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Blood Quantum, Race, and Identity in Indian Country

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1. Introduction

Throughout the history of our country, different levels of “blood quantum” have been required to achieve different levels of status – one drop here, one-half there, and so on. In this way, “[o]ur propensity to sort people into categories has, over the course of history, contributed to immense human suffering.” Depending on the group, its political clout, and the monetary resources at stake, different lines are drawn around or through a group, and only enough “blood” will get you across those different lines. For example, one drop of “black” blood (aka anyone black in your family tree) was enough to make you a member of the “negro” group. However, it took anywhere from one-fourth to one-half “Indian” blood (an Indian parent or a grandparent) to get you into the “Indian” group. In this way, blood quantum has been used to define the boundaries of groups throughout our history.

A closer examination of the history of Indian blood quantum shows, however, that sometimes this boundary drawing was completely arbitrary, based on nothing more than an individual’s appearance. Sometimes the determination of insider/outsider status was also based on the property interest of the powerful class (read: whites). Despite the dubious history of blood quantification, however, the mechanism is still used today by many Indian tribes to determine insider or outsider status. Blood quantum has been adopted by the tribes to determine,

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3 Gross, supra note 1, at 153-160.
4 Id. at 44.
5 Id. at 153-160.
for their own purposes, who is considered an Indian and who is not. Thus, blood quantum has been used by tribes to decide tribal membership.

Adoption of blood quantum rules by Indians themselves would be troubling enough, given the imperial and arbitrary history of their early implementation by the U.S. government. What is even more troubling, however, is that even today, blood quantum is used to determine who gets valuable resources – land, money, and preference. Those who are determined, by their blood quantum, to be “Indian” enough are given rights to land, natural recourses, per capita payments, and a number of other valuable assets.

In the United States, however, we have developed a very strong belief in equal protection: no one should be deprived of anything, or get anything extra, based only on the color of their skin, their racial heritage, or their affiliation with a certain group. We take this equality very seriously; people died to make sure that could happen. And yet, Indian tribes today are determining that one tribal member gets a certain amount of government money because they have the right “blood quantum,” while depriving someone who does not have that same “blood quantum” of getting an equal amount of money. To many people, tribal members or otherwise, this determination seems suspect. Given the history of our country, and our tradition of equal protection, should we be suspect of any rule that gives an individual anything on the basis of race alone?

The United States Supreme Court has said, however, that “Indian” is not a racial category. It has determined that Indian blood quantum is a political, rather than a racial determination, and therefore no one is getting anything extra, or being denied anything, based on their race. The Court has carved out Indian blood quantum rules from regular equal protection

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analysis, and created a troubling legal fiction. By insisting that “Indians” are political, rather than racial beings, the Court ignores both the history and the reality of tribal membership.

This paper argues that this legal fiction is not only absurd, but harmful to Indian interests. Blood quantum is a suspect classification that should be subject to normal equal protection analysis. Part Two of this paper discusses the intellectual concept of “blood quantum” and defines it in the abstract. This discussion and definition show how easily blood quantum rules can be used as arbitrary political tools. Part Three puts this abstract definition into actual historical contexts and shows how Indian blood quantum rules came to exist. The history shows that the rules were based on a disturbing historical precedent, and implemented by the U.S. government with the specific intention of limiting the number of “Indians” who were eligible for land grants. The history also makes it clear that who was determined “Indian” and who was not was the product of a split-second, racial determination by random government officials during a chaotic enrollment process. Part Four shows how, despite the dubious history of blood quantum rules, tribes have increasingly used them to determine tribal membership. Part Five discusses how the U.S. Supreme Court continues to insist that “Indian” is not a racial category, but a political one. The section explains why, in the light of the history and the practical use of blood quantum by tribes today, this is a complete legal fiction.

Part Six discusses why the continued use of blood quantum rules should matter, based on an equal protection analysis. The section explains that maintaining a legal fiction (that “Indian” is not a racial category), actually harms Indian interests, and promotes racism rather than understanding. While blood quantum rules are racial, and should be subject to strict scrutiny, this section also discusses arguments that could be used to overcome that judicial hurdle. The conclusion, in Part Seven, reiterates that discussion about Indian identity, and the benefits or
preferences that one can receive as an Indian, should be candidly one of racial distinction. This discussion should also include a justification of policies specifically tailored to advance a compelling tribal and governmental interest in maintaining a trust relationship and righting historical wrongs. If that conversation can occur openly, the racist idea that Indians get special treatment or something for nothing, is addressed head on, and justified through recognizable equal protection standards. This is a far more productive discussion than side-stepping the issue entirely and pretending that race is not a factor in the equation.

2. What is Blood Quantum?

Blood quantum is a measurement of someone’s heritage. It is an artificial approximation of ancestry that people use to determine insider or outsider status. Hypothetically, your “blood quantum” will correspond to your parentage. If you have one parent from group A and another parent from group B, then you will have a blood quantum level of one-half in both group A and group B. Your status of one-half both group A and group B does not guarantee you entry into either group, however. Depending on the rules of each group, one-half blood quantum may be enough to make you an insider in group A, but not in group B, as B may only recognize full bloods as true insiders in the B group. Your blood quantum levels therefore determine whether you are considered an insider or an outsider according to the group. It is important to note, also, that this determination is made by others, without regard to how you may identify yourself.

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7 Kirsty Gover, *Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, and the United States*, 35 LAW & SOC. INQUIRY 689, 6-7 (2010).

8 Here is an illustration of the concept:
As this example illustrates, the blood quantum determination is both artificial and not artificial at the same time. On the one hand, it is artificial because, unless the blood quantum rules actually correspond to DNA heritage, it would be impossible to test someone’s blood and determine that they are half-A and half-B. If the definition of the groups can change – today you are an A if you have half of full-blood, but tomorrow you are only an A if you have one-thirty-second or more of A blood – then there is no fixed way to measure someone’s actual level of affiliation with the group. Who is an A may be defined by where you live, or what political party you belong to. Sometimes one may be an insider and sometime an outsider, depending on the definition of the group, and so “ancestry” for the purpose of the term is always fluctuating.

On the other hand, however, the term is tied to actual, biological parentage, and so it can only fluctuate so much, and is therefore not entirely artificial. Even though the boundaries of the groups may be artificially drawn at any time, you cannot change who your parents are. That is what makes it blood quantum, as opposed to just quantum. No matter how the lines were drawn, who your parents and grandparents are determines what side of the line you are on – insider or outsider. But even this basis in blood and heritage poses problems because “[q]uestions of ancestry raise many difficult issues. Our DNA connects everyone to everyone else after a couple of thousand years, so determining who is an ancestor of whom is far from straightforward.”

Additionally, “[i]f ancestry is associated with genes, a homeland, or a culture, who has the right to claim ownership of the past?” The semi-artificial nature of blood quantum rules thus allows a group to draw boundary lines to include or exclude certain individuals. This line-drawing and definition-changing can be done to preserve resources, promote certain individuals over others, or change the political landscape of the group (much like gerrymandering). Blood quantum,

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9 Olson, supra note 2, at 195.
10 Id.
then, is an excellent political tool for controlling a certain population. The practical implications of this become apparent when we look at the actual history of Indian blood quantum rules.

3. **The History of Blood Quantum**

   A. *Early Integration*

   In the early history of America, just after colonization, Indians enjoyed a good deal of interracial integration. Professor Gross explains, “[t]he early colonies functioned without clear definitions of race – and they likewise featured a great deal of racial mixing.” Indians, Africans, and English worked alongside one another, and it was not until the mid-eighteenth century that clear racial distinctions began to form around the issue of African slavery. As a result of working together, “[n]ot only did Indians, Africans, and English servants form political alliances, but they also married and bore children.” Most states did not pass laws against interracial marriage between whites, blacks, and Indians until the late eighteenth century. By the middle of that century, therefore, a “significant number of people, slave and free, traced their roots to both Indian and African ancestors.”

   This interracial marriage and procreation led to a number of social enclaves, especially in the Appalachians, where blacks, Indians, and whites became so intermixed as to defy any single racial identity. Groups like the Malungeon, of Hancock County, Tennessee, defied every attempt by the courts or society to classify their heritage as either white, “negro,” or Indian.

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11 *Gross, supra* note 1, at 17.
12 *Id.* at back cover (“John B. and Alice R. Sharp Professor of Law and History, University of Southern California.”).
13 *Id.* at 17.
14 *Id.*
15 *Id.* at 18.
16 *Id.*
17 *Id.*
18 *Id.* at 111-139.
19 *Id.* at 63-72.
Similarly, a group called the “creoles” successfully defied the Alabama Supreme Court’s attempt to disentangle their racial heritage. The object of a prosecution for living with a white woman, a man named Reed claimed that his grandmother “was mixed Indian and white,” rather than “negro.” The prosecutor in the case, however, claimed that Reed’s grandmother was black. The court found, however, that neither was true, and instead that “much of the neighbors’ testimony suggested that the woman had associated with neither blacks nor whites but as part of a racially ambiguous community.”

The Black Seminoles of Florida are another example of such an integrated community. The “Seminole Nation did not exist before contact with Europeans; it is rather the result of the political, social, and sexual mingling of Indians and Africans in colonial Florida, beginning in the late seventieth century.” Sometimes on the boarders of society, and sometimes right in its midst, the interracial marriage between whites, blacks, and Indians was not only allowed, but was sometimes even looked at “approvingly, without necessarily casting doubt on the political sovereignty or cultural integrity of the Indian nations.” In other words, Indians did not feel that they had to separate themselves from the other races through a quantification of member’s racial heritage. Instead, “racial islands” or “tri-racial communities,” thrived in areas where peaceful coexistence was possible. These interracial communities were not forced to align with one race or nation – Indian, American, or African – until after the Civil War.

20 Id. at 132.
21 Id.
22 Id.
23 Id. at 141-142.
24 Id. at 113.
25 Id. at 132.
26 Id.
B. The Dawes Act, Enrollment, and Allotment

Any such interracial “Edens” were destroyed, however, after the Civil War, when America became obsessed with race and increasingly desirous of racial determination, classification, registration, and segregation. The Dawes Allotment Act of 1887 and the legislation that extended the Dawes policy to Indian Territory in 1898 forced Indians to extricate and distinguish themselves from all other races in order to gain land from the United States government. Henry Dawes, the father of the Act, believed that by giving Indians individual portions of land, he could transform them into proper U.S. citizens. Before allotment could begin, however, “the government had to decide who should receive allotments, which it did by compiling rolls of names,” known as the Dawes Rolls.

These rolls sought to distinguish Indians, who would receive land allotments, from “negros,” “freedmen,” and whites, who would not. Indians were thus forced to separate themselves from any other race and “individual Indians were forced to take their places in the U.S. racial hierarchy.” Because the receipt of land under the Dawes Act was predicated on an individual’s status as an Indian, classification as an Indian – rather than as any other race – was essential. Any relationship to other races – any African or white heritage or any non-Indian blood – would need to be minimized if an individual was to gain a land allotment. The Dawes rolls thus “extended the concept of blood quantum to Indian tribes for the first time, and soon afterwards, new laws tied the ability to sell and control land to a person’s blood quantum.” The separation of Indians was thus encouraged, and the interracial marriages and tri-racial

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27 Id. at 140-141.
28 Id. at 141
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
communities that thrived before allotment were discouraged. This was done through official
government policy, whether intentional or not. Indians were therefore encouraged to separate
and segregate themselves racially, even though the Dawes Act intended to end the official
separation of Indians on reservations.\textsuperscript{34}

The U.S. government also had no incentive to settle questionable cases in favor of Indian
heritage, as that would require the output of more land. As Darius Lee Smith\textsuperscript{35} explained, the
policy for determining who was an Indian was directly opposite to the process that was used to
determine status as a “negro.”\textsuperscript{36} The “‘one drop of blood rule’ racialized African Americans,
perpetuated their slave status, and, after the passage of the Fourteenth Amendment, facilitated
their second class citizenship.”\textsuperscript{37} In contrast, one-half or one-fourth “Indian” blood was needed
to gain status as an Indian.\textsuperscript{38} Therefore, whereas even “one drop” of African blood made
someone a “negro,” and increased the likelihood that the individual would become ownable
property or have diminished rights, much more Indian blood was needed to gain the benefits of
land allotment and per-capita payments.\textsuperscript{39} In other words, when the white populous could gain
property by blood quantum rules, less blood quantum was needed, but when the white population
stood to lose property, more blood quantum was needed.\textsuperscript{40} Thus, the different policies mirrored
the economic realities of racial classification – more slaves for whites and less land given away
to Indians.\textsuperscript{41} The introduction of blood quantum requirements under the Dawes Act therefore

\textsuperscript{34}Id.
\textsuperscript{35}Darius Lee Smith, presentation to the Jurisdiction in Indian Country class,10/6/2010, notes on file with the author.
\textsuperscript{36}Id.
\textsuperscript{38}Id. at 803.
\textsuperscript{39}Darius Lee Smith, Presentation to the Jurisdiction in Indian Country class, 10/6/2010, notes on file with the
author.
\textsuperscript{40}Id.
\textsuperscript{41}Id.
served not only to isolate and segregate Indians, but also served to limit the number of official “Indians” there were for the purpose of land allotment.

The Dawes Commission, created to implement the Dawes Act by creating rolls of those eligible for land allotment, was charged with separating “Indians by blood,” from “freedmen,” and “negros.”42 “Freedmen” were those individuals with any black blood.43 Those designated as “freedmen” were usually a mixture of black, white, and Indian heritage, created by the intermingling of the races before the Civil War.44 These individuals, because of their mixed-blood and slightly-elevated status, were distinguished from “darkies” or “negros,” who constituted the group of recently-freed slaves.45 Many of these ex-slaves had migrated to Indian Territory after the Civil War, to escape the Jim Crow laws and share-cropping in the South, and to set up homesteads and establish themselves as free men.46 Because of their lack of any Indian blood, these individuals were systematically excluded from Indian land allotment, but even the “freedmen” were not considered “Indian” enough to be given land under the Dawes Act. It was therefore only those who made it onto the Dawes Commission’s “Indians by blood” list who were eligible to receive land from the government.47

In addition to these underlying policies and categories, the methods that the Dawes Commission used to classify Indians were dubious. After the Commission was formed, it “traveled with a caravan, pitching a small tent city of three commissioners, a stenographer, a translator, and several secretaries.”48 In every town, the Commission would then attempt to employ a local tribal member for translation, but they would often not be able to find one, and so

42 Gross, supra note 1, at 153.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id. at 153-177.
48 Id. at 155.
would go without any translator at all. After it had set up shop, the Commission was ready to start categorizing. Several memoirs recount the processes and “[b]oth officials and applicants painted a picture of considerable chaos at enrollment sites.” The main sorting process involved herding people into different tents, where their names would be recorded on lists. There were “two tents: one known as the ‘Indian tent’ and one known as the ‘nigger tent’ or ‘darky tent.’”

Once inside a tent, the stenographer would record an individual’s name, age, sex, and names of family members on a “field or census card.” Based on the card’s information, in addition to the experience of the interviewers (what they saw, heard, or thought about the individual), and the presence of the individual’s name on a prior tribal roll, the census cards were marked and divided according to the likelihood that the individual on the card was an Indian for allotment purposes. There were “‘Straight cards,’ for individuals who appeared on earlier tribal rolls, and ‘Doubtful’ or ‘D’ cards for those who did not.” Needless to say, very few applicants whose cards were marked “D” were ever considered Indian enough to receive citizenship and a land allotment.

The real problem with the Dawes Commission’s process, however, was that very few decisions were actually made inside the tents, when the relevant information was received. Instead, “[o]nce an individual ended up in one tent or the other, it was assumed that his or her identity was already fixed; the true determination happened outside the tents.” Therefore, the individuals guarding the doors to the different tents, or directing traffic to them, were really the

49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
ones responsible for making the determination that one person was an Indian an another person was not. Sometimes it would be a tribal member standing at the door, directing individuals to one tent or another based on his or her knowledge of the applicant’s family or status in the community. \(^{58}\) Sometimes, however, there was not even a tribal member with personal knowledge of the applicants to discern for the Commission who was an Indian and who was not. \(^{59}\)

Professor Gross relates the story of Rebecca Williams, a woman who claimed she was a “mixed-blood” Indian and wanted to be registered by the Commission as a Choctaw Indian by blood. \(^{60}\) When Williams went down to the Commission’s tent city, however, she was met with two of the Commission’s officials, which she called the “leading men.” \(^{61}\) Williams explained that she “didn’t want to go in with the negroes and then one of them [the officials] almost forced me to go.” \(^{62}\) There ensued a disagreement in which Williams attempted to go into the “Indian” tent and one of the officials started insulting her:

> I asked Linton Tell what was going on in that tent. He says “Enrolling.” And I says “What is going on in that tent?” and he says “Enrolling.” I ask him about several tents and then I says “What about that tent” and he says “The niggers,” and then I asked him about another tent and he said “Indians.” I started to go there but Mr. Linton Tell stopped me. We got into a little fuss. He spoke very insulting to me, told me that was the place for me, among the negros. I told him that wasn’t… He says to me “You are nothing but a negro.” \(^{63}\)

For Williams, then, the decision about whether she was enrolled as an “Indian” or a “nigger” was made outside the enrollment tent. The decision was made with no information – no family background, no testimony about community ties, no tribal input, and no reference to her self-

\(^{58}\) Id. 
\(^{59}\) Id. 
\(^{60}\) Id. at 156-157. 
\(^{61}\) Id. at 156. 
\(^{62}\) Id. 
\(^{63}\) Id. at 156.
definition. Instead, the decision was made by a government official, in a split second, based only on the way she looked.

Despite the questionable process used by the Dawes Commission, its influence has been lasting. From the mid-twentieth century until the present, blood quantum has become more and more important for both tribes and individual Indians as a way of determining Indian identity.64 And, for many tribes, blood quantum is still determined by an individual’s proximity to the original Dawes rolls, created by the Commission. Thus, “[f]rom the moment the Dawes Rolls were created, people who wished to identify as Indian had to trace their lineage back to those rolls to prove citizenship” in many Indian tribes.65 The tribes have, therefore, adopted the process used by the Dawes Commission as their own, using it to define their tribal heritage. They are now basing their Indian identity on a split-second, superficial, racial decision of a government official.

Thus, instead of self-definition, “the determination made in a dusty tent by ill-informed white officials… during a few hectic months in the early twentieth century determines whether today an Indian Certificate of Degree of Indian Blood card reads ‘1/32’ or ‘3/64’…numbers that might determine whether the cardholder can vote in Indian elections or qualify for government aid.”66 Many current definitions of blood quantum, therefore, are not based on any political affiliation with a tribe, but rather on a racial categorization, based on post-civil war stereotypes and external appearance.

C. Exclusion

After Indians were forced to distinguish themselves, through enrollment and allotment, from all other racial, ethnic, or political groups, tribes became more and more

64 Id. at 177.
65 Id.
66 Id.
exclusive.\textsuperscript{67} The pre-civil war era of intermixing was over. Tribes began working to ensure that those who had chosen to intermarry and mix blood were not allowed to share in the federal distributions of land or money.\textsuperscript{68} In this way “segregated allotment drove a wedge between people who had previously been united in various ways.”\textsuperscript{69}

Some tribes even used the federal courts to prevent “freedmen,” or those of mixed Indian, African, and European blood from gaining status as Indians.\textsuperscript{70} Every time the Black Cherokees or the Black Seminoles took a census of freedmen, other tribal members would initiate a suit in federal court to try and recover payments made by the United States to the freedmen, alleging that they were not legitimate tribal members.\textsuperscript{71} As recently as 1983, “freedmen whose names appeared on the Dawes Rolls” as less than full blood were “turned away from a tribal election as ineligible to vote.”\textsuperscript{72}

Part of the “wedge” that was driven between Indians and those with mixed blood stemmed from the fact that many tribes believed the amount of federal subsidies and land allotments were limited.\textsuperscript{73} For the Cherokees, “although Cherokee citizens would receive all 160 acres regardless of how many people applied (with the remainder sold as ‘surplus’), Cherokees were convinced by the per capita payments of the late nineteenth century that the pie was finite, and that more freedmen citizens meant less to go around.”\textsuperscript{74} The tribe’s attempts to exclude anyone who had not been enrolled as a full-blood tribal member (however dubious that

\textsuperscript{67} Id. at 169.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 169-177.
\textsuperscript{71} Id. at 169-171.
\textsuperscript{72} Id. at 171.
\textsuperscript{73} Id. at 155.
\textsuperscript{74} Id.
enrollment process may have been) was thus directly tied to the tribe’s desire to limit the division of federally supplied land and money.

Just as the government’s interest had been in limiting the number of federally recognized “Indians,” for the purposes of allotment, so to the tribes had an interest in limiting the number of tribally recognized “Indians.” Everyone had a desire to limit the output of resources, so now everyone had an interest in limiting the number of “Indians.” Even the tribes benefitted from a narrow definition of Indian, based on the arbitrary but extremely limited Dawes Rolls, and on a blood quantum requirement drawn from those rolls. If the tribes could limit their enrollment, each per-capita payment or land allotment would (hypothetically) be larger for already existing tribal members. Therefore, the system inherently encouraged limited, exclusionary views of who was an Indian and who was not.

Although there may have been pressure to limit the number of federally recognized “Indians,” the determination of who was an Indian and who was not did not grow out of a political affiliation. Because the Dawes Rolls were made out of spilt-second and largely racial determinations, they did not recognize an individual as a Crow, Choctaw, or Seminole. Instead, you were either an Indian or you were not. (Perhaps you were a freedman, perhaps a white, or perhaps some mixed-blood that could not be disentangled.) In this way, “the federal conception of Indianess” made “no distinction between tribes as the source of Indian blood.”75 Instead, the federal government “position[ed] Indians as a racial (albeit tribally organized) population.”76 This is evident not only from the binary classification of Indianess (Indian or non-Indian), but also from the way the decisions were made. As Rebecca Williams’ story proves, the decisions were based on a momentary, racial determination of who looked like an “Indian” and who did

75 Gover, supra note 6, at 9.
76 Id.
not. For the purposes of the Dawes Rolls, then, an Indian was not a political entity, but a racial category. Thus, “blood quantum rules had the double effect of not only racializing American Indians but also undercutting their right of sovereignty, including their property rights.”

4. How Blood Quantum is Used Today

Today, even after allotment has been abandoned as a policy, tribes still receive land and money from the United States government. More importantly, tribes determine how to distribute these goods based on tribal enrollment. If you are not a member of the tribe, you cannot receive a tribal per-capita payment. In this way, “[t]he channeling of resources to tribes . . . encourages applications for tribal membership and raises the relative costs of non-membership.”

Additionally, “because of these new incentives, there is a growing interest in the first-order question of tribal self-governance: Who are the members of tribes, and how are they chosen?”

Finally, since the resources are inevitably limited, there continues to be a financial and political pressure to limit tribal membership. This pressure does not come just from outside the tribe, or from those who are distributing the resources (i.e. the U.S. government). There is also pressure from current tribal members to limit the number of tribal insiders. Because resources are limited, each individual stands to gain by refusing to allow more individuals into the group. In other words, the fewer tribal members there are, the larger each member’s slice of the limited pie will be. For this reason, there are both more people who want to gain membership to the tribe, and more members who want to ensure that they do not. The linking of resources directly to blood quantum thus raises the importance of blood quantum as both a financial and a political issue.

Despite the apparent problems, decent – judged by blood quantum – has a dominant role in tribal membership regimes today. One study of 586 tribes in New Zealand, Australia, Canada,

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77 Villazor, supra note 34, at 4.
78 Id.
79 Id.
and the United States found that “[t]here can be no doubt that descent is the popular organizing principle of tribal membership.”\textsuperscript{80} The study found, however, that tribes in the United States and Canada used blood quantum to define membership much more readily than tribes in any other area.\textsuperscript{81} Indeed, there has even been an increase in “the tribal use of blood quantum rules over time, from 44 percent of pre-1941 constitutions to 70 percent today.”\textsuperscript{82} Of those tribes that used blood quantum requirements to define membership, “the most frequently used blood quantum is one-fourth” Indian blood.\textsuperscript{83}

About 88 percent of tribes in the United States “define descent by reference to a base roll.”\textsuperscript{84} This means that, of all the tribes in the United States that require a certain blood quantum level for membership, most of those tribes also determine blood quantum based on decedents from an original tribal roll. Therefore, if you are not somehow related (usually fairly closely) to someone on the original tribal roll, then you cannot be recognized as a member of the tribe. Of the tribal rolls that are used, “[h]istorical federal census rolls are by far the most frequently occurring.”\textsuperscript{85} In this way, the Dawes Rolls, created by the federal government as a way of taking a census of the “Indians” eligible for allotment, are still the primary source used by tribes in the United States to determine blood quantum and the resulting tribal membership.\textsuperscript{86} To become a member in most tribes, then, you have to have a direct, blood relationship (for example one-half or one-fourth blood quantum) to someone that a federal government official considered “Indian” enough to get into the Indian tent, and be placed on the “Indian” roll. As Rebecca Williams’ testimony showed, this was often split-second, racial determination, made outside a dusty tent,

\textsuperscript{80} Id. at 3-5.
\textsuperscript{81} Id. at 8.
\textsuperscript{82} Id. at 9.
\textsuperscript{83} Id. at 8.
\textsuperscript{84} Id. at 11.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
based only on an individual’s appearance. And yet, most tribes today still base their membership criterion on that decision. Thus, most tribes have membership requirements that are racial in nature – requiring an individual to be related to someone who (racially) looked like an Indian.

5. The Supreme Court’s View

Despite the apparent racial nature of the Dawes Rolls, and the blood quantum membership requirements that derive from them, the Supreme Court has been reluctant to recognize that “Indian” is a racial category.87

Since 1974 the Supreme Court has decided five equal protection cases concerning Indians, covering challenges to federal Indian hiring preferences, a criminal conviction of an Indian in federal court, the distribution of an Indian claims award, the preemption of state jurisdiction in an Indian adoption proceeding, and a state criminal and civil jurisdiction scheme on reservation land. All of these equal protection challenges were rejected.88

Instead, the Court continually maintains that any preference or special treatment of Indians is “not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes . . . In this sense, the preference is political rather than racial in nature.”89 The Court has thus tried to insist, for example, that a BIA policy that “[a]n Indian has

87 Mancari, 417 U.S. at 535. See also Fisher v. District Court, 424 U.S. 382, 390 (1976) “In summarily rejecting the equal protection challenge, the court noted that the ‘exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.’”; Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) (Disbursements of federal funds to some and not others is “significant in that it demonstrates that the Court will not summarily dismiss equal protection challenges to federal Indian legislation even when the legislation is in an area in which Congress constitutional power with respect to Indians is greatest.”); United States v. Antelope, 430 U.S. 641 (1977) (Indians tried in federal court versus state court for murder – different standards of proof for murder in each – Indians claimed “discrimination because of the racially based disparity of governmental standard of proof” but court said not outside Mancari even though the law worked to the disadvantage of Indians, it was tied to the unique obligation of the federal government to Indians); Rice v. Cayetano, 528 U.S. 495, 499 (2000) (Voting right for a Native Hawaiian relation branch of the government limited to native Hawaiian was subject to strict scrutiny and found unconstitutional); Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995); Williams v. Babbitt, 115 F.3d 657, 664 (9th Cir. 1997); Malabed v. North Slope Burough, 42 F. Supp.2d. 927 (1999).
89 Mancari, 417 U.S. at note 24.
preference in appointment to the Bureau” is not aimed at promoting a racial class, but a political one.\textsuperscript{90} The Court relies on the fact that, in order to be an “Indian” for the purpose of preferential treatment under such a policy, the individual must be “a member of a Federally-recognized tribe.”\textsuperscript{91} According to the Court, the federal recognition of a tribe is a political construct, and “operates to exclude many individuals who are racially to be classified as ‘Indians.’”\textsuperscript{92} Thus, for the Court, membership in a tribe was a political affiliation (rather like citizenship in the United States) instead of a racial identity.

Not once, however, has the Court discussed the history of the Dawes Act, the racial nature of the Dawes Rolls, or the basis of tribal blood quantum requirements. Instead, in Mancari, the Court completely ignored the portion of the BIA hiring policy that defined an Indian as “an individual [who] must be one-fourth or more degree Indian blood.” The Court thus side-stepped the problem of blood quantum requirements and ignored the possibility that such a blood-based measurements could be racial rather than political in nature. The Court focused entirely on the “federally recognized tribe” membership requirement that formed the second-half of the BIA’s definition of an “Indian” who would receive hiring preference. It was on that definition alone that the Court justified a concept of political, rather than racial distinction. Thus, it was only by ignoring and entire half of the BIA’s definition of “Indian” in Mancari that the Court was able to construct a political “Indian” identity rather than a racial one.

But even if we were to focus only on that “federally recognized tribe” requirement, as the Court did, there is still a vast quantity of evidence that membership in such a tribe is race-based. Because most tribes today base their membership on blood quantum requirements, and those requirements in turn trace their roots back to the Dawes Rolls, membership in most tribes today

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
\end{itemize}
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is dependent on one government official’s split-second, racial determination of who looked like an “Indian” and who did not. As previously discussed, when those Dawes Rolls were made, the government was not determining who was a Blackfoot and who was a Cherokee, but rather who was an Indian and who was not – a racial distinction.\textsuperscript{93} For federal Indian policy, “descent from a pre-contract society appears as racial difference, with the result that descent-based membership rules appear as race-based exclusion.”\textsuperscript{94} And, since the tribes today require a certain amount of blood relation to those who were determined to be “Indian” by the Dawes Rolls, membership in a tribe today is based on a racial distinction.

It is true that recently some tribes have started to distinguish between “Indian blood” and “Tribal blood,” requiring that tribal members trace their heritage back to member of a particular tribe, rather than anyone of Indian decent.\textsuperscript{95} Today, about one-third of tribes “reject Indianess in favor of a more tribally focused measure.”\textsuperscript{96} This means that, rather than requiring a quantum of Indian blood, gained from any tribe, tribal membership is based on an individual’s connections to the specific tribe where membership is sought. However, “just over two-thirds of tribes with \textit{tribe-specific} blood rules” still require at least “a one-forth quantum” of Indian (rather than tribal) blood.\textsuperscript{97} In other words, one-sixteenth blood quantum may be enough to get over the tribal blood hurdle to membership, but if you are not at least one-fourth “Indian” of some kind (perhaps pan-Indian or from another tribe), then you will still be barred from membership in the tribe. Additionally, that one-fourth Indian” blood quantum is most often measured in relation to

\textsuperscript{93} Glover, \textit{supra} note 6, at 9.
\textsuperscript{95} Glover, \textit{supra} note 6, at 9.
\textsuperscript{96} \textit{Id.} at 8.
\textsuperscript{97} \textit{Id.} at 8-9 (emphasis in original).
the Dawes Rolls. Thus, even tribes that have begun to identify themselves and their membership as political – tribal – entities are still clinging to the Dawes Commission’s racial distinction between Indians and non-Indians. No matter your connection to a tribe, if you are not “Indian” enough to pass inspection, you cannot be a tribal member.

For these reasons, membership in an Indian tribe today is not a political affiliation, as the Supreme Court wants to believe. Instead, it is a racial identification based not only on the biases of long-dead federal administrators, but also on tribes’ own racial preferences. You cannot be a member of a “federally recognized” Indian tribe today unless you possess some (usually one-fourth) Indian blood quantum. That means that you cannot be recognized as an Indian by Indians themselves (even the “federally recognized” ones) unless you are closely related to someone who racially resembled an Indian. Thus, membership in a “federally recognized” tribe is not a political affiliation, but a racial identification. Any insistence, by the Supreme Court or otherwise, that tribal membership is not race-based is, therefore, a legal fiction. It is clear from the history of blood quantum rules, and their use by tribes today, that they are intended to maintain a distinction between those who are racially “Indian” and those who are not.

6. Analysis and Arguments: Why It Matters

A. Side-Stepping Equal Protection Analysis Promotes Racism

If tribal membership, based on blood quantum, is a racial distinction, then it should be subject to equal protection analysis and strict scrutiny. This is because every racial classification since the conception of equal protection has been subjected to strict scrutiny:

Government action dividing people by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility, reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin, and endorse race-based reasoning.

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98 Id.
and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.\textsuperscript{99}

Because so much of our history revolves around race-based categorization, ignoring a classification that looks, walks, and talks like a racial distinction opens deep wounds in our national psyche and promotes anger and hatred towards the racially-privileged group.

Historically, distinctions between Indians and non-Indians was clearly a racial issue. Indians “have been denied the right to vote, attend schools with or marry whites, eat at restaurants, stay at hotels, or get jobs because of their race.”\textsuperscript{100} Additionally “[l]ike African Americans, native people have been lynched, raped, and had their homes burnt out from under them because of their race.”\textsuperscript{101} This history makes it impossible to deny that “racism has been a persistent factor in Indian policy since very early in European American-American Indian relations.”\textsuperscript{102}

The difference between prior Indian policy and the post-1970 “self determination era”\textsuperscript{103} in which we currently find ourselves is that now, rather than being persecuted for their skin color, Indians receive benefits intended to assist their tribal governance capacities and restore their asset base.\textsuperscript{104} As far as the layman’s experience, this means that Indians are receiving something based on their race, rather than having something taken away. This has resulted in a great deal of hard feelings between Indians and non-Indians. When Indians asserted the right to be free of state fishing regulations, “[t]he Northwestern bumper sticker ‘Can an Indian, Save a Salmon’ in the Midwest became signs saying ‘Spear an Indian: save a walleye’ or even ‘Spear a

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Gover, \textit{supra note} 91, at 21.
\textsuperscript{104} Id.
pregnant squaw, save two walleyes.” Additionally, receiving government subsidies, land, or per-capita payments has goaded protesters into using “a barrage of racial epithets – ‘Tanto,’ ‘Redskin,’ and ‘timber nigger’” as well as “characterization of tribal members as lazy and dependent on government handouts referring to [Indians] as… ‘welfare warriors.’” When tribes protested the use of Indian mascots, for example the “Fighting Sioux” of the University of North Dakota, the racial backlash included “a poster representing Indians as an alcoholic, lazy, and defeated people dependent on government handouts.” On the other side of the coin, tribes that have made use of their gaming privileges are also “accused of being too successful” and characterized as capitalizing on their racial status.

All of these examples show how, despite the Supreme Court’s assurances to the contrary, Indianess is experienced by the general public as a racial category. For this reason, “[m]odern backlash against tribes, which emphasizes the racial composition of Indian tribes and their adherence to insular traditions” is “construed as inferior and unfair.” A society that has committed itself (at least nominally) to equality and equal protection cannot understand how something that is experienced as racial difference can be allowed to continue.

By insisting that Indian identity is political, rather than racial, the Supreme Court is not only creating a legal fiction that runs counter to people’s experience, but is also missing a crucial opportunity to justify and explain that experience. If the Supreme Court were to subject any Indian preference to strict scrutiny, the racial categorization of Indians could not only be admitted, but actually explained to the satisfaction of the populous. Subjecting blood quantum to equal protection analysis means that any benefit, preference, or special right granted to a member

105 Berger, supra note 97, at 649.
106 Id.
107 Id.
108 Id.
109 Id. at 654.
of a federally recognized Indian tribe must be “immediately suspect and must be rigidly scrutinized.” Because the category of “Indian” is a racial classification, any laws distinguishing an individual on that basis should “be sustained only if they are suitably tailored to serve a compelling state interest.” Taking the opportunity to show the public how racial preferences are based on compelling state interests allows the Court an opportunity to undercut and prevent any racial hatred that might otherwise erupt, if the policy is not explained.

B. Arguments That Could Overcome Strict Scrutiny

Many scholars and advocates worry about the effect that this equal protection analysis will have on Indian law. The concern is that if preferential laws promoting the interests of Indians are subjected to strict scrutiny, much of the progress made in Indian Law (towards self determination, higher standards of living, cultural preservation, etc.) will be reversed when the laws and policies are not allowed to pass strict scrutiny, because of their racial basis. It is possible, however, that the advancement of Indian interests could be considered a “compelling state interest,” based on the United States’ special trust relationship with Indian tribes and the “fulfillment of Congress’ unique obligation toward the Indians.” The Mancari court recognized that this special relationship and obligation could foster preferential statutes that were “reasonable and rationally designed to further Indian self-government.” Therefore, it would not be too great of a leap for the Court to recognize that the same statutes were “suitably tailored to a compelling state interest.”

112 Jurisdiction in Indian Country, class discussion following paper presentations, 12/1/2010.
113 Mancari, 417 U.S. at 555.
114 Id. In the Mancari case, rather than making this recognition in the context of equal protection, to overcome strict scrutiny, the Court used it as a reason to avoid the equal protection analysis entirely.
115 Cleburne, 473 U.S. at 440.
The Supreme Court does have a history of discounting affirmative action as a valid use of racial distinction, no matter how well-intentioned the laws or policies are.\textsuperscript{116} In general, statutes that aim to right an historic wrong are not upheld if they are race-based.\textsuperscript{117} This adds fuel to advocates concerns about equal protection and Indian law. In the past, whether a law tried to overcome the history of segregation, or promote the economic and educational opportunities that were available to minorities, the Court consistently refused to allow race to be the distinguishing factor on which a preference was based.\textsuperscript{118} This historical reluctance to uphold affirmative action programs may account for the Court’s refusal to consider Indian preferences in the context of strict scrutiny – the Court may be concerned that it would have to overrule prior affirmative action case law in order to uphold an Indian preferential law. If the Court was unwilling to allow states and cities to give preferential treatment to racial minorities in the wake of slavery and the civil rights movement, it seems unlikely that they will allow Indian preferences in the wake of colonialism, capture, and imperialism.

There is, however, a substantial difference between the affirmative action programs the court has considered to date, and any policies or laws that promote the interests of Indians. Unlike African-Americans, Asian-Americans, or any other racial minority in the United States, Indians can claim sovereign status and a trust relationship with the United States Government. This means that any Indian preference that acts like affirmative action could, instead, be

\footnotetext{116}{See e.g., Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (striking down the University’s affirmative action policy guaranteeing admission to a certain number of racial minorities); Wygant v. Jackson Board of Education, 476 U.S. 297 (1986) (striking down racially preferential layoffs that were intended to facilitate the hiring of minority teachers); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a city policy to hire at least 30% “Minority Based Enterprises” for city contracts); Parents Involved in Community Schools v. Seattle School District No 1; Meredith v. Jefferson Co. Board of Education, 551 U.S. 701 (2007)(striking down student school assignment plans based on race that attempted to reverse the effects of segregation).}

\footnotetext{117}{See e.g., Freeman v. Pitts, 503 U.S. 467 (1992) (“Racial balance is not to be achieved for its own sake.”).}

\footnotetext{118}{Id.}
considered “fulfillment of Congress' unique obligation toward the Indians.”\textsuperscript{119} However, “Congress' unique obligation to Indians,”\textsuperscript{120} could qualify as a “compelling state interest” for the purposes of strict scrutiny.\textsuperscript{121} Therefore, as long as the classification based on racial Indianess was “suitably tailored” to that compelling state interest of upholding “Congress' unique obligation,” then the law or policy could be found acceptable. In this way, the Court would not be constrained by, and would not have to risk overturning, any of its prior anti-affirmative action cases.

Overcoming the equal protection challenge does not lessen the racial nature of membership in an Indian tribe. Rather, in \textit{Korematsu}, the Court explained that although classifications based on a “single racial group are immediately suspect… [t]hat is not to say that all such restrictions are unconstitutional.”\textsuperscript{122} In other words, the Court has recognized that there are instances where singling out a particular racial group for special treatment may be constitutional, as long as it is done “to serve a compelling state interest.”\textsuperscript{123} Since maintaining the “unique” trust relationship and respecting the sovereign status of Indian tribes could be considered a “compelling state interest,” it would not matter that membership in an Indian tribe is a racial categorization. The equal protection challenge can thus be overcome (rather than avoided) by recognizing the legitimate interest the United States has in preserving the sovereign status of tribes and fulfilling its trust obligation toward Indians.

In addition to those considerations, the court could weigh the various reasons given by the tribes (and their advocates) for the continued use of blood quantum requirements. In this analysis the tribe, rather than the United States government, could be considered “the state” that

\textsuperscript{119} \textit{Mancari}, 417 U.S. at 555.  
\textsuperscript{120} \textit{Mancari}, 417 U.S. at 555.  
\textsuperscript{121} \textit{Cleburne}, 473 U.S. at 440.  
\textsuperscript{122} \textit{Korematsu}, 323 U.S. at 216.  
\textsuperscript{123} \textit{Cleburne}, 473 U.S. at 440.
must provide a “compelling interest” for a race-based law or policy. Thus, if the tribe can specifically tailor and justify its race-based membership rules, then the Court might allow preferences based on blood quantum to pass strict scrutiny.

Some of the reasons given for the continued use of blood quantum are as follows: First, in the context of tribes with resources (particularly settlements) to distribute, “blood rules… serve two administrative purposes in the distribution of limited resources.”¹²⁴ Those administrative purposes are to “confirm the link of every applicant [for membership] to the historic community that endured the injustice” and to “exclud[e] some descendants… by using criteria that can be objectively applied across multiple generations.”¹²⁵ In other words, for tribes that receive some benefit (money, land, or preference, for example), that benefit must be evenly distributed among a deserving membership. By ensuring that those who receive membership are somehow (racially) related to the originally harmed individuals, for which the benefit is supposed to compensate, then the tribe can both limit the amount of individuals receiving the benefit (making each individual’s portion greater) and ensure that they do so through as transparent and objective a criterion as possible. Tracing an individual’s lineage back to the Dawes Rolls would therefore guarantee that the individual was, at least partially, related to the originally harmed party.¹²⁶ Thus, a blood quantum rule is specifically tailored to a compelling tribal interest of preserving benefits for those who are direct decedents of the Indians harmed by colonialism, conquest, movement to reservations, termination, and other harmful policies implemented by the United States government.

¹²⁴ Gover, supra note 90, at 23.
¹²⁵ Id.
¹²⁶ Because the Dawes Rolls were part of the termination policy, which eliminated reservations and resulted in even greater economic disadvantages for Indians. Gover, supra note 91, at 21.
A second reason given by tribes for the use of blood quantum rules is the need to distinguish one tribe from another. This justification can be used only for blood quantum rules based not on Indian blood, but *tribal* blood. These tribal blood quantum rules are used to “extricate themselves from the pan-Indian category used by the federal government and to reassert themselves as self-contained, self-governing polities.”¹²⁷ When tribes are able to use blood quantum rules to distinguish tribal members from other Indians (one-forth Apache versus one-fourth Navajo) they are able to “transform the concept from a racial to a genealogic one.”¹²⁸ The small increase in the number of tribes using *tribal* blood quantum rules – to about one third of tribes in the United States today¹²⁹ – “indicates that a form of ‘retribalization’ is underway.”¹³⁰ A tribe might, therefore, be able to justify the need to separate their tribal identity (politically, historically, and otherwise) from other Indians, and therefore articulate a compelling need for the race-based blood quantum membership requirement that could overcome strict scrutiny.

Third, tribes could argue that without blood quantum rules, Indian identity – as separate from white, Asian, black, or any other American racial group – would be lost entirely. If Indians are not permitted to maintain a certain racial purity, then the purpose of the reservations, of sovereignty, and of tribal organization will be lost. If non-racial “Indians” are permitted to join tribes and receive the benefits of membership, then dilution will eventually lead to larger and larger tribal communities. In addition to stretching resources to the breaking point, such widespread integration will mean losing any racial, cultural, or historical difference between Indians and non-Indians. Indian identity will be swallowed entirely:

Over-inclusive membership rules could legally transform a tribe from a sovereign political entity to a racial association and release the federal government from its trust

¹²⁷ *Id.* at 24.
¹²⁸ *Id.*
obligations. According to this logic, a tribe's sovereign status could be withdrawn by an act of Congress or federal court on the grounds that the community is no longer sufficiently tribe-like to exercise tribal sovereignty.\textsuperscript{131}

For some, integration may not seem like a bad thing – after all, globalization has taught us that intermixing is inevitable. But for others, the loss of any difference is a tragedy that wipes over history and erases individuality. Wherever you stand on the issue, it is clear that there is at least a good argument, from the tribal perspective, for maintaining blood quantum rules as a means of continuing differentiation. Without the separation between Indian and non-Indian, there is no need for a distinct sovereign nation of Indians, a portion of land reserved for only Indians, or special cultural deference to Indian traditions. Thus, Indian law, and Indian identity as we know it falls apart when there are no longer any Indians distinguishable from the rest of us. This is certainly a compelling interest, which blood quantum rules are specifically tailored to address.

The fourth argument follows from the third. Tribes can argue that the integration (or termination) model has already been tried, and proved to be a complete failure:

As a result of termination policy and the resulting diaspora, at the beginning of the self-determination era in 1970, the landscape of tribal governance looked very different from the one envisaged by the IRA. Many tribes had been “de-recognized,” the tribal land base had been eroded, and a large proportion of the Indian population now lived away from the tribal territories. The economic goals of termination policy had also failed to be realized for Indians on and off the reservations. It is little wonder, then, that the primary policy ethos of the self-determination era were reparative, directed toward rebuilding tribal governance capacities and restoring their asset-base.\textsuperscript{132}

Termination, as a policy of the U.S. government, was aimed at integrating Indians into mainstream American society, and giving them the opportunity to flourish as regular citizens.\textsuperscript{133}

\textsuperscript{131} Id. at 9.
\textsuperscript{132} Id. at 21.
\textsuperscript{133} H.R. Con. Res. 108, 83d Cong. (1953), reprinted in Documents of United States Indian Policy 234 (Francis Paul Prucha ed., 2000)(“[A]s rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of
By all accounts, however, it failed on every level – economically, socially, and practically. Since integration of the sort envisioned by termination policy would be the ultimate effect of the removal of blood quantum requirements for membership in a tribe, Indians can argue that those requirements are necessary to avoid the mistakes of the past. In this way, blood quantum requirements, despite their racial nature, are specifically tailored to a compelling tribal interest.

Any one of these five arguments could supply the tribe with the fuel to overcome strict scrutiny in an equal protection analysis of blood quantum rules. And these arguments are supplementary to the fact that the United States has a special trust relationship to maintain with the sovereign Indian tribes, recognized by the Court in *Mancari*, which offers an additional opportunity to clear the hurdle of strict scrutiny. With all these arguments at their finger tips, tribes should not be afraid to face strict scrutiny and equal protection analysis. Rather, they should look at it as an opportunity for the Court, and the public, to recognize the importance and validity of maintaining a separate, racial, Indian identity.

7. **Conclusion**

Avoiding equal protection analysis and perpetuating the legal fiction of “political identity” ignores the history and present reality of Indian blood quantum rules. This hypocrisy on the part of both the U.S. Supreme Court and Indian tribes promotes racism and hard feelings toward Indians. Tribes and the Court should come clean, admit that Indian identity is racial in nature, and then publically justify that racial distinction. These justifications can be based on historical wrongs, limited resources, tribal distinctions, the need to maintain a separate Indian identity, and many other rational arguments. By admitting to the obvious racial bias, but justifying it with reasoned argument that overcomes strict scrutiny, Indians are better placed to
claim what is theirs without fear, shame, or prejudice. This is a better situation for everyone than maintaining a pretense that is based on an historical, indefensible, legal fiction. With honesty comes clarity and understanding. That is what Indian law should be based on. Smoke and mirrors only create suspicion and contempt.