535.

³⁰ The respondent in *Kamehameha* pointed to this reversal in the brief in opposition to the writ of certiorari stating that, "it would be incongruous to conclude that while Congress was repeatedly enacting remedial measures aimed exclusively at Native Hawaiians, at the same time Congress would reject such Native Hawaiian preferences through § 1981." Respondents' Brief in Opposition at 27, (March 16, 2007).

³¹ *Id.* See also Gould, *supra* n.22.

³² *Id.* Gould suggests that other factors such as cultural performance and participation should supersede race.

classification entirely from race,³³ or have focused on ways to classify the categorization as a “political group” for compliance purposes,³⁴ this article will argue that courts should instead harmonize the special trust doctrine with other antidiscrimination laws, and that this includes accepting that the distinction is, at least in part, racial. Judicial acknowledgement of the use of race in the trust doctrine will provide lower courts with a standard which is flexible enough to accommodate the dynamic nature of Indian affairs, while restricting its application to the ancestors of indigenous peoples, in accordance with the doctrine’s original intentions.

Part I: Origins and Sources of the Special Trust Doctrine:

The special trust doctrine is scattered across a wide range of legal, legislative, diplomatic, and historical sources.³⁵ While the doctrine appears to be rooted in recognition of tribes as political entities, that acknowledgement was not divorced for an awareness of an Indian racial identity.³⁶ As early as the 1800s, federal policymakers imposed “blood quantum,” as a federal standard of Indian identity.³⁷

In other words, the classification was never, and is not now, purely political and has retained a prominent racial component since its inception.³⁸ This section will survey

³³ See Lawrence R. Baca, *American Indians, the Racial Surprise in the 1964 Civil Rights Act: They May, More Correctly, Perhaps, be Denominated a Political Group*, 48 How. L.J. 971, (2005).

³⁴ *Id.*

³⁵ See John M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale Law Pol. Rev 95 (1998).

³⁶ *U.S. v. Montana*, 180 U.S. 261, 266 (1901). (defining Indian as somebody of the Indian or similar race, or descendants of such people).

³⁷ Jeanette Wolfley, *Rice v. Cayetano: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians with Sovereign Rights* 3 A. Pac.L.Pol. J. 6 at 3

³⁸ *U.S. v. Montana*, 180 U.S. at 266.

the origin of the doctrine and the major sources that comprise it and will touch on the disparate policies behind the special trust doctrine.

Because the special trust doctrine is not encapsulated in a single opinion, statute, or treaty, but rather a collection of treaties, statutes, common law decisions, customary practices, and proclamations which collectively point to a set of obligations and entitlements between Indian groups and the federal government, the doctrine is applied in radically different ways, if at all, depending on the type of preference given and depending on the identity of the party receiving the benefit.³⁹ For example, exemption from state criminal jurisdiction or taxation may allow a categorization which takes into account race or tribal status while a law which limits statewide public elections to only Indian may not.⁴⁰ This disunity is due largely to the substantial disagreement over the purpose and origin of the special trust doctrine, a debate which affects its future viability and application. For the purposes of this article, the special trust doctrine refers not to the general field of Indian law or federal relations with Indian tribes, an area of law which is sometimes referred to as a “special trust doctrine” or a “special relationship doctrine,” but instead to the special treatment afforded Indians and their exemption under equal protection statutes because of their Indian status.

Commentators and lawmakers equivocate over what the origins and purpose of the special trust doctrine are.⁴¹ In broad terms, the special trust doctrine can be conceived of as containing various historical purposes: fostering political relations

³⁹ *Mancari* 417 U.S. 535 (Indian preference permissible in hiring for B.I.A. under the special trust doctrine); *Rice* 528 U.S. 445 (2000); compare, (Preference permitting only Native Hawaiians to vote in statewide election for O.H.A. violated 15th Amendment).

⁴⁰ *Id.*

⁴¹ See Kimberly A. Costello, *Rice v. Cayetano: Trouble in Paradise For Native Hawaiians Claiming Special Relationship Status*; 79 *Nor. Car. L.R.* 812, 814 (2001).

between co-sovereigns, the basis for a federal welfare and police program for Indian peoples, promoting self governance and self determination, an effort to civilize native peoples, and serving as a form of anthropological or cultural conservatism.⁴² This first interpretation has been the predominate strain of thought, connecting the doctrine to the power of the Federal government to direct foreign affairs.⁴³ One commentator has insisted that while “[t]he source of federal authority over Indian matters has been the subject of some confusion, [it is now] generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”⁴⁴ The prevalence of this theory, even in a modern era where many tribal entities struggle for basic subsistence needs,⁴⁵ let alone the political leverage of co-sovereigns, has hampered a more nuanced understanding of the special trust doctrine and imposed unfair results on intended beneficiaries. In the wake of the early colonial treaty era, the Constitution made an explicit mention of the new nation’s relationship with Indians.⁴⁶ The Constitution states that “Congress shall have the power to regulate

⁴² Id; see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, (1989); *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986); *Williams v. Babbit*, 115 F.3d 657 (only those activities which are traditional and essential to tribal culture are covered under the special trust doctrine of *Mancari*. Therefore, preference which prohibited reindeer herding by non-Alaska Natives was not exempt from strict scrutiny under the doctrine).

⁴³ *Mancari*, 417 U.S. at 553-55.

⁴⁴ Mary Ward, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*; 1994 Univ. Tex. L.R. 1471, 1496-1497, (1994).

⁴⁵ As early as the turn of the 20th Century, Indian tribes were viewed firmly as wards with only an inferior brand of sovereignty. See *United States v. Kagama*, 118 U.S. 357, 383-84 (1886). “These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights... . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.” (emphasis in original). For detailed statistics and up to date reports, refer to the U.S. Census Bureau page on American Indian and Alaska Natives data and links, <http://factfinder.census.gov/home/aian/index.html>. The reports at the time of this article indicate that Native Americans are at the bottom of the socio economic scale in terms of household income, education levels, teenage pregnancy, substance abuse, criminal history, as well as general health levels and housing standards.

⁴⁶ U.S. Const. art. I § 2

commerce with the Indian tribes.”⁴⁷ Case law through the 19th century interpreted this power as giving Congress plenary power in dealing with the Indian tribes.⁴⁸ In an era when the co-sovereign classification reflected on military reality, the United States gave its legislature the sole power to negotiate with a domestic military threat.⁴⁹ Professor Mary Wood of Stanford, observed this reasoning as being the genesis of the trust doctrine, “At the time of early treaty negotiations in the late eighteenth century, the native nations were still relatively powerful and autonomous, and the treaties expressly recognized the sovereignty of the tribes.”⁵⁰

As the 19th and 20th centuries progressed, this condition of relative power and autonomy was eclipsed by increasing dispossession, poverty, and destruction of social and cultural institutions.⁵¹ Indigenous peoples, in their weakened state became increasingly frequent targets for hostile private and state actors.⁵² In response, the Federal government felt the need to institute protections for the health and physical safety of the Indian tribes.⁵³ “The vast majority [of treaties between the Federal government and the Indian tribes] contained federal promises to provide food, clothing, and services to the tribes.”⁵⁴ Several treaties also provided that the federal government would ensure the tribes' peaceful existence by restraining a sometimes hostile non-Indian population.”

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⁴⁷ Id.

⁴⁸ *Cherokee Nation*, 30 U.S. at 1. *But see Kagama*, 118 U.S. at 375. (The court rejected the Indian commerce clause as a congressional enactment of a system of criminal laws for Indians living on reservations. The court instead affirmed the laws on the grounds that Congress had a special responsibility towards a weak and dependent people.)

⁴⁹ Mary Ward, *supra* n.38

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ See *United States v. Kagama*, 118 U.S. at 383-84. *Supra*, n. 45.

⁵⁴ Id.

⁵⁵ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

While earlier treaties from the colonial era and early part of the republic dealt with the Indian tribes as co-equal sovereigns, the trend would shift from uneasy equality to paternalism.⁵⁶ The landmark case of *Cherokee Nation v. Georgia* established in 1831 that the Indian tribes were “domestic dependant nations... in a state of pupilage. . . . [T]heir relation to the United States resembles that of a ward to his guardian.” Justice Marshall went on to note the uniqueness of this relationship between the federal government and the Indian tribes “[t]he condition of Indians in relation to the United States is perhaps unlike that of any other two peoples in existence.”⁵⁷ This gradual retraction of sovereignty progressed throughout the past century. In 1970, the Court in *Montana v. United States* decided that tribal power does not extend “beyond what is necessary to protect tribal self-government or to control internal relations.”⁵⁸ From foreign nations to co-sovereigns, to dependent wards of a Federal guardian, the Indian tribes have not been truly sovereign entities equal in stature for nearly one and a half centuries.⁵⁹ Yet, laws pertaining to the assignment of benefits and to the use of Indian preferences still operate on this outdated and problematic notion.

The aforementioned approach is not the only justification for the existence of the special trust doctrine.⁶⁰ Alternative interpretations locate this power in the

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ 450 U.S. 544, 564 (1981).

⁵⁹ Id. Although the 1934 Reorganization act attempted to facially reverse this trend by establishing the tribes as self governing bodies on reservations, they were still dependent entities in all but name. Today, tribes are firmly subordinate to the federal government, incapable of most of the trappings of a sovereign nation. See also, U.S. Census Bureau page on American Indian and Alaska Natives data and links indicating that Native Americans constitute a socially disadvantaged ethnicity. *Supra*, n.45.

⁶⁰ In fact, some commentators reject the distinction. See Felix S. Cohen *Handbook of Federal Indian Law*, 1-2 (Renard Strickland et al. eds., 1982) (noting that it has been argued that rights and obligations of individual Indians are derived from their tribal ties, not expressly from the relation of that tribal entity to the federal government).; Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians* 106 Yale L.J 537, 560 (1996) (“[N]either *Mancari* nor any other case directly stated...that the special relationship was limited to Indian tribes and their members.”)

acknowledgement that the federal government's past actions left tribes in a decimated state and in need of protection⁶¹ or in the desire to foster and promote self governance and independence amongst tribal entities.⁶² Most recently, perhaps in recognition of the shaky foundation for a political distinction, the focus of the trust doctrine has shifted to serve as a means to preserve the distinctive cultural and social institutions of indigenous peoples.⁶³ Yet, the Supreme Court has insisted that the political distinction is still the overriding motivation for the special trust doctrine, a notion affirmed in 1974 by the Supreme Court in *Morton v. Mancari*.⁶⁴

Indian as a Political Identity, *Morton v. Mancari*:

The seminal 20th century case dealing with the modern formulation of the special trust doctrine is *Morton v. Mancari*, decided in 1974.⁶⁵ In *Mancari*, the Bureau of Indian Affairs (BIA) instituted a hiring policy, in line with The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act.⁶⁶ This policy accorded an employment preference for qualified Indians in the Bureau of Indian Affairs, a federal agency.⁶⁷ The appellees were non-Indian BIA employees.⁶⁸ The appellees challenged the preference as contrary to the Equal Employment Opportunity Act of 1972,⁶⁹ and as violative of the Due

⁶¹ *Kagama*, 118 U.S. at 384.

⁶² 417 U.S. 535.

⁶³ See *Malabed v. North Slope Borough*, 42 F. Supp 2d 927, 928-31 (9th Cir. 1999) (borough's employment preference for Native Americans was not legal where it was not related to native land, or tribal or cultural affairs. Only those activities which were closely tied to a Native way of life could be afforded such a preference); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (race based assignment of the exclusive right to herd reindeer was prohibited by the 14th Amendment, where Native Alaskans do not have a traditional history of reindeer herding and where the species is not native to Alaska).

⁶⁴ 417 U.S. at 535.

⁶⁵ *Id.*

⁶⁶ 48 Stat. 984, 25 U.S.C. §461 et seq.

⁶⁷ 417 U.S. at 535.

⁶⁸ *Mancari*, 417 U.S. 535.

⁶⁹ 86 Stat. 103, 42 U.S.C. §2000e et seq. (1970 ed., Supp. II),

Process Clause of the Fifth Amendment.⁷⁰ The Federal District Court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 EEOC Act.⁷¹

On appeal to the 9th Circuit, The BIA's hiring policy was again challenged under the 5th Amendment.⁷² The Supreme Court upheld the legality of the preference finding that (1) rational basis and not strict scrutiny applied because the distinction was political and not racial; (2) the BIA's policy of giving preference to Indians was rationally related to the legitimate concern that Congress expressed in furthering Indian self determination.⁷³

Since the *Mancari* decision, lower courts have applied rational basis review to uphold the constitutionality of programs for tribal members which would otherwise violate the Equal Protection Clause or Federal anti-discrimination laws.⁷⁴ The courts have utilized the legal fiction of *Mancari*: the special relationship doctrine operates under: such programs distinguish based on "political" or "legal" status, as opposed to a racial or national origin basis, categorizations which would normally trigger strict scrutiny.⁷⁵ Courts interpreting *Mancari* have taken this to mean that federal recognition of a tribal entity is a prerequisite for the triggering of the special trust doctrine.⁷⁶ So while the *Mancari* decision opened the door to government benefits based on Indian status, a classification with inevitable racial implications, subsequent cases have simultaneously

⁷⁰ *Mancari*, 417 U.S. 535.

⁷¹ 417 U.S. at 540.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Tafuya v. City of Albuquerque*, 751 F. Sup. 1527, 1530-31 (D.N.M 1990).

⁷⁵ *Id.*

⁷⁶ *St. Cloud v. U.S.*, 702 U.S. F.Supp 1456, 1460 (D.S.D. 1988). (The doctrine did not apply where the tribe to which an ethnically Indian appellant belonged had been terminated by agreement between the federal government and the tribe, even though the termination agreements did not represent a full consensus of former members.)

restricted the use of race by imposing non-racial requirements. However, there is conflicting authority as to what these requirements are or should be.⁷⁷

How one views the scope of *Mancari* is partly dependent on what one views as a legitimate purpose of the special trust doctrine. To date, the focus has been on the “political status,” a model which is outmoded and contrary to the current equal protection jurisprudence.⁷⁸

Part II: The Purpose of the Special Trust Doctrine in light of *Mancari* and *Rice*

At the crux of the *Mancari* formulation of the special trust doctrine is the assertion that discrimination based on Indian status is not an impermissible use of race. Instead, it is a political distinction premised on the idea of Indian tribes as sovereign entities.⁷⁹ Use of this legal fiction seems to dodge the equal protection problems and the almost always fatal barrier of strict scrutiny which usually ensues from using a racial classification.⁸⁰ The political nature of the classification requires enrollment in a group which has been given official federal recognition.⁸¹ But political or status based classifications in the context of Native Americans is highly problematic. First, tribes as we conceive of them today were largely the invention of a federal government which sought to break up large militarily powerful groups into smaller, less threatening entities.⁸² The “tribal roll” system which limited Indian status to the descendants of

⁷⁷ *Tafoya* 751 F. Supp. at 1530-31; *Kamehameha* 470 F.3d at 850 (Judge Fletcher concurring); see *Lee v. Pero*, 99 F.2d 28 (1938).

⁷⁸ The more contemporary ideals of a reparations based welfare system and cultural conservationism, while more palatable, still pose significant problems. See Goldberg *infra* n.84.

⁷⁹ 417 U.S. at 535; Cohen *supra* n. 54. Congress occasionally divided ethnologically indistinct tribes, such as the Chippewas and Sioux, into several smaller tribes or bands to disperse powerful tribal entities.

⁸⁰ 417 U.S. at 540.

⁸¹ *Id.*

⁸² See Cohen, *supra* n.54

individuals who had signed official rolls was likewise developed as a measure to restructure indigenous society according to military and economic policies and to minimize the number of applicants of valuable government subsidies.⁸³ In addition to the arbitrary nature of the political divisions, many historians concur that the idea of a continuous centralized tribal government is a myth and that kinship rather than a formalized political body played a central role in “tribal” identity.⁸⁴

As evidence of the political nature of special relationship preferences, courts point to cases where “anthropological” or “ethnic” Indians who are not enrolled in a federally recognized tribe are denied benefits intended for Indians who meet that criteria.⁸⁵ For example, in *U.S. v. St. Cloud*, an ethnic Indian was denied the benefit of more lenient federal criminal jurisdiction.⁸⁶ Although the defendant was one hundred percent Native American blood, he was a member of a tribe which had been disbanded under a federal termination statute.⁸⁷ Under the agreement, former reservation lands were allotted to tribal members in exchange for termination of tribal status.⁸⁸ The court reasoned that denying federal jurisdiction was appropriate where such benefits are bestowed not as a virtue of being “anthropologically Indian” but by reason of political status.⁸⁹ The same can be said of individuals who are denied benefits even though they are recognized as

⁸³ *Id.*

⁸⁴ See. Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*. 38 Ct. L.R. 649, (2006) (acknowledging that the modern tribal structure was a result of assimilationist policies and not reflective of indigenous consensus); Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*. 50 Univ. Kans. L. Rev. 437, 451 (Apr. 2002).

⁸⁵ *St. Cloud*, 702 F.Supp. at 1460. (jurisdictional advantage denied to ethnic Indian where his tribe had been legally terminated by agreement with the federal government); *But see Lee v. Pero*, 99 F.2d 28 (1938) (son of an Indian mother and half Indian father was an “Indian” for the purposes of federal jurisdiction over crimes committed by an Indian on an Indian reservation notwithstanding the fact that he was not enrolled with any federally recognized Indian tribe on any reservation).

⁸⁶ *St. Cloud*, 702 F.Supp. at 1460.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Indians in the greater community, maintain tribal relations, and live on or near reservations.⁹⁰

Such logic glosses over the fact that race is inherent in the category itself. From the late 1700s through until the passage of the 1934 Indian Reorganization Act, federal law provided Indian benefits without requiring tribal enrollment or federal recognition.⁹¹ This effectively required the applicant to have some degree of Indian blood or other significant tie to a Native American “race.”⁹² Blood quantum or recognition by a tribal community as an Indian could entitle one to preference in employment, college scholarships and immunity from state criminal jurisdiction and taxation.⁹³ The 1934 Reorganization Act defined “Indians” as either “all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction, and their descendants who were residing on any Indian reservation,” or “all other persons of one-half or more Indian blood.”⁹⁴ In fact, the only definition of “Indian tribe” that the Supreme Court has advanced in the last century is racially based; it defines it as “a body of Indians of the *same or a similar race*, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”⁹⁵

This thinly veiled use of race seems, at first glance, to conflict with *Adarand v. Peña*, where the Supreme Court established in 1995 that state action which utilizes racial classification is subject to strict scrutiny.⁹⁶ Professor Gould of the University of Maine Law School sees this blatant inconsistency as “a refuge for race-conscious legislation in

⁹⁰ Id.

⁹¹ Goldberg, *supra* n. 84.

⁹² Id.

⁹³ Id; See also *U.S. v. Rogers* 45 US (4 How.) 567 (1846). (defining Indian as one who both abides by Indian custom and who has Indian blood).

⁹⁴ 437 U.S. at 650

⁹⁵ *U.S. v. Montana*, 180 U.S. 261, 266 (1901).

⁹⁶ 515 U.S. at 200.

an *Adarand* world of race neutrality.⁹⁷ It permits preferences and delegations of authority that otherwise would not escape strict scrutiny.”⁹⁸ The *Mancari/Adarand* tension becomes apparent when the “lessened scrutiny and political status acting as a mask for race—cannot confer benefits without also jeopardizing rights.”⁹⁹ But race is and can be a permissible criteria for the federal government to use in allotting benefits to indigenous people despite the court’s holding in *Mancari* and latter on in *Rice*.

Rice v. Cayetano, a narrowing of Mancari?

33 years after the Supreme Court decided *Mancari*, the Court appeared to retract the scope of the special trust doctrine by handing down the case of *Rice v. Cayetano*.¹⁰⁰ In *Rice*, the plaintiff was a non-native Hawaiian who sought to vote for and run for election to the board of the Office of Hawaiian affairs (OHA).¹⁰¹ The OHA is a body created by the state constitution of the state of Hawaii.¹⁰² The OHA is responsible for administering trust lands and funds for the benefit of Native Hawaiians who meet a certain blood quanta established by the charter of the OHA.¹⁰³ Rice was a Hawaiian resident and citizen whose ancestors had lived on the islands since the 1820s yet he had no ancestors of indigenous Hawaiian ancestry.¹⁰⁴ He attempted to vote in the OHA board elections and was denied that opportunity.¹⁰⁵ The Supreme Court seemingly refused to apply the special trust doctrine and found that it was a violation of Rice’s 15th

⁹⁷ Gould, *supra* at n.22

⁹⁸ *Id.*

⁹⁹ 101 CLMR 702 at 746.

¹⁰⁰ 528 U.S. at 519-22.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Amendment right to deny him the ability to vote for the board of the OHA simply because he was not a descendant of an indigenous Hawaiian.¹⁰⁶

Justices Stevens and Ginsburg, in their dissent, stated that the trust relationship applied in this case.¹⁰⁷ They argued that the indigenous peoples' entitlement to special consideration under the special relationship doctrine has never depended on the origins of the people, the allotment of lands, or the existence of a tribal self-government.¹⁰⁸ The trust relationship has never depended on the definition of "Indian" that Congress has chosen to adopt as the majority had suggested.¹⁰⁹ But because the majority decision lacked a clear rationale, courts interpreting *Rice* have divided over its meaning. Some courts have held it to be a blanket denial of the special relationship benefits to Native Hawaiians in particular and to non-Federally recognized tribes in general. Other courts and scholars, such as Justice Fletcher writing in dissent to the rest of the 9th Circuit, believe that the decision in *Rice* does not necessarily dispense with the doctrine in the context of remedial educational programs, non federally recognized tribes, or Native Hawaiians.¹¹⁰ According to judge Fletcher, the *Rice* decision was a 15th Amendment case, not a foible to *Mancari's* formulation of the trust doctrine.¹¹¹

Rice and voting rights

One interpretation of the *Rice* decision sees it as an attempt by the Court to narrowly define the scope of the ruling prohibiting racial classifications to those actions

¹⁰⁶ Id.

¹⁰⁷ Id. at 530 (Justices Stevens and Ginsburg dissenting).

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ 470 F.3d at 850.

¹¹¹ Id.

which involve a state actor and those actions which implicate the fundamental democratic activity of public elections. It is important to note that the court did not definitively decide if Native Hawaiians qualify for special trust status or what exactly the boundaries of that status are, and seemed to leave it up to future litigation or for Congress to decide. The majority of the 9th Circuit stated that, “Even if Congress had the authority...to treat Hawaiians...as tribes, Congress may not authorize a State to create a *voting scheme* of the sort created here...a scheme that limits the electorate for its public officials [to a tribal group]. The design of the [15th] Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise...The State’s ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic *elections* seek to preserve.”¹¹² To that earlier question, the court decided to “stay off this difficult terrain [of deciding if Native Hawaiians could be considered ‘tribal’ peoples].”¹¹³

Rice as a case distinguishing State versus Federal Actors

Rice v. Cayetano may also be about reaffirming the federal nature of the special trust doctrine and not about declaring certain groups as being eligible special relationship status.. The special trust doctrine has traditionally been understood to be between the federal government and the tribes.¹¹⁴ Early Indian law established that it is the federal government of the United States and not the individual states that have power in Indian

¹¹² Id. at 496. (emphasis added).

¹¹³ Id.

¹¹⁴ *Worcester v. Georgia* 31 US 515 (1832).

affairs.¹¹⁵ Congress has plenary power in these matters while the states have explicitly been excluded from meddling in this arena.¹¹⁶ State or locally imposed preferences are almost always bound to fail strict scrutiny or attempted application of the special trust doctrine. For example, in *Tafoya v. City of Albuquerque*, a city ordinance prohibited anyone but members of federally recognized tribes, pueblos, or of the Navajo Nation from selling jewelry and crafts in the town square of the “Old Town” section.¹¹⁷ The plaintiff argued that this violated equal protection under the federal and state constitutions.¹¹⁸ The city invoked the special trust doctrine, pointing to *Mancari* for the proposition that a preference based on tribal affiliation was permissible.¹¹⁹ The court ruled that strict scrutiny applied and that *Mancari* was not applicable because the trust doctrine did not extend beyond the federal government to the city of Albuquerque.¹²⁰ This decision was consistent with *Mancari* in holding that the relationship between the federal government and the Indian tribes was distinct from the relationship between state or local governments and the tribes.

Similarly, in *Malabed*, the 9th Circuit ruled that a Native preference for state jobs in Alaska was subject to (and failed) strict scrutiny under the state constitution because it was a racial preference, having been enacted by the North Slope Borough, a subdivision of the state of Alaska, and not the federal government.¹²¹ The Court emphasized that although Congress does have the power to delegate this power to states, this happens only

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 751 F. Supp. 1527, 1530-31 (D.N.M. 1990).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Malabed v. North Slope Borough*, 355 F.3d 864 (9th Cir. 2003). (the court here also stated that discrimination based on tribal affiliation may possibly constitute impermissible national origin discrimination.)

when the state acts under either an explicit delegation of the power or when the state acts to enforce a pre-existing federal program that the federal government would itself enforce.¹²² In other words, federal imputation did not occur where the North Slope Borough was not given federal permission and where the Indian preference did not correlate with an extant program giving any qualified Native Alaskans a hiring preference, especially where the majority of the population was already Alaska Native and there was no evidence of discrimination against the majority.¹²³

In *Rice*, the problem could have been classified as a lack of authority to act under the color of the special trust rather than as a prohibition of the use of racial distinctions. The OHA was a body created by the state constitution of Hawaii, not by federal mandate.¹²⁴ The BIA, in contrast, is a federal agency within the department of the interior. As in *Tafoya* and *Malabed*, strict scrutiny applied where the acting body did not have the federal imprimatur to deal with the native group on a political level. Together these cases may be read as recognizing a greater degree of latitude for federal discrimination as opposed to state discrimination under the special trust doctrine.

As demonstrated above, case law has chipped away at the idea that tribal organization, federal recognition, or a political relationship is the sole determiner of special trust status, especially in the sense that the validity of the trust relationship. The actor who is utilizing Indian status must be the Federal government or an agent of the federal government, or, if neither of these, must be enforcing a pre-existing federal policy in the same manner that the federal government would have. Otherwise, when a state or local government employs an Indian preference, courts interpret it as being a racial

¹²² Id.

¹²³ Id.

¹²⁴ *Rice*, 528 U.S at 500.

categorization and courts employ strict scrutiny. When the federal government makes the same distinction, the preference is deemed a political one and rational basis applies. The action may be the same, but the doctrine names one as political and one as racial. In other words, the federal government alone is permitted to make a racial discrimination, though it does not call it that. Does this make sense to limit this doctrine to the federal government and to prevent local government and private actors, who may have a more intimate understanding of community needs, from using the special relationship doctrine?

Despite *Mancari*'s attempts to stray away from racial categorizations by naming the trust doctrine a "political preference"¹²⁵ or a "legal status preference"¹²⁶ the reality remains that race is a common factor in the equation throughout application of the special trust doctrine. It is inherent in the category itself. The vast majority of tribes have an ancestry or blood quanta requirement.¹²⁷ For example, the Alaska Native Claims Settlement Act of 1971 uses a blood quantum requirement to define "Native" though it also provides discretion to accommodate those persons who do not meet the criteria.¹²⁸ A large number of Indian tribes utilize blood quantum as a bar to enrollment but some do not use blood quantum as an absolute bar and look towards ancestry, cultural performance, residency, or heritage as factors in the equation.¹²⁹ Even those tribes which do not impose a blood quantum may utilize an ancestry requirement such as requiring members to have descended from individuals on a tribal roll, which the Supreme Court has acknowledged may be a pretext for race.

¹²⁵ *Mancari*, 417 U.S. at 540

¹²⁶ *Id.*

¹²⁷ See Golberg *supra* n.84.

¹²⁸ *Id.*

¹²⁹ See

A closer look at the case law both before and after *Mancari* supports this lack of consensus over the question of the permissibility of racial distinctions in the special trust doctrine. Even post *Mancari*, the Federal government does not see tribal status as an absolute requirement of Indian status.¹³⁰ In fact, the Federal government is prone to considering the ancestry or race of the individual despite explicit language that it is not doing so. In *Antelope v. U.S.* the Supreme Court ruled that a federal law which applied federal criminal jurisdiction to certain major crimes committed in Indian country where the offender is an Indian. The state statute for murder had a higher burden of proof, and *Antelope* was, therefore, disadvantaged by this classification. The court did not support this argument and found that the statute did not look at race “neither in whole nor in part.”¹³¹ 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.”¹³² Although *Antelope* dealt with whether federal jurisdiction applied in a murder case and not the assignment or denial of benefits or a hiring preference, the case stands for the proposition that race is not ignored, even under the supposedly race neutral political categorization of *Mancari*.

Part III: Applying the standards to Kamehameha and future cases: Race as a permissible component in the equation

The Kamehameha Schools were created under a charitable trust established by the last reigning monarch of the sovereign kingdom of Hawaii Princess Bernice Pauahi Bishop, who left funds and land in trust for a school dedicated to the “education and

¹³⁰ *United States v. Antelope*, 430 U.S. 641, 643-44 (1977).

¹³¹ *Id.*

¹³² *Id.*

upbringing of Native Hawaiians.”¹³³ The will of Princess Pauahi gave the trustees “full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils.”¹³⁴ The board of trustees exercised this power in 1910 when it affirmed the admissions policy of refusing to admit a pupil without Native Hawaiian ancestry.¹³⁵ Princess Pauahi’s widower, in a letter to the trustees affirmed this decision and stated that this policy should continue until Native Hawaiians failed to apply to the Schools, or if conditions changed fundamentally.¹³⁶ This has become the defacto admissions policy of the Schools. At present, the schools operate three K-12 campuses.¹³⁷ Total enrollment is at around 4,856 students.¹³⁸ The Schools subsidize a large portion of the education, who pay less than ten percent of the cost of their education.¹³⁹ In addition, the majority of students receive additional financial aid on top of this heavy subsidy.¹⁴⁰

The Schools maintain an official policy of giving preference to any student of Native Hawaiian ancestry, defined as anybody descended from the aboriginal people who occupied the Hawaiian Islands prior to 1778, the time of first western contact.¹⁴¹ Because there are approximately 70,000 students in the state who qualify, and less than 5,000 positions, this policy effectively excludes non-Native applicants.¹⁴²

The Schools’ curriculum integrates Native culture, language, heritage, and tradition into its college preparatory courses. A stated goal of the schools is to uplift

¹³³ *Kamehameha*, 470 F.3d at 831

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

Native students who, according to Congressional reports¹⁴³ and independent research are amongst the bottom in terms of scholastic performance, graduation rates, and standardized tests.¹⁴⁴ The Kamehameha schools has had considerable success as the vast majority of its graduates enter either two year or four year university programs.¹⁴⁵ The school also has a history of producing leaders in business, sciences, arts, and government.¹⁴⁶

What distinguishes the *Kamehameha* case from prior Indian law cases debating the application of the trust doctrine is the fact that the defendant schools openly and admittedly conceded that the classification was racial as opposed to political. This may have been done in fear that the Court would read *Rice v. Cayetano* as foreclosing application of the special trust doctrine to native Hawaiians specifically and which forecloses any use of racial distinctions generally, even for remedial programs.

Yet, Judge Fletcher's dissent did not see a problem to raising a *Mancari* based argument that the special trust doctrine applies despite the Schools' own admission that race was a factor.¹⁴⁷ Such an argument was suggested by the respondent in their brief of opposition to the petitioner's writ of certiorari to the Supreme Court.¹⁴⁸ Had the case not been settled, and Doe not withdrawn his petition for certiorari, the *Kamehameha* case may have opened the door to courts taking a new look at the artificial racial versus political distinction which has plagued the special trust doctrine, and allow an honest

¹⁴³ Id. citing Ka Huaki, 2005 Native Hawaiian Educational Assessment 229, available at <http://ulukau.org/elib/cgi-bin/library?c=nhea>. The most recent report found that 75% of public schools with a predominately Native Hawaiian student body did not meet the state's adequate yearly progress standards as compared to 58% for schools without such a demographic. The study also found Native Hawaiian students to be the lowest in state reading and math scores.

¹⁴⁴ Id.

¹⁴⁵ *Kamehameha*, 470 F.3d at 833.

¹⁴⁶ Id.

¹⁴⁷ *Kamehameha*, 470 F.3d at 850.

¹⁴⁸ Respondents' Brief in Opposition, 24-7, (March 16, 2007).

dialogue on the importance of common ancestry in remedial programs. Currently, Native Americans are an anomaly when it comes to affirmative action programs and other equal protection claims. Whereas other races are treated as individuals for purposes of discrimination, Native Peoples derive their rights from the collective association of their tribe.¹⁴⁹ The political bodies decisions to exclude individuals from enrollment or to end association with the federal government can negate an Indian's rights under the doctrine by terminating their legal Indian status. Such is not the case with other ethnic groups. Additionally, the sliding scale which permits greater selection by private entities is reversed in the case of Native Peoples; the federal government may make more overt discriminations based on race than a private actor is able to make.¹⁵⁰

As mentioned before, the special trust doctrine has been confined to dealings which involve the federal government and its agents. The doctrine is also applicable in cases where a non federal actor is carrying out a federal policy in the same way that the federal government would have or where the non-federal actor is sanctioned to act as an agent of the federal government.¹⁵¹ This may have been the case in *Kamehameha*.

The special trust doctrine applies to the relationship between the federal government and Indian tribes, not to their relationship with state governments, yet the OHA was created by and administered by the state of Hawaii. In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs.¹⁵² This begs the question of how we impute federal intentions to state or private actors. In *Rice*, counselor for the Schools, John Roberts, argued that the federal government *or* those to whom the federal

¹⁴⁹ See *St. Cloud*, 702 U.S. F.Supp at 1460. (Member of terminated tribe not entitled to federal jurisdiction under major crimes act).

¹⁵⁰ *Malabed*, 42 F. Supp 2d at 928-31.

¹⁵¹ See *Tafoya* 751 F. Supp. at 1530-31.

¹⁵² Haw. Const., Art. XII, § 5.

government had delegated this power to either through legislation or through funding, could exercise the power, while Mr. Olsen, arguing for the appellant *Rice*, argued that only the Congress could do so, not private parties.¹⁵³ The court ultimately found for *Rice*, but never ruled on this critical component of the special trust doctrine.

In *Kamehameha*, the respondent pointed to numerous facts which would suggest that federal intent can be imputed to the schools, despite the fact that they are a private entity which receives no federal funds. First, the schools showed that their policy was in alignment of extant Congressional policy both broadly towards recognizing a trust relationship between the federal government and Hawaiian Natives as well as specific acts which allocated funds and exclusively for the education of Hawaiian Natives.¹⁵⁴ Most tellingly, the Court pointed to the 1993 Federal Apology Resolution passed by President Clinton which acknowledged the illegality of the overthrow of the Hawaiian Kingdom and the federal government's complacency and participation in the overthrow.¹⁵⁵ The petitioner also pointed to Congressional reports which were in accord with its own findings that Native Hawaiian students continued to underachieve in comparison with all other ethnic groups in the state of Hawaii.¹⁵⁶ This evidence would satisfy the requirement that a non-federal actor may be in harmony with the trust doctrine by being an agent of a recognized federal policy.

The argument resurfaced in the first *Kamehameha* case when Judge Bybee in his dissent to the en banc majority of the 9th Circuit argued that the special relationship doctrine does not apply to private parties discriminating on the basis of tribal status, only

¹⁵³ *Rice*, 528 U.S. at 520.

¹⁵⁴ *Kamehameha*, 470 F.3d at 850, listing allocations of federal money specifically for Native Hawaiian education, healthcare, housing, and job training.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

to the federal government or to the tribes themselves¹⁵⁷. Bybee's reading of *Rice* and *Mancari* posits that classification based on Indian status does not even consider race, but only political status as reflected in membership in a federally recognized tribe. This argument holds that the distinction must be *only* political and *not racial*, as opposed to not being solely racial. Because only Congress can deal with foreign sovereigns under the treaty power, only Congress may exercise the special relationship doctrine. If however, the classification is racial, private parties have greater leeway to select based on criteria which would be impermissible for a state actor to use.

The distinction is important. On the one hand, if we take the origin of the doctrine to be a relationship between the federal government and quasi-sovereigns, than it makes little sense to allow non-parties to the relationship (states, state agencies, and private parties) to act under it. If however, we see the doctrine as permitting agents and other approved parties to act under it, than programs such as the OHA and Kammehameha Schools would be saved, but only after a very ponderous process of examining if Congress can impliedly authorize a policy through indirect funding, proclamations.

Nevertheless, in light of the greater deference usually afforded to non-state actors, the District Court and the 9th Circuit (both a three judge panel and 15 judges hearing the appeal en banc) chose to apply the more deferential and highly modified, burden-shifting Title VII scheme from *McDonnell Douglas v. Green*. This framework had previously been applied to race-based disparate treatment in employment situations, though its application to the educational context was a new move. The test does provide guidance

¹⁵⁷ Id.

as to what is permissible in a private *employer's* remedial affirmative action policy, and the court found that reasoning to be a good fit for the facts presented to it.

This would be the first time that the court applied title VII analysis to a §1981 claim in the educational context.

Judge Fletcher argued that “Congress has emphasized that it “does not extend services to Native Hawaiians because of their race, but because of their unique status as indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.”¹⁵⁸ While there is no consensus of what constitutes a tribal entity in the first place. 38 U.S.C. §3765(4) defines “tribal organization” to include “the Department of Hawaiian Homelands, in the case of native Hawaiians, and such other organizations as the Secretary may prescribe.” Therefore, the policy is consistent with existing federal policies and enforced in the same way.

The court in *Bob Jones University v. United States*, 461 U.S. 574 (1983) held that a private college could not qualify as a public charity eligible for a tax exemption because of a racially discriminatory ban on interracial dating was contrary to fundamental public policy. It could be argued that this simply is not the case in situation of remedial affirmative action programs by private entities. In fact, Congress has explicitly encouraged the preservation of indigenous groups and called for measures to promote increased independence.

One effect of the political theory is that the federal government becomes the sole repository of the special relationship doctrine. *Kamehameha* was decided on this assumption and the majority en banc opinion attempted to impute private action to the federal government. Though my argument has been that the political theory is not sound,

¹⁵⁸ 20 U.S.C. § 7512(12)B.

even under *Mancari* and *Rice* federal intent can be inferred and imputed through private or state action. *Mancari* established that states and private actors could act under color of the special trust doctrine where they act consistent to a preexisting federal policy and enforce it in the same manner that the federal government would.

A final problem which arose from the *Mancari* and *Rice* decisions was the imposition and reaffirmation of externally determined membership and legitimacy criteria. These requirements such as a tribal structure, federal recognition, and cultural performance criteria are inapposite to the purpose of fostering self determination amongst indigenous peoples. “If tribal culture can evolve, then how much cultural evolution will the courts allow before they decide that tribal culture is so diluted that they no longer justify the perpetuation of tribal governments’ sovereign powers?”¹⁵⁹

In *Williams v. Babbitt* the 9th Circuit Court of Appeals held that the Alaskan “Reindeer Act” was subject to and failed strict scrutiny where it permitted reindeer herding by Alaska Natives only.¹⁶⁰ The 9th Circuit found this to be an impermissible use of race where the herding of Reindeer was not a “uniquely Indian” interest where the herding was not limited to tribal lands and where reindeer herding was not a “traditional cultural practice.”¹⁶¹ Traditional practice was defined in terms of practices which existed before European contact, and as Professor Carole Goldberg observed “They are grounded in the view that Indians deserve special consideration only when they are acting in

¹⁵⁹ Curry, Lucy A. *A Closer Look At Santa Clara Pueblo v. Martinez: Membership by Sex, By race, and by Tribal Tradition*. 16 WIWLJ 161, 210, 2001.

¹⁶⁰ 115 F.3d 657 25 U.S.C §500 (2001)

¹⁶¹ *Id.*

conformity with non-Indian conceptions of their culture, which typically requires that they must remain unchanged in order to be considered Indian.¹⁶²

A reading of *Mancari*, which would require federal recognition of tribal status, is just as much a logical and legal fiction as the political/racial distinction. First, such a requirement ignores the historical fact that modern tribal entities were in large part a creation of federal policy which sought to divide militarily powerful and culturally unified groups into smaller units and the fact that cultural and kinship ties blended across tribal lines.

Conclusion:

When it comes to equal protection under the Constitution or statutory provisions, Indian law remains an outlier. In a legal environment which seeks to eliminate distinctions based on race and which seeks to protect individual rights as opposed to those of a collective ethnic group, the federal government is bound by an obligation which forces it to make decisions, render benefits, and hand down punishments which seem to be based on race. However, the apparent tension with *Adarand* is not a tension which requires sustaining Native American exceptionalism. Most, Native preference programs would sustain strict scrutiny review based on a compelling government interest to address Native disadvantages which arose from the direct actions of the Federal government in a remedial fashion and based on the fact that such programs are narrowly tailored. Recognition of the racial nature of the special trust doctrine will permit a more honest dialogue on the role that race plays in the American system and will eliminate racial favoritism where it is not motivated by an established and lauded federal policy.

¹⁶² Carole Goldberg *Descent into Race*, 49 UCLALR 1373, 1379 (2002).

