Apocalypse Now:

The Unrelenting Assault on *Morton v. Mancari*

by Gregory Smith and Caroline Mayhew

It has become axiomatic within federal Indian law circles that if possible, tribal cases should not be taken to the U.S. Supreme Court. Of the Court's last 30 tribally related decisions, tribal interests have only prevailed six times. Many of the losses were by wide margins and overturned significant and long-standing principles of federal Indian law. For example, in *Carcieri v. Salazar*,[1] the Court held by an 8-1 margin that the Secretary of the Interior may only take land into trust under the Indian Reorganization Act (IRA) of 1934 for tribes that were "under federal jurisdiction" in 1934, despite 70 years of administrative practice where the secretary took land into trust for all federally recognized tribes.[2]

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,[3] also by an 8-1 margin, the Court held that the Indian lands exception of the Quiet Title Act does not bar a challenge to a land into trust decision by the secretary that is not based on the Quiet Title Act, even though for decades it was well established that once lands were in trust for a tribe no challenge to that status was available.

Just as Indian Country advocates have become increasingly wary of the Court, so too have interests contrary to Indian Country become enthused about getting their cases before the nine Justices. Accordingly, there has been a concerted effort to put key trust and sovereignty doctrines before the Court. One of the best examples of this is the repeated effort to get the Court to revisit the critical holding in *Morton v. Mancari*.[4] In *Mancari*, the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA) in the face of an equal protection challenge, on the basis that the preference was political in nature and could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians[.]"[5] This rational basis standard is easier to meet than the strict scrutiny standard applied to race-based governmental actions.

The effort to overturn *Mancari*, whether in whole or in part, is led by high-profile attorneys such as William Perry Pendley, the president of the Mountain States Legal Foundation (MSLF). The mission of the MSLF "is to provide high-quality, effective legal representation for those who share [its] commitment to fight for the right to own and use property, limited and ethical government, individual liberty and free enterprise system."[6] In furtherance of this mission, the MSLF has challenged affirmative action and environmental laws, as well as laws and rights that uniquely apply to tribes and tribal members.

Pendley is best known for his successful argument before the Court in *Adarand Constructors, Inc. v. Peña* regarding the constitutional standard of review for government minority contracting incentives.[7] Discussed at greater length below, the MSLF has used the holding in *Adarand* as the basis for several certiorari petitions seeking to overturn *Mancari*. Paul Clement is another nationally known attorney involved in several cases challenging *Mancari*. Clement served as U.S. solicitor general during the administration of President George W. Bush and was counsel for the state attorneys general in *National Federation of Independent Business v. Sebellius*, challenging the constitutionality of the Patient Protection and Affordable Care Act.[8]

Clement, who is considered a leading candidate for nomination to the Court under a future Republican president, also serves as counsel for the guardian ad litem in the case of *Adoptive Couple v. Baby Girl*. In that capacity, he filed a brief in support of a petition for certiorari this term that raises equal protection concerns and seeks to narrow the scope of *Mancari*.[9] On Jan. 4, 2012, the Court granted the petition and for the first time in 13 years will be hearing arguments in a case that in significant part, could turn on an interpretation of *Mancari*. Clement is also counsel for KG Urban Developers in *KG Urban Enterprises, LLC v. Patrick*,[10] in which he has argued that *Mancari* does not apply to state action favoring a federally recognized tribe. Notably, he is quoted in the media as saying that if KG Urban's appeal fails "I would strongly recommend to my client that … we ought to file a petition to be heard by the Supreme Court. I believe we would have some very sympathetic ears there."[11]

Mancari and Its Central Importance in Federal Indian Law

Mancari involved a challenge to a provision of the IRA that created an employment preference for Indians in the BIA and exempted Indian appointees from the civil service laws. In implementing the preference, the BIA in 1972 adopted a policy stating that the Indian preference would also apply to promotions where two or more qualified employees were competing to fill the same vacancy. Non-Indian BIA employees brought a class action suit against the Secretary of the Interior, the commissioner of Indian Affairs, and BIA area office directors claiming both that the IRA's Indian employment preference had been repealed by the 1972 Equal Employment Opportunity Act and that the BIA's implementation policy violated the Due Process Clause of the Fifth Amendment. The U.S. District Court for the District of New Mexico agreed that the IRA preference had been implicitly repealed, and therefore did not reach the constitutional arguments. The Supreme Court, however, found no repeal, and its resulting analysis of the appellees' due process challenge has come to be regarded in federal Indian law circles as one of the bedrock cases of modern federal Indian law.

Mancari is most often cited by federal Indian law scholars and practitioners for creating the "political versus racial" distinction that ensures that federal Indian law is not subject to the increasingly strict scrutiny applied by the courts to government classifications deemed racial in nature. The Court held with regard to the Indian preference at issue in *Mancari*:

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

The Court further emphasized: "Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." And, in a footnote, the Court continued: "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 this sense, the preference is political rather than racial in nature." With regard to these types of classifications, the Court adopted a different standard of review: "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." [12]

The Court's political versus racial distinction is logical and follows naturally from the pre-constitutional sovereign status of Indian tribes, the U.S. Constitution's recognition of tribal sovereignty, numerous treaties, federal laws, court decisions and the unique relationship that exists between tribes and the federal government. In the context of the Supreme Court's modern race law jurisprudence, without this distinction wide swaths of federal Indian law would be subject to strict scrutiny review with very uncertain outcomes.

Indeed, the *Mancari* Court acknowledged the significance of its decision, noting that

> [l]iterally every piece of legislation dealing with Indian tribes

> and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[13]

Furthermore, while *Mancari* arguably could have been limited to the *sui generis* context of BIA employment preferences, subsequent decisions have read it more broadly. In the *Mancari* opinion, the Court specifically noted:

> 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*. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.[14]

However, in the following paragraph of the opinion the Court went on to cite "numerous occasions" on which the Court has "specifically … upheld legislation that singles out Indians for particular and special treatment."[15] The examples cited by the Court range from federally guaranteed tax immunity, to tribal court jurisdiction, to special federal welfare benefits, suggesting that the Court did not believe that the reasoning it employed in *Mancari* is or ever was narrowly limited to the context of BIA employment.

Whatever ambiguity may be found in *Mancari* itself, in later cases the Supreme Court applied the *Mancari* political/racial analysis and rational basis standard of review to situations outside the BIA or the employment context. For example, in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*,[16] the state of Montana appealed a federal district court determination that under federal law, the state could not tax certain personal property located on the reservation and owned by Indians or impose a vendor license fee or cigarette sales tax with regard to on-reservation sales by Indians to Indians. The state argued that the tax immunity as interpreted by the district court violated the Due Process Clause of the Fifth Amendment, but the Supreme Court held that that argument was foreclosed by *Mancari*. The Court reiterated, citing *Mancari*: "The test to be applied to these kinds of statutory preferences, which we said were neither 'invidious' nor 'racial' in character, governs here: '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.'"[17] And the following year, in *United States v. Antelope*,[18] the Court addressed the question in the context of criminal laws. In *Antelope*, three enrolled members of the Coeur d'Alene Tribe were convicted of various crimes under the Major Crimes Act. Because federal law treated the defendants' offenses more harshly than state law, and the Major Crimes Act subjected them to the harsher federal laws due to their status as Indians, the defendants argued that their convictions under federal law violated the equal protection requirements of the Due Process Clause. In rejecting the defendants' challenge, the Supreme Court noted: "The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." The Court cited the *Mancari* Court's observation that all Indian legislation singles Indians out for special treatment, and 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."[19]

The *Antelope* decision extended the *Mancari* rationale beyond the context of Indian self-government, which had been a strong theme in the *Mancari* opinion. The *Antelope* Court acknowledged that *Mancari* and other past cases "involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests." Nevertheless, the Court employed *Mancari*'s reasoning, reaffirming the political/racial distinction as the basis for that reasoning in the process:

> [T]he principles reaffirmed in [*Mancari*] point more broadly

to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. 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.'[20]

In the two decades or so following *Antelope*, the Supreme Court largely did not expand on its analysis regarding the special rational-basis standard applied in *Mancari*, but did continue to reference it positively in several cases, including: *Delaware Tribal Business Committee v. Weeks*, where it held that Congress' plenary power over Indian affairs "has not deterred this Court … from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment," but that the *Mancari* standard of review applies[21]; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, where it wrote that "the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'"[22]; and *United States v. Sioux Nation of Indians*, where it acknowledged that *Mancari* establishes the standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment. [23] In later opinions, *Mancari* was more often cited for the plenary power of Congress over Indian affairs, and its broad authority to legislate with respect to Indians.[24]

In 2000, the Supreme Court again took up *Mancari*'s political/racial distinction in *Rice v. Cayetano*,[25] a case involving a special state voting scheme. In order to carry out its responsibilities under the Hawaiian Homes Commission Act, the state of Hawaii created the Office of Hawaiian Affairs (OHA) to administer programs for Native Hawaiians, choosing to limit the right to vote for trustees of the OHA to Native Hawaiian individuals. A non-Native citizen of Hawaii challenged the voting qualification as a racial classification in violation of the Fifteenth Amendment. The state argued that the classification simply limited voters to those whose ancestors were in Hawaii at a particular time in the past and was not racial in character, but the Court found that the ancestry component of the requirement was merely a proxy for race. In the alternative, the state argued that the voting restriction was permitted under *Mancari*, an argument that the district court accepted, finding the relationship between Native Hawaiians and the federal government to be analogous to the relationship between the federal government and Indian tribes. Rejecting both arguments, the Supreme Court held that the Fifteenth Amendment precluded the ancestry-based voting qualification. In doing so, the majority made clear that to apply *Mancari*'s reasoning to Hawaii's voting scheme would be to "extend the limited exception of *Mancari* to a new and larger dimension" concluding that "[i]t does not follow from *Mancari* … that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all others."[26] However, citing *Moe* and *Antelope,* and other cases, the Court stated that

> [o]f course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs [and, quoting *Mancari*, further] observed [that] "every piece of legislation dealing with Indian tribes and reservations … single[s] out for special treatment a constituence of tribal Indians."[27]

The Court noted that many of these cases rely upon *Mancari* and specifically cited *Mancari*'s political versus racial footnote, reaffirming the vitality of the political/racial distinction while holding that its rationale simply could not extend to a state voting scheme that violates the Fifteenth Amendment.

The *Adarand* Case

Notwithstanding the Court's citations to *Mancari* in *Rice*, many recent attacks on *Mancari* are founded in the holding of the 1995 case *Adarand Constructors, Inc. v. Peña.*[28] In *Adarand*, Adarand Constructors brought an equal protection challenge to the federal government's practice, in federal procurement contracts, of offering financial incentives to general contractors to hire subcontractors controlled by socially and economically disadvantaged individuals including racial minorities. The Court had previously held in *City of Richmond v. J.A. Croson Co.* that strict scrutiny applies to all race-based actions by a state or local government, even if remedial.[29] And though the Court had applied intermediate scrutiny (requiring that a distinction be reasonably related to an important governmental objective, a standard now generally applied to classifications based on gender) to a federal racial classification found to be "benign" in *Metro Broadcasting, Inc. v. FCC*,[30] in *Adarand* a majority of the Court overruled *Metro Broadcasting* in favor of a "consistent" approach applying strict scrutiny to all government racial classifications regardless of whether they are "benign" or "invidious" and regardless of whether the action is state or federal:

> Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental 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.[31]

Certain features of the *Adarand* opinion raise the question of its impact on *Mancari*. The federal contracting preference program at issue in *Adarand* included a presumption that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" fell within the category of "socially and economically disadvantaged individuals."[32] Additionally, citing *Mancari*, Justice John Paul Stevens in his dissent stated that "[w]e should reject a concept of 'consistency' that would view the special preferences that the National Government has provided to Native Americans since 1934 as comparable to the official discrimination against African-Americans that was prevalent for much of our history."[33] But while the majority in *Adarand* held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny[,]" the Court had found in *Mancari* that the Indian preference at issue in that case was "political rather than racial in nature." Based on precedent, therefore, *Adarand* should not apply to federal Indian programs because those programs are based on allowable political, not impermissible racial,

classifications. This conclusion is supported by the fact that the Supreme Court cited *Mancari*'s "political rather than racial" doctrine in *Rice v. Cayetano*, five years after *Adarand*, without any indication that the doctrine had been overruled.

Recent Efforts to Put *Mancari* in Front of the Supreme Court

There have been and continue to be many challenges to the *Mancari* political/racial distinction, most frequently based on the Court's decision in *Adarand*. For example, in 1997, in *Williams v. Babbitt* the U.S. Court of Appeals for the Ninth Circuit considered *Mancari* in ruling on an equal protection challenge to the Reindeer Act of 1937.[34] The Reindeer Act was designed to provide Alaska Natives with economic security and a stable food supply by limiting the sale of reindeer in Alaska to non-Natives and taking other measures to protect Native reindeer herders from non-Native competition. Though nothing in the act specifically prohibited non-Natives from owning and selling reindeer, the Interior Board of Indian Appeals (IBIA) nevertheless determined that a non-Native was barred from importing reindeer from Canada for commercial purposes under the Act. The IBIA's position was based on the Act's policy, structure, and legislative history, which suggested an intent to prevent the entry of non-Natives into the reindeer industry in Alaska. On appeal, the Ninth Circuit overturned the IBIA's decision in order to avoid potential equal protection issues, declining to interpret the Reindeer Act as precluding non-Natives from owning and importing reindeer from outside of Alaska.

The Ninth Circuit did not apply the *Mancari* standard of review, instead reviewing the IBIA's statutory interpretation under strict scrutiny. The court read *Mancari* as applying only to "those statutes that affect uniquely Indian interests" but found that reindeer herding is not a uniquely native industry and "in no way relates to native land, tribal or communal status, or culture" given that reindeer are not native to Alaska but were imported from Russia.[35] The court also questioned the effect of *Adarand* on the *Mancari* doctrine:

> The Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about the IBIA's interpretation of the Reindeer Act. In *Adarand,* the Court ruled that racial classifications by the federal government are subject to strict scrutiny. ... Justice Stevens in dissent argued that the majority's "concept of consistency [in equal protection jurisprudence] ... would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered.[36]

The court also predicted, however, that much of Title 25 of the U.S. Code would survive even without *Mancari*, given the government's "compelling interests" in dealing with Indians.[37] The appellee reindeer herders petitioned the Supreme Court for a writ of certiorari, seeking review of "[w]hether, in light of *Adarand Constructors, Inc. v. Peña,* the rational-basis standard of review adopted in *Morton v. Mancari* continues to apply to constitutional equal-protection challenges to congressional enactments singling out Native Americans for special treatment" and "[i]f so, whether application of the *Mancari* standard of equal-protection review of Indian classifications is restricted to those addressing 'uniquely Indian interests.'"[38] The Supreme Court denied the petition.

In 2005, Mancari was challenged from within Indian Country in Means v. Navajo Nation. Means was prosecuted in Navajo tribal court for actions occurring on the Navajo reservation, then argued that the 1990 Amendments violated the equal protection guarantee of the Fifth Amendment. The Ninth Circuit commented that the equal protection argument "has real force," but nevertheless declined to accept it. Means submitted a petition for a writ of certiorari to the Supreme Court, essentially asking that the Supreme Court clarify "that any ethnic or cultural aspect of identity is a proxy for race." The Supreme Court did not take up this invitation, however, denying the petition.

In 2003, the Ninth Circuit again addressed the scope of *Mancari* in *Artichoke Joe's California Grand Casino v. Norton*.[39] The state of California had amended its Constitution to allow Indian tribes to conduct casino-style gaming on Indian lands pursuant to compacts entered into under the Indian Gaming Regulatory Act (IGRA). Because the California Constitution otherwise banned the same casino-style games that the amendment allowed for Indian tribes, the result was a tribal monopoly on class III gaming in California. Several California card clubs and charities challenged the compacts as in violation of the IGRA as well as their equal protection rights under the Fifth and Fourteenth Amendments. The plaintiffs argued that, like the Reindeer Act in *Williams*, the monopoly-granting compacts were a racial preference subject to strict scrutiny. The Ninth Circuit acknowledged that its recent case law "suggested that the political-versus-racial classification is not always easy to identify," but distinguished the compacts from the Reindeer Act in *Williams* on the basis that the compacts applied to tribal governments as opposed to individual Indians, and that the classification was therefore clearly political in nature.[40] Notably, the Ninth Circuit

was willing in *Artichoke Joe's* to uphold an Indian preference in the context of economic activity under the *Mancari* standard of review, regardless of dicta in *Williams* that might have suggested a contrary result. In seeking a writ of certiorari from the Supreme Court, the petitioners urged that *Mancari* only provides a limited exception to the general prohibition on racial preferences. That exception could not encompass economic benefits that do not otherwise have a "unique relationship to Indian history or culture," according to the petitioners' argument, because "that rationale establishes no limits to the tribal preferences that Congress might allow."[41] The Supreme Court denied the petition.

In 2005, *Mancari* was challenged from within Indian Country in *Means v. Navajo Nation*.[42] Means, an enrolled member of the Oglala Sioux Tribe, was prosecuted for various misdemeanor crimes in Navajo tribal court for actions occurring on the Navajo reservation. Through the 1990 Amendments to the Indian Civil Rights Act, Congress had recognized the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, including non-member Indians. Means argued, however, that the 1990 Amendments violated the equal protection guarantee of the Fifth Amendment by subjecting non-member Indians to tribal court jurisdiction based on their race. Means also argued that *Mancari* had been undermined by *Adarand*. The Ninth Circuit commented that the equal protection argument "has real force," but nevertheless declined to accept it, stating that "both the Supreme Court and our court have continued to rely on *Mancari,* and we are bound to follow it under the doctrine of *Agostini v. Felton.*"[43] The Ninth Circuit expressly reserved the question of whether the prosecution in tribal court of an individual who was racially Indian but not enrolled in any Indian tribe under the 1990 Amendments would violate equal protection.

Means submitted a petition for a writ of certiorari to the Supreme Court arguing that "a new era of equal protection has largely been ignored or misconstrued by the Ninth Circuit" and citing *Adarand*.[44] The petition argued that the *Mancari* doctrine is limited to the trust obligation carried out by the BIA to Indians and that, otherwise, "Indian" is a racial classification to which strict scrutiny applies. The petition stated that in *Rice v. Cayetano*, "Justice Kennedy concluded that ancestry can be a proxy for race.… It is simply impossible to find that the same conclusions do not apply to Indian members of each tribe."[45] Thus, the petition essentially asked the Supreme Court to clarify that *Rice* held "that any ethnic or cultural aspect of identity is a proxy for race."[46] The Supreme Court did not take up this invitation, however, denying the petition.

Under William Perry Pendley, the MSLF in particular has urged the Supreme Court to revisit and severely restrict, if not overturn, the *Mancari* doctrine. For example, in 2002, Pendley was on the brief in *United States Air Tour Ass'n v. Federal Aviation Administration,*[47] in which the Air Tour Association argued that federal flight limitations over the Grand Canyon violated the equal protection component of the Fifth Amendment because they provided an exemption for flights to and from the Hualapai Indian Reservation at the bottom of the canyon. MSLF founded its argument upon the premise that *Adarand* had overturned *Mancari*. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit upheld the flight limitations exception on a rational basis review, citing *Agostini v. Felton* (like the Ninth Circuit in *Means*) for the rule that "if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[48] The D.C. Circuit also noted that "this circuit has continued to apply *Mancari* post-*Adarand.*"[49] The Supreme Court denied a petition for certiorari.

In its 2006 amicus brief in support of the petition for certiorari in *Morris v. Tanner*, the MSLF asked the Supreme Court to hold that the 1990 amendments to the Indian Civil Rights Act, affirming the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians within their territories, violate the due process and equal protection guarantees of the Constitution.[50] The arguments advanced in the brief proceeded from the foundational view that tribal sovereign rights are now granted by Congress pursuant to its plenary power over Indian affairs, and are no longer rooted in inherent tribal sovereignty. MSLF therefore asked the Court to hold that any prosecution of a United States citizen (Indian or not, tribal member or not) in tribal court is unconstitutional because Congress may not deprive individuals of their constitutional rights by subjecting them to prosecution in a non-constitutional forum. Though MSLF argued that it is unconstitutional for Congress to allow prosecution of *any* U.S. citizen in tribal court, MSLF also argued that the Indian/non-Indian distinction embodied in the ICRA amendments would be "a constitutionally suspect racial classification requiring strict scrutiny even if fundamental constitutional rights were not involved."[51]

Additionally, in response to the Ninth Circuit's application of the *Mancari* standard of review to the 1990 Amendments in *Means v. Navajo Nation* and *Morris v. Tanner*, rather than strict scrutiny under *Adarand*, MSLF argued in its brief that "*Mancari* either does not apply or should be overruled." It continued:

> First, *Mancari* did not deal with the Due Process Clause issues here, so it is inapposite to that extent. Second, *Mancari* did not deal with a classification that deprives individuals of their basic constitutional rights, which requires

> strict scrutiny regardless of the character of the classification. In such a case as this, a political classification is no different from a racial one. Third, *Mancari* deals strictly with the *sui generis* issue of Congress's power to promote tribal self-government relative to the Bureau of Indian Affairs, and should be limited to its special facts. Finally, to the degree that *Mancari* may stand for the proposition [that no racial classification is involved in this case and therefore strict scrutiny is not required], then this Court must hear this case and overrule *Mancari* for the reasons stated above. That is, Congress's plenary power to protect tribes' group rights does not permit Congress to escape strict scrutiny when making racial distinctions between and among individuals.[52]

The Supreme Court, however, denied certiorari.

In 2008, the MSLF again took the opportunity in *Hawaii v. Office of Hawaiian Affairs* to ask the Supreme Court to revisit *Mancari* in light of *Adarand*. The question in that case was whether a 1993 joint resolution enacted by Congress, known as the Apology Resolution, prohibited the state from alienating public lands, as the Supreme Court of Hawai'i held. [53] The MSLF filed an amicus brief in order to argue that, if the Supreme Court of Hawai'i's holding was correct, the Apology Resolution is unconstitutional because it "confer[s] special benefits on persons of Hawaiian ancestry" and "violates the Equal Protection Clause of the Fifth Amendment." [54] In its amicus brief, MSLF argued that *Mancari*'s rational basis test is founded in Congress' "special and unique relationship with American Indians," and that Congress has no such special relationship with Native Hawaiians.[55] MSLF further argued, however, that the political versus racial distinction identified in *Mancari* is merely dicta, without factual basis, unconstitutional, and may not be relied upon by courts. The brief asserted, "*Mancari* is not grounded on such a clearly unconstitutional distinction—it is beyond dispute that tribal membership is based on race, ancestry, or descent—but instead upon Congress' unique historical trust relationship and its plenary and constitutional powers over Indians."[56] Following from its assertion that "Indian" is in fact a racial classification, MSLF further argued that *Adarand* severely limited the effect of *Mancari* by subjecting all governmental racial classifications to strict scrutiny:

> Consequently, after *Adarand*, if Congress seeks to legislate specially with regard to American Indians, it must argue that—due to the unique guardian-ward status between Congress and American Indian tribes, Congress' plenary powers over Indians, and Congress's historical relationship with American Indian tribes—it has a compelling interest to further American Indian tribes' self-government and sovereignty. No other argument satisfies the Constitution's equal protection guarantee, *Adarand*, and strict scrutiny, which requires that legislation be narrowly tailored to achieve a limited compelling interest. Accordingly, Congress's powers to treat American Indian tribes and their members, much less persons of Hawaiian ancestry, in a special fashion are very limited.[57]

The Supreme Court granted certiorari, but did not discuss *Mancari*, finding that the text of the Apology Resolution did not strip the state of its powers to alienate public lands.[58]

Current and Future Challenges to *Mancari*

On Jan. 4, 2013, the United States Supreme Court granted a petition for writ of certiorari to review the South Carolina Supreme Court's ruling in *Adoptive Couple v. Baby Girl*.[59] The petitioners and the guardian ad litem in *Adoptive Couple* challenge the constitutionality of the Indian Child Welfare Act (ICWA) as applied and seek to limit the scope of *Mancari*. The attorney for the guardian ad litem is Paul Clement.

The case involves the biological child of an Indian father and a non-Indian mother. Before the child was born, the biological father indicated his desire to relinquish parental rights in a text message to the biological mother. The biological mother later consented to the baby's adoption, and the child resided with and was cared for by her adoptive parents following her birth. Under state law, according to the Response of Guardian Ad Litem in Support of the Petition for Certiorari, the biological father's actions would have been sufficient to terminate any claims he may have had to parental rights.

When the birth father was served with the adoption complaint four months after the child's birth, he challenged the adoption under the ICWA, which provides that parental rights may not be terminated without evidence that continued custody by the Indian parent is likely to result in serious emotional or physical damage to the child. The adoption proceeding was tried two years later, and the Cherokee Indian Nation intervened in support of the father. The family court, applying ICWA's higher standard for termination of parental rights, denied the adoption petition and granted custody to the biological father. The family court's order was upheld by the South Carolina Supreme Court, and the adoptive parents filed a petition for writ of certiorari to the U.S. Supreme Court. The guardian ad litem then filed a response.

The response first advocates an interpretation of ICWA that looks to state law to define "parent," and argues that the heightened standard for termination of parental rights only applies where the Indian parent already has custody over the child. But the response also devotes a significant amount of space to the argument that any contrary interpretation raises "serious equal protection concerns" by "overrid[ing] the best interests of the child based on one factor and one factor alone—the race of the child's birth father."[60] Citing *Williams v. Babbit*, the response argues for a restrictive application of the *Mancari* doctrine:

> The key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race, is whether the challenged legislation 'relates to Indian land, tribal status, self-government or culture.' … When a racial classification is tethered directly to tribal land or tribal self-government, the political and racial aspects of the regulation are inextricably intertwined such that treating the laws as involving ordinary racial classifications would deny the federal government its authority under the Treaty and Indian Commerce Clauses. But when tribal preferences are untethered from tribal land or tribal self-government and simply provide a naked preference based on race, strict scrutiny is imperative.[61]

The response argued further that "[c]onferring special privileges on the biological father—or more to the point, special disabilities on a

child—simply because of race serves no purpose relating to 'Indian self-government[.]'"[62]

Another case in the U.S. Court of Appeals for the First Circuit may eventually become ripe for review, potentially presenting another opportunity for the Supreme Court to reconsider *Mancari*. In 2012, the First Circuit weighed in on the *Mancari* doctrine in *KG Urban Enterprises, LLC v. Patrick*.[63] The case involves a challenge to the Massachusetts Gaming Act, which allowed for a limited number of "category 1" gaming licenses to be issued in three designated regions within the state and included a preference for an Indian tribal licensee (to operate pursuant to a tribal-state compact) in one of the regions. KG Urban, a development firm and potential applicant for a gaming license in Massachusetts, argued that the Massachusetts Gaming Act is preempted by federal law and discriminates on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. KG Urban sought a preliminary injunction, as well as injunctive and declaratory relief, in the district court. Paul Clement was counsel for KG Urban.

The district court upheld the Massachusetts Gaming Act, denying KG Urban's motion for preliminary injunction and dismissing its complaint, on the basis that the state scheme implemented and was authorized by the Indian Gaming Regulatory Act, a federal law.[64] The district court, noting that the Supreme Court has not addressed whether or not state or local laws singling out Indian tribes are subject to the *Mancari* standard, nevertheless cited *Washington v. Confederated Bands & Tribes of Yakima Indian Nation* (*Yakima*) for the proposition that where Congress has delegated authority over Indian affairs to the states, state laws enacted pursuant to that delegated authority are reviewed as if they were federal laws.[65] The district court also rejected KG Urban's argument that *Adarand* had overruled *Mancari* in any event by subjecting all federal race classifications to strict scrutiny. Citing *Rice v. Cayetano*, the district court stated that "[b]y distinguishing *Mancari* instead of overruling or ignoring it, the Supreme Court signaled that tribal classifications are not racial proxies and that *Mancari* remains good law."[66]

The district court, however, was sympathetic to KG Urban's arguments and expressed frustration with the *Mancari* doctrine, opining that the case "makes an artificial distinction which undermines the constitutional requirement of race neutrality."[67] The district court viewed itself as bound by precedent, but offered its own alternative vision:

> If this Court were addressing the issue as one of first impression, it would treat Indian tribal status as a quasi-political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake. Federal laws relating to native land, tribal status or Indian culture would require minimal review because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs. Laws granting gratuitous Indian preferences divorced from those interests, such as Circuit Judge Alex Kozinski's hypothetical monopoly on Space Shuttle contracts [in *Williams v. Babbitt*], or, more germanely, a law granting tribes a quasi-monopoly on casino gaming, would be subject to more searching scrutiny.[68]

The First Circuit reversed the district court's order dismissing KG Urban's complaint. The circuit court found it "quite doubtful that *Mancari*'s language can be extended to apply to preferential state classifications based on tribal status," noting,

> *Mancari* itself relied on several sources of federal authority to reach its holding, including the portion of the Commerce Clause relating to Indian tribes, the treaty power, and the special trust relationship between Indian tribes and the federal government … The states have no such equivalent authority, which is ceded by the Constitution to the federal government. Further, the state preference here has to do with establishing gaming facilities and not employment of Indians within agencies whose mission is to assist Indians.[69]

With regard to *Rice*, the First Circuit stated that its effect on a Fourteenth Amendment claim involving a federally recognized tribe is "unclear." Moreover, the First Circuit was not convinced that the Massachusetts Gaming Act could be characterized as authorized under the IGRA to fall under the *Yakima* doctrine applying *Mancari* to state action authorized under federal law. Essentially, the First Circuit reasoned that IGRA applies to gaming on "Indian lands," but that there are no such "Indian lands" as defined in the IGRA in the region to which the state applied the preference. Therefore, the First Circuit concluded, "whether [the scheme] is 'authorized' by the IGRA such that it falls within *Yakima* and is subject only to rational basis review is far from clear, presents a difficult question of statutory interpretation, and implicates a practice of the Secretary of the Interior not challenged in this suit."[70] Leaving the issue open, the court reinstated the complaint and remanded to the district court.

The First Circuit's reading of *Mancari* focuses on that opinion's discussion of the relationship between tribes and the federal government, and less on the political/racial distinction, which is based not only on the federal relationship but also on the independent status of tribes as semi-sovereigns. As the district court noted:

> The Supreme Court has not addressed whether state or local laws selecting Indian tribes for preferential treatment should be reviewed under the same deferential standard. On the

> one hand, the nature of a classification, in theory, should not change based upon the identity of the sovereign making it. If a classification is political when the federal government makes it, it is difficult to imagine that it could be anything other than political when a state or local government makes it. On the other hand, state and local entities lack the constitutional permission to regulate Indian tribes that the federal government enjoys. It may be appropriate for courts to apply more searching review to state and local regulation of Indian tribes given their lack of authority to legislate in the field.[71]

Given some of the facts and procedural features of the KG Urban case, the equal protection issues may not be ripe for review for some time or may ultimately be avoided altogether. Nevertheless, depending on how this case progresses, Clement has indicated an intent to take the viability of *Mancari* all the way to the Supreme Court. Notably, in its amended complaint filed following the First Circuit's remand, KG Urban dropped its federal preemption claim, ensuring that the case will be focused solely on its state and federal equal protection claims and forcing the district court to confront the reach of *Mancari*.

Conclusion

At a very commonsense level, the legal categories of "federally recognized tribe" and "member of a federally recognized tribe" are inherently political, and have been dealt with as such in the Constitution, hundreds of treaties, laws, executive orders and court decisions. *Mancari* recognizes this fact of tribal sovereignty and translates it into a legal doctrine that embraces the government-to-government relationship between tribes and the United States and protects the relationship against misguided challenges that do not account for tribal histories or governmental status. Notwithstanding this history, there has been and continues to be a concerted effort by some interests to limit *Mancari's* application or even have the case overturned in its entirety. Even if the Supreme Court were only to limit the *Mancari* doctrine, for example by constraining its application to "uniquely Indian interests" or to programs that "promote tribal self-government," this could easily spawn a decade of litigation over the precise meaning and scope of such a limitation, as well as whether a range of long-established federal Indian programs are constitutional under a strict scrutiny standard of review. While a decision of this magnitude may seem unlikely, at least one justice has indicated a willingness to review the fundamentals of federal Indian law. Writing in concurrence in the judgment in *United States v. Lara,* Justice Clarence Thomas stated that "federal Indian law is at odds with itself" and called upon the Court to "examine more critically our tribal sovereignty case law."[72] He stated that he does "not necessarily agree that the tribes have any residual inherent sovereignty,"[73] a view which if adopted by the Court could significantly impact the political/racial distinction established in *Mancari*. ⊙

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Endnotes

[1]*Carcieri v. Salazar*, 555 U.S. 379 (2009)

[2]*Id.*

[3]*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. __ (2012).

[4]*Morton v. Mancari*, 417 U.S. 535 (1974).

[5]*Id*. at 555.

[6]Mountain States Legal Foundation, *Mission*, www.mountainstateslegal.org/mission.cfm (last visited Jan. 22, 2013).

[7]*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

[8]*National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. __ (2012).

[9]Response of Guardian Ad Litem in Support of Petition for Writ of Certiorari, *Adoptive Couple v. Baby Girl*, No. 12-399, 2012 WL 5209997(Oct. 22, 2012).

[10]*KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012).

[11]Steve Decosta, *Lawyers for Developer KG Urban Believe They Will Prevail in Bid to Throw Out State's Casino Guidelines*, SouthCoastToday.com (June 24, 2012), www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20120624/NEWS/206240335/-1/NEWS06.

[12]*Mancari*, 417 U.S. at 553-55.

[13]*Id.* at 552.

[14]*Id*. at 554.

[15]*Id*. at 554-55.

[16]*Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

[17]*Id*. at 480.

[18]*United States v. Antelope*, 430 U.S. 641 (1977).

[19]*Id*. at 645.

[20]*Id*. at 646.

[21]*Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977).

[22]*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979).

[23]*United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 n.28 (1980).

[24]*E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 791 (1991) (Blackmun, J. dissenting).

[25]*Rice v. Cayetano*, 528 U.S. 495 (2000).

[26]*Id*. at 520.

[27]*Id*. at 519.

[28]*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

[29]*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[30]*Metro Broad., Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990).

[31]*Adarand*, 515 U.S. at 227.

[32]*Id*. at 205.

[33]*Id*. at 244-45.

[34]*Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

[35]*Id*. at 664-65.

[36]*Id*. at 665 (internal citations and quotations omitted).

[37]*Id*. at 665 n.8.

[38]Petition for Writ of Certiorari, *Kawerak Reindeer Herders Ass'n v. Babbitt*, No. 97-1280, 1998 WL 34112444 (Feb. 5, 1998).

[39]*Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003).

[40]*Id*. at 734.

[41]Petition for Writ of Certiorari, *Artichoke Joe's California Grand Casino v. Norton*, No. 03-1602, 2004 WL 1204498, at *9 (May 27, 2004).

[42]*Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

[43]*Id*. at 932.

[44]Petition for Writ of Certiorari, *Means v. Navajo Nation*, No. 05-1614, 2006 WL 1696525, at *10 (June 16, 2006).

[45]*Id*. at *12.

[46]*Id*. at *14.

[47]*U.S. Air Tour Ass'n v. Federal Aviation Admin.*, 298 F.3d 997 (D.C. Cir. 2002).

[48]*Agostini v. Felton*, 521 U.S. 203, 237 (1997).

[49]*U.S. Air Tour Ass'n*, 298 F.3d at 228 n.8.

[50]Motion for Leave to File Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioners, *Morris v. Tanner*, No. 05-1285, 2006 WL 1635660, at *3 (June 9, 2006).

[51]*Id*. at *13.

[52]*Id*. at **15-16.

[53]*Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Haw.*, 177 P.3d 884 (Haw. 2008).

[54]Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioners, *Hawaii v. Office of Hawaiian Affairs*, No. 07-1372, 2008 WL 5249238, at *3 (Dec. 11, 2008).

[55]*Id*. at *18. *See also id*. at **6-7.

[56]*Id*. at *19.

[57]*Id*. at **23-24.

[58]*Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

[59]*Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *cert. granted*, No. 12-399 (Jan. 4, 2012).

[60]Response of Guardian Ad Litem in Support of Petition for Writ of Certiorari, *Adoptive Couple v. Baby Girl*, No. 12-399, 2012 WL 5209997, at *10 (Oct. 22, 2012).

[61]*Id*. at *11.

[62]*Id*. at *12.

[63]*KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012).

[64]*KG Urban Enters., LLC v. Patrick*, 839 F. Supp. 2d 388 (D. Mass. 2012).

[65]*Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 500-01 (1979).

[66]*KG Urban Enters.*, 839 F. Supp. at 407.

[67]*Id*.

[68]*Id*. at 404.

[69]*KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 19 (1st Cir. 2012).

[70]*Id*. at 24.

[71]*KG Urban Enters.*, 839 F. Supp. 2d at 403.

[72]*United States v. Lara*, 541 U.S. 193, 223, 226 (2004).

[73]*Id*. at 224.