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EXTENDING THE STATUS QUO: INDIAN LAW AND THE SUPREME COURT'S 1999-2000 TERM

Melissa L. Tatum*

For the first time in over a decade, the United States Supreme Court ended its term without deciding a formal "Indian law" case.[1] That is not to say, however, that none of the Court's decisions during its October 1999 term affect Indians or Indian Tribes. Indeed, two of the Court's opinions have a potentially large impact on the indigenous peoples who live within the geographic boundaries of the United States: *Rice v. Cayetano*[2] and *Arizona v. California*.[3] The *Rice* and *Arizona* opinions cannot be classified as true "Indian law" cases because the Court's analysis and resolution did not turn on interpreting the principles and policies imbedded in that area of the law. The very fact, however, that the Supreme Court decided these cases without looking at Indian law doctrine may be significant. This essay will review these two decisions and discuss their impact on Indian law.

I. *RICE V. CAYETANO*: NATIVE HAWAIIANS AND SELF-DETERMINATION

The indigenous peoples who live within the exterior boundaries of the United States can be grouped into three general categories: those who live in the lower 48 states, those who live in Alaska, and those who live in Hawaii. A significant amount of litigation has focused on the Indian tribes of the lower 48, and there has also been substantial litigation elaborating on the status of Alaskan

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1. The October 1998 term had two Indian law decisions: Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) and El Paso Natural Gas v. Neztsosie, 526 U.S. 434 (1999). The October 1997 term resulted in three Indian law decisions: South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998); Kiowa Tribe v. Manufacturing Technologies Inc., 523 U.S. 751 (1998). The October 1996 term delivered Strate v. A-1 Contractors, 520 U.S. 438 (1997), and the October 1995 term resulted in Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). The October 1994 term had Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995), and the October 1993 term resulted in Hagen v. Utah, 510 U.S. 399 (1994), as well as Department of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994). The October 1992 term was a busy one for Indian law, resulting in four decisions: South Dakota v. Bourland, 508 U.S. 679 (1993), Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993), Lincoln v. Vigil, 508 U.S. 182 (1993), and Negonsott v. Samuels, 507 U.S. 99 (1993). The October 1991 term had County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), and the October 1990 term resulted in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991).

2. 120 S. Ct. 1044 (2000).

3. 120 S. Ct. 2304 (2000).

Natives. The same cannot be said of Native Hawaiians. Indeed, *Rice v. Cayetano* is the first decision in which the U.S. Supreme Court was presented with the opportunity to define the legal status of these peoples.[4] The Court explicitly ducked that question, but its methods have the potential to tell us a great deal about how the Court would answer it, as well as the potential to spill over into cases concerning America's other indigenous peoples.

A. *Background and Arguments*

The specific issue before the Court in *Rice* centered around the validity of a particular provision of the Hawaii State Constitution. The Hawaii State Constitution created a state agency known as the Office of Hawaiian Affairs (OHA).[5] OHA is responsible for various programs targeted at "Native Hawaiians" and "Hawaiians."[6] Both of these terms are defined by statute: "Native Hawaiians" are descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to the arrival of Europeans in 1778;[7] "Hawaiians" are a larger class, essentially defined as people who are descended from those who inhabited the Hawaiian Islands as of 1778.[8] Clearly, Native Hawaiians are a subset of the class known as Hawaiians. OHA is a quasi-independent state agency governed by a board of trustees.[9] According to the terms of the Hawaiian Constitution, only "Hawaiians" may vote in elections for OHA trustees.[10] Harold Rice challenged this provision as violating the Fifteenth Amendment's guarantee that no citizen shall be denied the right to vote on the basis of race, as well as the Fourteenth Amendment's Equal Protection Clause.[11] Rice is a long time resident of Hawaii, whose family had lived there for several generations.[12] He is not, however, a "Hawaiian" as that term is defined by Hawaiian law.[13]

Rice's argument was almost deceptively simple. His primary contention was that:

> The Fifteenth Amendment's command is clear and absolute, and allows for no exceptions or excuses: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race."[14]
>
> Despite the plain terms of the Fifteenth Amendment and more than a century of

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4. The history of Hawaii did play a minor role in two prior Supreme Court decisions, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) and Kaiser Aetna v. United States, 444 U.S. 164 (1979), but the status of Native Hawaiians was not at issue in either case.
5. *See* HAW. CONST., art. XII, § 5.
6. *See* HAW. REV. STAT. § 10-3 (1993).
7. *See id.* § 10-2.
8. *See id.*
9. *See id.* §§ 10-4 and 10-12.
10. *See* HAW. CONST., art. XII, § 5.
11. Petitioner's Brief at 13 and 28-29, *Rice v. Cayetano* (No. 98-818).
12. *See* Rice v. Cayetano, 120 S. Ct. 1044, 1053 (2000).
13. *See id.*
14. U.S. Const. Amend XV, §1.

> this Court's jurisprudence, the State of Hawaii has imposed a stark race-based restriction on the right to vote in statewide elections for officials who distribute public funds.... [T]his flagrant racial discrimination in the voting booth plainly violates the Fifteenth Amendment's guarantee of race-neutral voting laws and is patently offensive....[15]

According to Rice, nothing could save the OHA voting structure: not the beneficial motives of the state, not the "special limited purpose" of the elections, and not any attempt to label the voting restriction as a political, as opposed to a racial, classification.[16]

Rice's second major argument was that the voting scheme violated the Fourteenth Amendment's Equal Protection Clause, as it could not satisfy strict scrutiny (that is, the law was not narrowly tailored to achieve a compelling government interest) and no lesser form of scrutiny was appropriate.[17] The Court generally uses rational basis scrutiny when reviewing Congressional statutes affecting Native Americans.[18] Essentially, Rice maintained that Native Hawaiians were not in the same position as Indian tribes in the continental United States, and therefore, should not be treated as "Indians."

Rice filed his suit against Benjamin Cayetano, the Governor of Hawaii.[19] Cayetano was sued in his official capacity, so the suit was defended by the state attorney general.[20] Cayetano, supported by nine amicus briefs from a diverse set of organizations,[21] vigorously argued that Rice's contentions could not be taken at face value; the issue was not so simple. Instead, it was inextricably bound up with the history of Hawaii and with the role of the United States in that history. Before I delve into the actual legal arguments raised by Cayetano, let me first detour and review the relevant history.

The islands of Hawaii had been settled, likely by Polynesians, for more than

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15. Petitioner's Brief at 13, *Rice* (No. 98-818).

16. *Id.* at 14-27. The Petitioner was supported by three amicus briefs: The Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom, 1999 WL 345639 (May 27, 1999); Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation, 1999 WL 374577 (May 26, 1999); and the Pacific Legal Foundation, 1999 WL 332717 (May 24, 1999).

17. Petitioner's Brief at 28 – 49, *Rice* (No. 98-818).

18. *See* Morton v. Mancari, 417 U.S. 535 (1974).

19. *See Rice*, 120 S. Ct. at 1053.

20. *See id.*

21. The amici included: the Hawai'i Congressional Delegation, 1999 WL 557289 (July 28, 1999); the National Congress of American Indians, 1999 WL 557271 (July 28, 1999); the states of California, Alabama, Nevada, New Mexico, Oklahoma, and Oregon, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam, 1999 WL 557268 (July 28, 1999); the Alaska Federation of Natives and Cook Inlet Region, Inc., 1999 WL 631668 (July 28, 1999); the Office of Hawaiian Affairs, Ka Lahui, the Association of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Convention, Native Hawaiian Bar Association, Native Hawaiian Legal Corporation, Native Hawaiian Advisory Council, Ha Hawaii, Hui Kalaiaina, Alu Like, Inc., and Papa Ola Lokahi, 1999 WL 557287 (July 28, 1999); State Council of Hawaiian Homestead Associations, Hui Kako'o 'Aina Ho'Opulapula, Kalama'ula Homestead Association, and Hawaiian Homes Commission, 1999 WL 557275 (July 28, 1999); Kamehameha Schools Bishop Estate Trust, 1999 WL 557279 (July 28, 1999); The United States, 1999 WL 569475 (July 23, 1999); and the Hou Hawaiians and Maui Loa, Native Hawaiian beneficiaries, 1999 WL 374578 (May 27, 1999).

1000 years when Captain James Cook arrived in 1778.[22] At that time, the inhabitants of the islands enjoyed a well-developed social, cultural, and political structure.[23] More specifically, the islands were ruled by four different kings.[24] Over the next several years, a number of other voyages by Europeans were mounted to the islands, and interaction, including intermarriage, between Hawaiians and whites increased.[25] In 1810, King Kamehameha I united the various kingdoms in Hawaii and formed one government.[26] That government entered into treaties with several countries, including the United States.[27]

The 1800's were a period of increasing western involvement in Hawaiian affairs, with land rights becoming an increasingly contentious issue.[28] Those tensions peaked in 1887 when westerners forced the Prime Minister of the Kingdom of Hawaii to resign, and also forced the Kingdom to adopt a new constitution providing, among other things, non-Hawaiians with the right to vote.[29] The new constitution did not solve all the problems, however, and in 1893 a group of businessmen overthrew the monarchy and installed a provisional government.[30] The overthrow was supported, and indeed made possible, through the active assistance of the United States minister to Hawaii, who provided American troops to the rebels.[31] The provisional government petitioned the United States to annex Hawaii, but President Cleveland denied the request, condemned the role of the American forces, and called for the restoration of the monarchy.[32] Five years later, however, President McKinley would annex the islands, making Hawaii a territory of the United States.[33] As part of the annexation resolution, all governmental land previously belonging to Hawaii was ceded to the United States, which in turn handed those lands over to the Territory of Hawaii.[34] Those lands would later, in 1959, be turned over to the state of Hawaii.[35]

As early as 1920, Congress displayed concern about the Native Hawaiian population, eventually enacting the Hawaiian Homes Commission Act.[36] The HHCA set aside a portion of public lands for use in a program to assist Native Hawaiians with loans and long-term leases.[37] Congress would also manifest its

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22. *See Rice*, 120 S. Ct. at 1048; Troy M. Yoshino, *Ua Mau Ke Ea O Ka Aina I Ka Pono: Voting Rights and the Native Hawaiian Sovereignty Plebiscite*, 3 MICH. J. RACE & THE LAW 475, 480 (1998).
23. *See Rice*, 120 S. Ct. at 1048.
24. *See id.*
25. *See id. See also* Yoshino, *supra* note 22, at 480.
26. *See Rice*, 120 S. Ct. at 1048.
27. *See id.* at 1050. *See also* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 102 (1998).
28. *See Rice*, 120 S. Ct. at 1048-49. *See also* Yoshino, *supra* note 22, at 480-81.
29. *See Rice*, 120 S. Ct. at 1050. This new constitution has been called the "Bayonet Constitution." *See, e.g.*, Yoshino, *supra* note 22, at 481.
30. *See Rice*, 120 S. Ct. at 1050. *See also* Yoshino, *supra* note 22, at 481-82.
31. *See Rice*, 120 S. Ct. at 1050. *See also* Yoshino, *supra* note 22, at 481-82.
32. *See Rice*, 120 S. Ct. at 1050. *See also* Yoshino, *supra* note 22, at 481-82.
33. *See Rice*, 120 S. Ct. at 1050-51. *See also* Yoshino, *supra* note 22, at 481-82.
34. *See Rice*, 120 S. Ct. at 1050-51.
35. *See id.* at 1052.
36. *See id.* at 1051-52. *See also* Act of July 9, 1921, ch. 42, 42 Stat. 108 (1921).
37. *See Rice*, 120 S. Ct. at 1051-52.

concern for Hawaii's indigenous peoples throughout the twentieth century by including them in a number of statutes designed to benefit all of the indigenous people in the United States, encompassing Indian tribes and Native Alaskans, as well as Native Hawaiians.[38] This concern was also shared by the state of Hawaii, at least in part because it had been so charged by the United States in the Admission Act.[39] It was this sequence of events that led to the 1978 amendments to the Hawaiian Constitution, which created the OHA. Indeed, in 1993 the United States Congress passed a joint resolution apologizing to Native Hawaiians for the role the United States played in overthrowing the traditional Hawaiian government.[40]

Governor Cayetano and the amici drew strongly on this history in constructing their arguments in opposition to Rice's contentions. The state's response had three basic elements:

1) The voting requirements for OHA trustees are based not on race, but rather on the trust responsibility between the government and the Native Hawaiians.
2) The Supreme Court should follow precedent and defer to Congress' decision to recognize that trust responsibility.
3) Regardless of the level of scrutiny applied, the OHA voting restrictions are constitutional; OHA exists to benefit a particular class of people, and only the beneficiaries of that trust are entitled to elect its trustees.

These arguments, particularly the comparison between Native Hawaiians and the Indian tribes of the continental United States, persuaded the lower courts. Both the District Court[41] and the Ninth Circuit[42] found in favor of Cayetano, setting the stage for the Supreme Court to hear the case.

B. *The Court's Decisions*

The Court voted 7-2 to reverse the Ninth Circuit and hold that the OHA voting requirements violated the Fifteenth Amendment. The members of the Court issued four separate opinions: a majority opinion signed by five Justices, one concurring opinion, and two dissenting opinions.

i. The Majority Opinion

The majority opinion[43] set out an extremely narrow and formalistic

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38. *See* Van Dyke, *supra* note 27, at 104-108. *See also* Appendix to amicus brief filed by the Hawai'i Congressional Delegation, 1999 WL 557289 (July 28, 1999) (setting forth a list of all relevant federal statutes).

39. *See Rice*, 120 S. Ct. at 1052. *See also* Van Dyke, *supra* note 27, at 108-109.

40. *See Rice*, 120 S. Ct. at 1052. *See also* Hawaii Statehood Admissions Act, Pub. L. No. 86-3, §§ 4 and 7, 73 Stat. 4, 7 (1959).

41. *See* Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 120 S. Ct. 1044 (2000).

42. *See* Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 120 S. Ct. 1044 (2000).

43. The majority opinion was written by Justice Kennedy and joined by Chief Justice Rehnquist, as

interpretation of the Fifteenth Amendment. This narrow, technical approach is consistent with recent Supreme Court Indian law decisions but is highly inconsistent with the origins and history of federal Indian law in general. The Court began its analysis by bluntly stating: "The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race."[44]

In interpreting this language, the Court refused to limit the meaning of the words to the historical context surrounding its adoption; that is, to the Civil War and the emancipation of slaves.[45] The Court also rejected the idea that the OHA voting requirements were framed in terms of ancestry rather than race, declaring that "[a]ncestry can be a proxy for race. It is that proxy here."[46] The Court reviewed its prior decisions interpreting the Fifteenth Amendment, as well as state attempts to circumvent the Amendment's requirements, and concluded that any attempt to develop a proxy for race and use that proxy to limit voting privileges must fail as unconstitutional.[47] The Court used strong language in making this conclusion clear:

> The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.
>
> . . . .
>
> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.
>
> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve.[48]

Nowhere in this reasoning is there recognition that the statutory voting scheme being challenged was actually a way to *preserve* the voice of Hawaiians. That is, Hawaii had created a state agency and charged it with serving the needs of Native Hawaiians and of Hawaiians. The state decided that the best way to achieve this goal was to give those groups the ability to elect the trustees who

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well as by Justices O'Connor, Scalia, and Thomas.

44. *Rice*, 120 S. Ct. at 1054.

45. *See id.* ("Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment"). *Id.*

46. *Id.* at 1055.

47. *See id.* at 1054-55.

48. *Id.* at 1056-57.

administered the agency. Obviously, these groups make up a minority of the inhabitants of Hawaii. If all inhabitants of Hawaii were allowed to vote, the non-Hawaiians could overwhelm the wishes of the beneficiary class and stack the board of trustees with people who would not serve the best interests of their clientele.

The Court, however, found this motivation all but irrelevant. After the Court issued its bright line declaration about the meaning of the Fifteenth Amendment, it proceeded to address the three major arguments offered in defense of the voting scheme, rejecting each one. The first argument rejected by the Court was the assertion that the voting scheme was valid under prior Supreme Court decisions "allowing the differential treatment of certain members of Indian tribes."[49] The Court noted that this argument was problematic, as it would require a finding that Native Hawaiians should be treated as "tribes."[50] The Court, however, found it unnecessary to resolve that issue: "Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."[51]

Essentially, the Court found that although Congress may have the authority to pass laws regarding Indian tribes, and although that authority may include allowing tribes to exist as quasi-sovereign entities, Congress does not have the authority to allow states to violate the provisions of the Constitution.[52] The elections here were not held by a tribal government, but rather by an arm of the state government.[53] Tribal elections might be exempt from the Fifteenth Amendment, but states are not similarly exempt,[54] and therefore, any quasi-

49. *Id.* at 1057.

50. The status of Native Hawaiians has been a matter of great controversy and debate. The argument that Native Hawaiians cannot be equated with tribes was made by Stuart Minor Benjamin. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996). Benjamin's article has been heavily criticized. *See, e.g.*, Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997). Professor Frickey's criticisms in particular could just as easily be applied to the Court's decision in *Rice*:

> Benjamin's analysis of the constitutional issues concerning the special treatment of Hawaiian natives exposes a different, but more fundamental problem: unless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions.

Id. at 1757.

> The problem remains, however, that the weak substructure of [the cited cases] cannot support the dense superstructure of analysis that Benjamin creates. He comes perilously close to saying, with the Wizard of Oz, that the reader should pay no attention to what is behind the curtain. Yet Dorothy and her entourage would have done rather more poorly had they relied on a deferential analysis of the apparent, rather than a critical analysis of the real.

Id. at 1764.

51. *Rice*, 120 S. Ct. at 1058.

52. *See id.* at 1058-59.

53. *See id.* at 1059.

54. As separate quasi-sovereigns, tribal governments are not subject to the strictures of the U.S.

sovereign status that might be enjoyed by Native Hawaiians was irrelevant.[55]

The Court also rejected Hawaii's argument that the OHA elections are "special, limited purpose" elections, and thus exempt from constitutional voting restrictions. Under a prior line of cases, the Supreme Court had declared that certain elections are not subject to the "one person, one vote" rule. Instead, the right to vote in elections for things such as water or irrigation districts could be limited to those who were affected by the regulations of the board.[56] Hawaii had argued that this same theory could be extrapolated to apply to OHA elections because they were for the purpose of electing trustees to run a special state agency, and thus, the right to vote in such elections could be limited to the class served by that agency. The Court rejected that argument, declaring that the special purpose cases arose under the Fourteenth, not the Fifteenth, Amendment.[57] Nothing in those cases allowed a state to discriminate on the basis of race.[58]

Finally, the Court explicitly rejected Hawaii's argument that the state was simply ensuring "an alignment of interests between the fiduciaries and the beneficiaries of a trust."[59] The Court did not find this argument convincing for two reasons. First, OHA is primarily charged with serving Native Hawaiians; its expenditures for Hawaiians are a much smaller percentage of its budget. Despite this, however, both Native Hawaiians and Hawaiians have equal votes in electing trustees.[60] Second:

> The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment.... [A]ll citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.[61]

Thus, the majority circled back to where it began. In the end, all that mattered was that a state had created a voting restriction based on race, and no explanation or beneficial motive could overcome the Fifteenth Amendment's prohibition of such a restriction.

ii. The Concurring Opinion

Justice Breyer wrote the concurring opinion, which was joined by Justice Souter.[62] These two justices would have gone even further than the majority. Whereas the majority did not specifically address Hawaii's trust relationship argument, the concurring justices would have explicitly "reject[ed] Hawaii's effort

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Constitution. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896).

55. *See Rice*, 120 S. Ct. at 1059.

56. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

57. *See Rice*, 120 S. Ct. at 1059-60.

58. *See id.* at 1059-60.

59. *Id.* at 1060.

60. *See id.*

61. *Id.*

62. *See id.* at 1060 (Breyer, J., concurring).

to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."[63]

The concurring opinion justified its conclusion by focusing on two predominant factors. First, it pointed out that the OHA's funding comes from a variety of sources, all of which are subject to change by ordinary state legislation.[64] According to the concurring opinion, this pattern is not commensurate with a "trust."[65] In addition, OHA spends money to benefit "Hawaiians," not just "Native Hawaiians."[66] In the eyes of the concurring justices, this makes OHA simply a "special purpose department of Hawaii's state government."[67] Second, the concurring opinion found that the extension of the right to vote for OHA trustees to "Hawaiians" and not just "Native Hawaiians" was fatal.[68] The concurring justices found that this electorate was so broad that it could not be compared in any meaningful way with an "Indian tribe."[69] These two factors combined "to destroy the analogy on which Hawaii's justification must depend."[70]

iii. The Dissenting Opinions

Both Justice Stevens and Justice Ginsburg wrote dissenting opinions, with Justice Ginsburg also joining part of Justice Stevens' opinion. Justice Stevens opened his dissenting opinion by declaring that:

> The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.[71]

From there, Justice Stevens proceeded to refute every argument and contention made by the majority.

In his first major section of analysis, Justice Stevens began by reiterating the basic premise that Congress possesses plenary power over Native American affairs and that this power is tempered by a trust responsibility.[72] These powers, according to Justice Stevens, are not dependent "on the ancient racial origins of the people, the allotment of tribal lands, the coherence or existence of tribal self-government, or the varying definitions of 'Indian' Congress has chosen to

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63. *Rice*, 120 S. Ct. at 1061.
64. *See id.*
65. *See id.*
66. *See id.*
67. *Id.*
68. *See id.*
69. *See Rice*, 120 S. Ct. at 1061-62 (Breyer, J., concurring).
70. *Id.* at 1062.
71. *Rice*, 120 S. Ct. at 1062 (Stevens, J., dissenting).
72. *See id.* at 1063-64.

adopt."[73] Accordingly, this power and responsibility extend to encompass the aboriginal inhabitants of Hawaii.[74] Once this power is deemed to exist, the Court should ask only whether "legislation that singles out Indians for particular and special treatment... can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians...."[75] If that standard is met, the Court should not overturn the legislation.[76] For Justice Stevens and Justice Ginsburg, then, the rest of the analysis was simple:[77]

> The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government.... [O]HA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries.... In this respect among others, the requirements is 'reasonably and directly related to a legitimate, nonracially based goal.'[78]

Justice Stevens next turned to address the majority's contention that the OHA voting restrictions violated the Fifteenth Amendment. In refuting the majority's arguments, Justice Stevens took issue with the majority's two primary contentions: that Hawaii used ancestry as a proxy for race and that the history of the Fifteenth Amendment was irrelevant. Rather than summarize Justice Stevens' opinion, I will let his words speak for themselves:

> [T]he majority relies on the fact that [a]ncestry can be a proxy for race. That is, of course, true, but it by no means follows that ancestry is always a proxy for race.... [T]he voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens—a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.
>
> That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies.... Cases such as these that 'strike down these voting systems... designed to exclude one racial class (at least) from voting,' have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.
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> Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries of the public trust created by the State and administered by OHA, and they have at least one ancestor

73. *Id.* at 1063 (citations omitted).
74. *See id.* at 1063-66.
75. *Id.* at 1064.
76. *See id.*
77. Justice Ginsburg joined in this portion of Justice Stevens' opinion. *See* 120 S. Ct. at 1062 (Stevens, J., dissenting); 120 S. Ct. at 1073 (Ginsburg, J., dissenting). Justice Ginsburg did not join in Justice Stevens' arguments regarding the Fifteenth Amendment.
78. *Rice*, 120 S. Ct. at 1067-68 (Stevens, J., dissenting) (citations omitted).

> who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept....
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> ....
>
> In this light, it is easy to understand why the classification here is not 'demeaning' at all, for it is simply not based on the 'premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.' It is based on the permissible assumption in this context that families with 'any' ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.[79]

Essentially, then, Justice Stevens' dissent turns on the theory that formalistic interpretations, divorced from context, are not the appropriate method for addressing issues concerning America's indigenous peoples.

D. *The Impact of the Decision*

It is difficult to evaluate the impact of the *Rice v. Cayetano* decision. On the one hand, the majority's decision purports to be a straightforward application of standard legal principles, with no interpretation of or impact on federal Indian law. On the other hand, the Court's refusal to look at principles and doctrines of federal Indian law may send the message that the Court was attempting to limit the application of those principles.

At the very least, *Rice* is consistent with the trends that have developed over the last twenty years in the Court's Indian law jurisprudence. Over the last two decades, the Supreme Court has repeatedly taken steps to limit the scope of tribal sovereignty by circumscribing the authority of tribal governments over their territory.[80] As part of this process, the Court has avoided overruling precedent but has taken very narrow views of prior precedent, as well as of historical context.[81] As Justices Stevens and Ginsburg pointed out in their dissenting opinions, this historical context is very important in Indian law decisions,[82] and a failure to pay attention to this context will often result in a misleading picture of events.[83] The majority in *Rice* found that the historical circumstances of Hawaii's entrance into the Union, as well as the United States' treatment of Native Hawaiians was irrelevant. By adopting this position, the majority was able to use

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79. *Id.* at 1069-72 (Stevens, J., dissenting) (citations omitted).

80. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438 (1997); Montana v. United States, 450 U.S. 544 (1981); Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish, 435 U.S. 191 (1978). *See also* Allison Dussias, *Geographically-Based Versus Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

81. *See* Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 TULSA L.J. 329 (1999).

82. *See supra* notes 71-78 and accompanying text.

83. *See, e.g.*, Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

a straightforward interpretation of the Fifteenth Amendment to strike down the OHA voting restrictions. As the dissenting opinions pointed out, however, this straightforward interpretation is rather simplistic *because* it fails to adequately deal with the historical circumstances behind those voting requirements.

The majority's decision to duck the question of whether Native Hawaiians are "Indians" might be taken at face value—the Court did not decide that issue because it did not need to, reserving the question for a later date when it is squarely before the Court. It is, however, possible to read a more sinister meaning into the Court's decision. By not addressing that issue, the Court may be signaling that it does not think that Native Hawaiians qualify as Indians, and therefore are not eligible for the "rational basis" review of statutes created in *Morton v. Mancari.*[84] We do know that four justices would have reached this issue, with the two concurring justices finding that Native Hawaiians are not Indians and the two dissenting justices finding that Native Hawaiians are Indians. This leaves us uncertain as to how the five justices in the majority would decide the issue, but the voting records of those five justices in Indian law cases are not encouraging.[85]

Even more uncertain is the fate of federal statutes that define "Indian" in terms of blood quantum and not simply by membership in a federally recognized tribe. While these statutes will not fall prey to the Fifteenth Amendment, as they do not concern voting requirements, they may now be open to a second look under the Fourteenth Amendment's Equal Protection Clause. Although *Mancari* spoke in terms of membership in a federally recognized tribe, the Court has not read that decision in such a limited fashion. Rather, it has applied *Mancari's* rational basis review to all federal statutes and federal actions dealing with Indians, not just with members of federally recognized tribes.[86] There simply is not enough in *Rice* to make a prediction one way or the other on that issue.

Finally, a second theme may be at work in *Rice*, and one not specifically related to federal Indian law at all. Over the last several terms, the Supreme Court has taken active efforts to revitalize state authority and to develop a version of federalism that puts most decisions in state hands.[87] The Court has also demonstrated renewed tension between its role as final interpreter of the Constitution and Congress' role in making policy decisions and enacting statutes.[88] These tensions were possibly also at work in *Rice v. Cayetano.*

The Court has often deferred to Congress' decision whether to recognize and treat particular groups as "Indians." In *Rice*, the Court indicated very clearly that any decision by Congress was subject to the boundaries of the Constitution, and that the Court may take a very narrow view of those boundaries. Again, there is not enough information in the majority opinion to do more than speculate, but

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84. 417 U.S. 535 (1974).
85. *See* Getches, *supra* note 80, at 1632-52.
86. *See Rice*, 120 S. Ct. at 1064 (Stevens, J., dissenting); Frickey, *supra* note 83, at 1760-68.
87. *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Idaho v. Coeur d' Alene, 521 U.S. 261 (1997); Brzonkala v. Morrison, 120 S. Ct. 1740 (2000).
88. *See* Boerne v. Flores, 521 U.S. 507 (1997).

it will be interesting to see how the Court views attempts to treat Native Hawaiians as Indians. Several statutes exist that might be subject to challenge on those grounds, and the federal government has also taken steps to grant Native Hawaiians the same sovereign status as Indian tribes.[89]

In sum, it is difficult to predict the impact that *Rice v. Cayetano* will have, either on federal Indian law in general or on the status of Native Hawaiians in particular. What is clear from the decision, however, is that state and federal actions to support tribes will be subject to the strictures of the Fifteenth Amendment. From that perspective, it is unlikely that *Rice* will have a broad impact, as Hawaii is unique in its efforts to hold state elections to administer programs to aboriginal peoples. This is due in large part to the uncertain status of Native Hawaiians and the lack of any well-organized, universally recognized equivalent to a tribal government. Thus, current efforts to create such a government will take on added importance.

II. *ARIZONA V. CALIFORNIA*: ALLOCATING WATER RIGHTS FOR THREE WESTERN TRIBES

The Supreme Court's *Arizona v. California* decision is somewhat unique in two respects. First, as is clear from the caption, the suit is one between states.[90] That means it is one of the rare cases in which the Supreme Court exercised its original jurisdiction.[91] Accordingly, rather than the standard review of a lower court (or perhaps state supreme court) opinion, this decision involved a review of challenges to a special master's report.[92] This decision is also somewhat unique in that the litigation is approaching its 50th anniversary: the suit began in 1952 as an attempt to adjudicate state rights to water from the Colorado River system.[93] Water rights are critical in the often arid West; indeed, one commentator has declared that "[w]ater is the most precious resource in the Western states."[94] The United States intervened in the suit to seek water rights on behalf of several Indian reservations.[95] After almost half a century, final determination of the water rights for three of those reservations—the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation—were at stake in this round of litigation.

Prior to the issuance of the special master's report and recommendation, the parties involved in the dispute regarding the water allocations for the Colorado

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89. *See* Jean Christensen, *U.S. Backs Sovereignty for Native Hawaiians*, SEATTLE TIMES, Aug. 24, 2000, at A7.

90. In addition to the original two states (Arizona and California), three other states later either intervened or were joined in the litigation: Nevada, Utah, and New Mexico. *See* Arizona v. California, 120 S. Ct. 2304, 2310 (2000).

91. *See* U.S. CONST. art. III, § 2.

92. *See* Arizona v. California, 120 S. Ct. 2304, 2310 (2000).

93. *See id.* at 2306.

94. Judith V. Royster, *Is the Quechan Tribe Barred From Seeking a Determination of Reservation Boundaries and Water Rights?*, PREVIEW OF UNITED STATES SUPREME COURT CASES 7, April 4, 2000, 1999-2000 PREVIEW 393 (Westlaw).

95. *See* Arizona v. California, 120 S. Ct. at 2306.

River and Fort Mojave reservations entered into settlement agreements. The special master recommended that the Court accept the agreements.[96] Obviously, the parties did not object to this recommendation, and the Court accepted the master's recommendations and approved the proposed settlements.[97] That left only the matters regarding the Fort Yuma reservation, which were not quite so simple.

A. The History of Both the Fort Yuma Reservation and of the Litigation

The immediate issues before the Court in this round of *Arizona v. California*, and the source of the parties' exceptions to the special master's report and recommendation, centered around the legal concept of preclusion. Preclusion arguments, however, make no sense in isolation—they are intimately bound up with the history of the particular litigation. These particular preclusion arguments were bound up not only with the history of the litigation, but also with the history of the Fort Yuma Reservation. Consequently, a brief review of that history is in order.

The Fort Yuma Reservation was created in 1884 by an Executive Order signed by President Chester A. Arthur.[98] Nine years later, in 1893, the Tribe entered into an agreement with the U.S. whereby the Tribe agreed to cede 25,000 acres of boundary lands in exchange for allotments of irrigated lands to individual Indians.[99] The language in the agreement, however, was not entirely clear.[100] Under one interpretation of the agreement, the land cession was valid only if the United States performed certain other obligations, including the construction of an irrigation canal.[101] Congress ratified the agreement in 1894, but the United States never fulfilled the obligations set forth.[102]

Arguments about the interpretation of the agreement were raised at least as early as 1935, when the Bureau of Reclamation sought to route the All-American canal across the Fort Yuma Reservation.[103] The Secretary of the Interior was called upon to decide whether the Bureau had to pay compensation to the Tribe for the right-of-way, which in turn led back to an interpretation of the 1893 agreement.[104] The matter was referred to Nathan Margold, who was then serving as the Interior Department's Solicitor.[105] In 1936, Solicitor Margold issued an opinion declaring that the 1893 Agreement was an unconditional cession of land, and as a result, the United States' failure to fulfill its obligations was irrelevant;

96. *See id.* at 2308.
97. *See id.* at 2309.
98. *See id.* at 2312.
99. *See id.*
100. *See id.*
101. *See Arizona*, 120 S. Ct. at 2312 (2000).
102. *See id.* at 2312 & 2315.
103. *See id.* at 2312.
104. *See id.*
105. *See id.*

the Tribe had lost title to the 25,000 acres of boundary land.[106]

Ten years later, in 1946, Congress enacted the Indian Claims Commission Act, which created a tribunal to hear claims made by Indian tribes against the United States.[107] In 1951, the Quechan Tribe filed a lawsuit challenging the 1893 agreement.[108] In that litigation, the Tribe raised two mutually exclusive grounds for relief: either the agreement was void because it was obtained through fraud or it was void because the United States had failed to fulfill its side of the bargain.[109] The Claims Commission thus began its notoriously long process of reviewing the Tribe's contentions.

Meanwhile, in 1952, Arizona invoked the Supreme Court's original jurisdiction in an effort to resolve disputes over state rights to water from the Colorado River system.[110] The United States intervened in that litigation on behalf of various Indian tribes, including the Quechan Tribe.[111] The United States' actions on behalf of the tribes trace back to two sources. The first is the trust responsibility. As the "guardian" for the rights of Indian tribes, the United States is under an obligation to oversee and protect the resources of the tribes, which includes their water rights.[112] The second source of the United States' actions rests on the Winters doctrine, which emerged from the Supreme Court's 1908 decision in *Winters v. United States*.[113] In *Winters*, the Court declared that the United States was deemed to have reserved and perfected water rights for each reservation at the time it was created.[114]

Western states' water rights work on a system known as prior appropriation.[115] Under this approach, it is important to determine both the quantity of water reserved by each user and the date that quantity was perfected.[116] This determination becomes critical in times of water shortage, as water is allocated on a priority basis, and a user's priority depends on the date its right was perfected.[117] Thus, an early user essentially gets "first dibs;" if there isn't enough water to go around, the later the perfection date, the more likely that a particular user will not receive any water at all. Since the date of perfection for a tribe's water allocation will be the date the reservation was created, most tribes will have a right superior to virtually every other user.[118]

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106. *See id.* at 2312-13.
107. *See Arizona*, 120 S. Ct. at 2312-13; Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70-72) (2000).
108. *See Arizona*, 120 S. Ct. at 2313.
109. *See id.* at 2313-14.
110. *See id.* at 2310-11.
111. *See id.* at 2311.
112. The trust doctrine has its origins in Cherokee Nation v. Georgia, 30 U.S. 1 (1831). *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 16-17 (Rennard Strickland et al. eds., 1982).
113. 207 U.S. 564 (1908).
114. *Id.* at 567.
115. *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 70-71 (1994).
116. *See id.* at 66-67 & 70-71.
117. *See id.* at 66-67.
118. *See id.* at 70-71.

This leads to a great deal of dispute about how to determine the quantity of water to which a tribe is entitled. In *Winters*, the Supreme Court declared that the United States reserved for each tribe sufficient water to fulfill the purposes of the reservation.[119] The Quechan Tribe was traditionally a farming tribe, so the purposes of the Fort Yuma Reservation were agricultural.[120] Accordingly, the Tribe's water allocation would be based on the amount of land determined to be practicably irrigable (the "practicably irrigable acreage"), which in turn revolves around the quantity of land on the reservation.[121] As a result, the interpretation of the 1893 agreement would play a role in *Arizona v. California*, as well as in the Claims Commission litigation. Since the Interior Department had determined that the Tribe had unconditionally ceded the disputed 25,000 acres of boundary land, the United States took the position in *Arizona* that those lands were not part of the reservation, and therefore, the U.S. did not calculate those lands into its request for water rights for the Fort Yuma reservation.[122]

In 1963, the Supreme Court issued its first decision in *Arizona v. California*.[123] In that decision, the Court held that the federal government had reserved water rights for the Fort Yuma reservation and that those rights were based on the reservation's practicably irrigable acreage.[124] The Court also upheld the special master's determination as to the quantity of relevant acreage.[125] That determination did not include any acreage from the disputed 25,000 acres of boundary lands.

Several years after *Arizona I*, things began to happen over at the Claims Commission with the Quechan Tribe's suit. The Commission held a trial on liability, although it stayed the proceedings before a decision was filed.[126] The stay resulted from legislation proposed in Congress that would have restored the lands to the Tribe.[127] That legislation ultimately failed, and the Claims Commission lifted the stay.[128] At some point, however, the Tribe requested that the Interior Department reconsider the 1936 Margold opinion.[129] The Department did so, and in 1977 it issued an opinion reconfirming the 1936 opinion.[130] That reconfirmation was very controversial, however, and the Department revisited the issue after the election of President Carter.[131] In 1978, the new Solicitor issued an opinion concluding that the 1893 Agreement was dependent on the unfulfilled conditions,

119. 207 U.S. at 576-77.
120. *See* Arizona v. California, 373 U.S. 546, 600-01 (1963). The purposes of most reservations were agricultural. *See generally* Royster, *supra* note 115, at 71-74.
121. *See Arizona*, 373 U.S. at 600-01.
122. *See id.* at 595-601.
123. 373 U.S. 546 (1963).
124. *See* Arizona v. California, 120 S. Ct. 2304, 2306 (2000).
125. *See id.*
126. *See id.* at 2313.
127. *See id.*
128. *See id.*
129. *See id.* at 2313.
130. *See* Arizona v. California, 120 S. Ct. 2304, 2313 (2000).
131. *See id.* at 2314.

and that as a result the Agreement was void.[132] Accordingly, the Tribe was entitled to the disputed 25,000 acres, and the United States held title to those lands in trust for the Tribe.[133] As a result of this revised opinion, the government reversed its stance in the Claims Court[134] litigation and ceased opposing the Tribe's claims.[135]

Also in 1978, the federal government and the state parties to *Arizona v. California* filed a joint motion with the Supreme Court asking the Court to enter a supplemental decree.[136] The Tribes moved to intervene, and the United States "ultimately joined the Tribes in moving for additional water rights for the five reservations."[137] The Court entered a supplemental decree in 1979 which set forth:

> the water rights and priority dates for five reservations under the 1964 decree, but added that the rights for all five reservations (including the Fort Yuma Indian Reservation...) 'shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.'[138]

The Court also referred several pending matters to a new special master.[139] The special master ultimately issued a report recommending that the Solicitor's 1978 Opinion be considered a final determination of the boundaries of the Fort Yuma Reservation.[140] The master also recommended that the 1964 decree be reopened to award additional water rights to the Tribe.[141]

The Court ruled on the special master's report and recommendation in 1983 with *Arizona II*.[142] In that decision, the Court held that the Solicitor's 1978 Opinion did not constitute a final determination of the Fort Yuma Reservation's boundaries because the various state groups and private individuals had not had an opportunity to challenge that Opinion in court.[143] A year later, in 1984, the Court issued another supplemental decree reiterating that the water rights for all of the reservations could be adjusted once a final determination was rendered regarding the boundaries of each.[144] At the time of these decisions, various California state agencies had initiated litigation in federal district court challenging the Interior Department's administrative decisions.[145] Of course, the

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132. *See id.*
133. *See id.*
134. In 1976, the Claims Commission transferred the Quechan Tribe's suit to the Court of Claims. *See id.* Indeed, the Claims Commission itself ceased to exist on September 20, 1978, when its term expired, and all pending cases were transferred to the Court of Claims. *See* COHEN, *supra* note 112, at 162.
135. *See Arizona*, 120 S. Ct. at 2314.
136. *See id.* at 2310.
137. *Id.* Several other reservations were also involved in disputes regarding boundary lands.
138. *Id.* at 2311.
139. *See id.*
140. *See id.*
141. *See Arizona*, 120 S. Ct. at 2311.
142. Arizona v. California, 460 U.S. 605 (1983).
143. *See* Arizona v. California, 120 S. Ct. 2304, 2306 (2000).
144. *See id.* at 2307.
145. *See id.* at 2311.

Claims Court litigation was also still pending, giving a second possible avenue for a court to review those decisions.

In August 1983, a few months after *Arizona II* was handed down, the United States and the Quechan tribe reached a settlement agreement in the Claims Court litigation.[146] By this time, both parties recognized that the Tribe was entitled to the disputed boundary lands. There were, however, three important elements of the settlement agreement:

1) The U.S. agreed to pay the Tribe $15 million dollars in "full satisfaction of all rights, claims, or demands of the Tribe";[147]
2) According to the terms of the judgment, the Tribe was barred "from asserting any further rights, claims, or demands against the [U.S.] and any future action on the claims encompassed" within the Claims Court litigation;[148] and
3) The parties stipulated that the final judgment was "based on a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case."[149]

The settlement agreement meant that no decision would be forthcoming from the Claims Court to adjudicate the appropriateness of the 1978 order. Within a few years, it also became clear that no decision would come from the states' federal court litigation, as that was ultimately deemed to be barred by the sovereign immunity of the United States.[150] The State parties requested that the Supreme Court reopen the 1964 decree "to determine whether the Fort Yuma Indian Reservation ... [was] entitled to claim additional boundary lands and if so, additional water rights."[151] The Court granted the motion and appointed a special master to review the claims.[152]

The States made two primary contentions before the special master. Both related to preclusion. First, they argued that the Supreme Court's decision in *Arizona I* precluded the United States and the Tribe from seeking water rights based on the disputed boundary lands.[153] The special master rejected this contention.[154] He did, however, accept the states' second argument, which urged that the Claims Court settlement also operated to preclude any additional claims for water rights.[155] The challenges to this report and recommendation formed the basis for the Supreme Court's decision this past term.

146. *See id.* at 2314.
147. *Id.*
148. *Id.*
149. *Arizona*, 120 S. Ct. at 2314.
150. *See* Metropolitan Water Dist. v. United States, 830 F.2d 139, 142-43 (9th Cir. 1987), *aff'd by an equally divided Court*, 490 U.S. 920 (1989) (per curiam).
151. *Arizona*, 120 S. Ct. at 2312.
152. *See id.*
153. *See id.* at 2317.
154. *See id.*
155. *See id.* at 2318.

B. The Court's Decision

Justice Ginsburg delivered the opinion for a six Justice majority.[156] After setting forth the background of the litigation, the opinion turned to the special master's first recommendation, the one rejecting the State parties' arguments that the prior decisions in the *Arizona v. California* litigation precluded the current claim for additional water rights. According to the State parties, the United States and the Tribes should have raised their claim earlier in the litigation, and to hear their claim now would disrupt the finality of the *Arizona I* decision.[157]

The special master recommended that the Court reject this argument, as the Solicitor's 1978 opinion constituted a "later and then unknown circumstance," thus fulfilling an exception to otherwise governing preclusion principles.[158] The Court chose not to reach the merits of the State parties' arguments, although it did note that the 1978 opinion did not satisfy the "later and then unknown circumstance" exception, as it did not change the underlying facts in dispute—it simply changed one party's view of those facts. The change of view should not have come as a surprise, since the Tribe had been urging the government to adopt the view for decades.[159]

Rather than reach the merits, the Court found that the preclusion argument was untimely and, therefore, inadmissible.[160] According to the Court, the State parties had a number of opportunities to raise a preclusion argument; for example, they could have raised it in the 1979 proceedings or even in the 1982 proceedings.[161] Instead, they waited until the 1989 proceedings, which they themselves initiated.[162] The Court also noted that it had repeatedly left the door open for adjustments to the Tribe's water allocations based on a final resolution of the boundary dispute.[163] The State parties' silence in the face of these statements proved deadly to their first preclusion argument.

The Court also declined the State parties' invitation to raise the preclusion

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156. Justices Stevens, Scalia, Kennedy, Souter, and Breyer joined Justice Ginsburg's opinion. Chief Justice Rehnquist filed a decision concurring in part and dissenting in part. Justices O'Connor and Thomas joined in Chief Justice Rehnquist's opinion, which concurred with the majority's decision regarding the Fort Mojave and Colorado River settlement agreements, but dissented with respect to the Fort Yuma Reservation. The dissenters argued that any further water rights claims for that reservation were precluded. Given the nature and posture of the Court's decision, this article will not spend time analyzing the dissenting opinion, but will instead concentrate on the majority opinion. The dissenting opinion is, however, notable for its highly technical and biased reading of preclusion law; the entire tenor of the dissenting opinion carries an extreme hostility to the tribal interests. This tone is not new, as various members of the Court have often used procedural issues to block the merits of an unfavored party's position. *See* Melissa L. Tatum, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 MICH. J. L. REFORM 49 (published as Melissa L. Koehn).

157. *See Arizona*, 120 S. Ct. at 2314.

158. *Id.* at 2315.

159. *See id.* at 2315-16.

160. *See id.* at 2316.

161. *See id.*

162. *See id.*

163. *See Arizona*, 120 S. Ct. at 2316.

argument *sua sponte*.[164] The Court declared that this was not an appropriate case for the Court to do so, as the policies underlying *res judicata* were not implicated here. Those policies are concerned with saving the time and money both of the litigants and of the court.[165] Here, there had been no waste of judicial resources, as no court ever actually litigated the merits of the boundary dispute. Since the policies of *res judicata* were not implicated, a decision by the Court to independently raise a preclusion argument would erode "the principle of party presentation so basic to our system of adjudication."[166]

Once the first preclusion argument was disposed of, the Court turned to the second preclusion argument, the one the special master urged the Court to adopt.[167] That argument centered around the consent decree settling the Claims Court litigation. According to the State parties and the special master, the settlement extinguished the Tribe's title to the disputed lands, rendering the Tribe unable to now seek any additional water rights based on a claim that the Tribe enjoyed beneficial ownership of those boundary lands.[168]

The Court reached into theories of claim and issue preclusion to reject the special master's recommendation. All the parties agreed that the consent decree satisfied the requirements of claim preclusion; that is, the Tribe and the United States (the parties to the litigation) extinguished any *claims* that they might have against each other arising out of the 25,000 acres of disputed boundary lands. That consent judgment, however, did not carry with it any *issue* preclusion. The Court used well-accepted principles of preclusion in reaching its decision.[169] Indeed, it quoted from a standard treatise on the issue: "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion."[170] Since the current litigation involved different parties, the consent judgment was not binding as to the issue of who held title to the disputed boundary lands.

The State parties also argued that even if standard preclusion law would not support their arguments, the Court should recognize that the Indian Claims Commission Act created a special type of statutory preclusion with respect to decisions of the Claims Commission (and later the Claims Court).[171] More

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164. *See id.* at 2318.
165. *See id.*
166. *Id.*
167. *See id.* at 2318.
168. *See id.*
169. Although these principles were well accepted, they had not been definitely established by the Court. *See* Judith V. Royster, *Is the Quechan Tribe Barred From Seeking a Determination of Reservation Boundaries and Water Rights?*, PREVIEW OF UNITED STATES SUPREME COURT CASES 7, April 4, 2000, 1999-2000 PREVIEW 393 (Westlaw). Accordingly, the door was open for the Court to establish a different interpretation of its prior decisions. The Court did not accept that invitation.
170. *Arizona*, 120 S. Ct. at 2319 (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443, at 384-85 (2d. ed. 1987)).
171. *See id.* at 2319-20.

specifically, the State parties argued that the whole purpose of the Claims Commission was to provide monetary compensation to extinguish any tribal claims to land.[172] The Court found it unnecessary to address the merits of this argument given the particular context of the Quechan Tribe's Claims Court litigation. In that litigation, the Tribe pursued mutually exclusive arguments as to why it retained title to the land. The consent judgment did not articulate which of those theories prevailed. Accordingly, the judgment was ambiguous as to whether the money was paid to extinguish the Tribe's title or simply as compensation for almost a century of trespass.[173] Because the theory underlying the judgment is ambiguous, the judgment does not, and cannot, carry with it any issue preclusion.

The Court refused the invitation of the federal government and the Tribe to look behind the judgment,[174] although the reality of what actually happened must have been on the Court's mind. The Claims Court litigation was settled largely as a result of the 1978 Solicitor's Opinion, which held that the 1893 Agreement was void and that the U.S. held the title to the disputed 25,000 acres in trust for the Quechan Tribe. Thus, the federal government's position was that the Tribe retained the rights to the land, making that land Indian Country under federal law.[175] That means the Tribe has jurisdiction over those lands. If the Court had found that the Tribe was precluded from seeking additional water rights, it would have meant that the Tribe could not "pursue the water rights that otherwise would attach to the trust lands, thus denying to the Quechan Tribe certain rights guaranteed to Indian tribes by federal law."[176] Indeed, for the Court to find that any claim for water rights was precluded by the consent judgment would be to interpret that judgment differently than the parties to that judgment, which would surely be an anomalous result. The United States holds the land in trust for the Quechan Tribe, which certainly runs counter to the state parties' claim that the Claims Court decision extinguished the Tribe's title to that land.

Thus, the resolution of *Arizona III* turned largely on standard principles of preclusion, rather than on any federal Indian law doctrine. From that perspective, it was not really an Indian law decision, and it will thus not affect that body of law. This might be especially true as the Court refused to address the only arguable "Indian law" issue before it—whether decisions of the Claims Court should carry any special preclusion effects. On the other hand, the decision was a significant victory in the eyes of the Quechan Tribe, as its claims for additional water rights are now back before the special master for a final determination as to quantity.[177] To a lesser, but still significant, extent, the decision was also a victory for those tribes inhabiting the Colorado River and Fort Mojave Reservations. Those three

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172. This argument rests on several decisions of the Ninth Circuit. *See, e.g.*, United States v. Pend Oreille Pub. Util. Dist., 926 F.2d 1502 (9th Cir. 1991).

173. *See Arizona*, 120 S. Ct. at 2320.

174. *See id.*

175. The standard definition of Indian Country is found at 18 U.S.C. § 1151 (1994).

176. Royster, *supra* note 169, at 9.

177. *See Arizona*, 120 S. Ct. at 2321-22. Indeed, those are the only remaining claims in this litigation. Once they are resolved, the books will be officially closed on Arizona v. California. *See Id.*

tribes will now be able to enjoy the increased water rights so critical in the Western states.

III. CONCLUSION

Although not technically Indian law cases, the Supreme Court's *Rice v. Cayetano* and *Arizona v. California* decisions from this past term illustrate how the Court can use existing legal principles either to prejudice or to benefit indigenous peoples. The detriment was apparent from the *Rice* decision. There, the Court focused exclusively on the narrow confines of the Fifteenth Amendment and refused to factor in any historical context to its interpretation of that Amendment. This approach resulted in the Court striking down a voting scheme designed to give Hawaiians the right to choose the trustees who administer funds for their benefit. The Court's decision was, thus, a blow to efforts to protect Native Hawaiians. It remains to be seen, however, how serious that blow is.

As to *Arizona*, in one sense the case was so fact specific that it may not carry much precedential effect, except to provide a definitive Supreme Court citation for the proposition that consent decrees do not usually carry any issue preclusive effects. On the other hand, it may demonstrate a way for tribes to win some future cases: avoid principles of federal Indian law and instead ask the courts to extend standard principles from other areas of the law. This can be a dangerous request, however, as many times those special principles of Indian law are what protect tribal sovereignty. On the other hand, in a few appropriate cases it may provide a method of victory in courts who are uneducated in or hostile to standard principles of Indian law. In any event, this past term sends a message to Tribes: they not only have to watch the minefields of federal Indian law, but they must now also watch for the mines buried within other existing legal doctrines.