

# Apples, Bananas, Coconuts and Oreos – the Fruit Salad and Dessert of Race: American Indians in the Diversity Discourse

Lawrence R. Baca

**Former Deputy Director, Office of Tribal Justice, U.S. Department of Justice Civil Rights Division**

---

*American Indians are the only group of people to have their own title in the United States Code (Title 25). As Native Americans, many consider them to be a race. Case law says they are a body politic, citizens of sovereign tribes. Are they either, or both, or something else? And depending upon how one answers that question, what are the implications and ramifications for Native American lawyers?*

The Supreme Court has recently granted certiorari in *Fisher v. University of Texas, Austin* to review the use of race in admissions as a tool for promoting greater diversity at the university.<sup>1</sup> While the case on its facts seems to be limited to whether the University of Texas, Austin can use race as a factor in admissions to create diversity, most of us assume that accepting this case is about more. As counsel for the defendant has pointed out, she cannot ask for prospective relief as she is about to graduate from another school. Moreover, she cannot apply for admissions as a new or transfer student; the only retrospective relief she is seeking is fifty dollars for her non-refundable application fee and fifty dollars for her also non-refundable housing deposit. Either the Court has taken a case to resolve a one-hundred dollar dispute, or something else is afoot.<sup>2</sup> Obviously, the potential exists that the Court will overrule its decision in *Grutter v. Bollinger*<sup>3</sup> and forbid the use of race in any way in school admissions. This could have long-term ramifications for diversity in law school and the legal profession. Then again, it may not affect Indians in the diversity discourse, because Indians are different.

## I. Two Conversations on the Meaning of Diversity

As people of color, we occasionally make derogatory terms out of the names of certain fruits or desserts. We use the words Apple, Banana, Coconut, and Oreo to describe people of our race or ethnicity whom we believe are only superficially of our race or ethnicity but in reality white people with dark skins.<sup>4</sup> An interesting component to our assessment is that we must believe them to be of our racial or ethnic group to begin with; else, we cannot accuse them of being white on the inside when we believe they should be something else.

---

1. *Fisher v. Univ of Tex., Austin*, 631 F.3d 213 (5<sup>th</sup> Cir. 2011), cert granted, 132 S.Ct. 1546 (2012).

2. See Brief in Opposition, at 2, *Fisher v. Univ. of Tex., Austin*, 132 S.Ct. 1546 (2012) (No. 11-345), 2011 WL 6146835, at \*2-\*3 (noting that based on the facts as presented by the Petitioner, the Respondents could moot the case by paying her the \$100 but fails to state why the University does not pay the \$100).

3. 539 U.S. 306 (2003).

4. To exaggerate the obvious, each of these food items are Red, Yellow, Brown or Black on the outside but white on the inside.



The challenge is to find a way to either reinvigorate those black institutions that sustained us and socialized us in the past – e.g., the Black Church, the NAACP, etc. – and/or to invent new institutions that can do the same or a better job.

I was having lunch one day in 1973 with two of my classmates at Harvard Law School. One, let's call him Paul, was White and the other, let's call him Harold, was Black. In the general course of first year student small talk we learned that Harold was from an educated and financially well-off family, his father being a lawyer and his mother a doctor. He told us that he'd gone to Choate Prep School and then Princeton for his undergraduate degree. Paul looked up at Harold and announced with great incredulity, "Well, you're not Black. You don't know anything about the Black experience in America. You grew up just like me!" Harold chuckled softly and said in the best "street" he could muster, "Paul, if I take a White woman to dinner in South Boston . . . trust me, *I be Black.*"

Paul didn't get Harold's subtlety, culturally or linguistically.

On the flip side, several years ago I worked with a man in my alumni association who announced to me one day with great pride that he'd been able to get his grandson into graduate school. Apparently the young man had been denied admission to several schools to which he had applied. My colleague helped him go over his application and in the course of many hours they discovered that one of the young man's grandparents on his mother's side was from Spain. So, on his next application they checked the Hispanic Heritage box and he was accepted into that school. While my associate thought he'd pulled a great coup, he in fact had undermined diversity at that school. His grandson had absolutely no relationship to Hispanic or Spanish culture. He didn't even know that he had such heritage on his family tree previous to that day. He had never identified himself as Hispanic nor would he while in graduate school. He brought no Hispanic diversity to the classroom because he never had a Hispanic experience. He knows nothing of Hispanic culture and he has never been discriminated against for being Hispanic. If the two components of diversity that I discussed above with respect to my law school classmate Harold hold true, this young man had neither an Hispanic cultural experience nor a racialized experience to bring to the discourse.

So what is diversity in the field of law about in the first place? Is it the importance of bringing a cultural, racial or life experience to the legal discourse that is different from others into the classroom or a workplace? Does that include just being a member of a different race in an all white classroom or law firm?

In *Grutter v. Bollinger* the Court approved the Michigan law school's diversity program describing it as one that, "does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions."<sup>5</sup> The

---

5. 539 U.S. 306, 316 (2003).

●●●●

We use the words Apple, Banana, Coconut,  
and Oreo to describe people of our race  
or ethnicity whom we believe are only  
superficially of our race or ethnicity but in  
reality white people with dark skins.

policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."<sup>6</sup> By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."<sup>7</sup>

So according to Sandra Day O'Connor "diversity" in law school admissions is broader than race and ethnicity.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."<sup>8</sup>

In the two scenarios that I presented we clearly have judgments being made about diversity. In the first, Paul didn't judge Harold to be Black, while Harold was pretty sure he had a grip on what it means to be Black in America. Paul would not have found that Harold brought diversity to the class of '76. In the second, I have made the judgment that the young man with his newly discovered Spanish ancestor to be little more than a fraud. He has no more connection to Hispanic heritage than someone who changes their name from Joseph White to Jose Blanco. He might bring something diverse to his class but it won't be Hispanic diversity.

Diversity, of course, means more than the color of your skin or your last name. Recognizing that racial and ethnic diversity can have many layers and components let me focus on how law schools can decide, "What makes someone an Indian?"

---

6. *Id.*, (citations omitted).

7. *Id.*, (citations omitted).

8. *Id.* at 333.

## II. Indians Are Different

We are the last people in America for whom there is a legal definition. Being Indian is a mix of racial makeup, cultural heritage, and citizenship in a tribe. In the seminal treatise on Federal Indian Law, published in 1942, Felix S. Cohen wrote:

The term "Indian" may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from the Caucasian, Negro, Mongolian, and other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race. Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent, but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community.

Recognizing the possible diversity of definitions of "Indianhood," we may nevertheless find some practical value in a definition of "Indian" as a person meeting two qualifications: (a) That some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an "Indian" by the community in which he lives. The function of a definition of "Indian" is to establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians.<sup>9</sup>

In the 1970's, I was asked to write a chapter for the Smithsonian Handbook of North American Indians on the Legal Status of American Indians. One of the first things I addressed was the question of "who is an Indian?" Some statutes or regulations provide that they grant benefits to persons who have a specific quantum of Indian blood, others require membership in a federally recognized tribe.<sup>10</sup> In general, the answer is probably: "It depends on the purpose for which the question is asked." In the Handbook, I essentially proposed continued use of the Cohen definition but altered slightly. I modified Cohen's (b) and made it "considered an Indian by the community in which he lives or where he was raised." I wanted to recognize that in the modern mobile society some of us may be recognized as Indians in our home communities but not necessarily in our present community. I also added a third prong (c) that "the person holds themselves out to be an Indian." This addresses two concepts: first, perhaps somebody shouldn't be assigned to a race they don't hold themselves to be;<sup>11</sup> and, second, someone who has always held themselves out to be one race shouldn't be allowed to call themselves a different race to achieve a benefit.<sup>12</sup>

Indians are a race, but we are also members of bodies politic: we are citizens of our tribes. When Bill Clinton was President, he established a Race Advisory Board with White, Asian, Hispanic, and Black members. But, he didn't appoint an Indian to the board. I spent a lot of time and ink criticizing

---

9. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942), available at <http://thorpe.ou.edu/cohen.html>.

10. Tribal membership is controlled almost exclusively by tribal law and custom. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

11. In the infamous *Plessy v. Ferguson*, few remember that Plessy argued that he had a legal right - a property right - to his race. He had always held himself out to be white and he argued that he had a right to be white even though the railroad wanted to assign him to the car for "the colored race." In fact, the statute allowing separation of the races in the passenger cars had a section exempting the conductors and the railroad from liability for assigning someone to the "wrong car" for their race. Plessy also challenged that part of the statute as being unconstitutional but the issue was deemed by the Supreme Court not to be properly before the Court. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

12. As I have previously written about, the National Native American Bar Association has a great concern about individuals who lie about their race because they believe affirmative action will get them into law school. We call them box checkers. We occasionally ask the question of such students, "What race were you before you filled out the law school application?"

the President for that, alleging everything from “he didn’t think Indians are a race” to “not thinking Indians are a race important enough for the Race Advisory Board”. I took some heat from my fellow Native Americans because of a legal doctrine developed by the Supreme Court in the case of *Morton v. Mancari*, the political distinction doctrine.<sup>13</sup> In that case, a non-Indian employee of the Bureau of Indian Affairs challenged the BIA employment regulations that give preference in hiring and promotion to individuals who are members of federally recognized tribes.<sup>14</sup> The Supreme Court addressed the matter as follows:

Contrary to the characterization made by appellees, this preference does not constitute “racial discrimination.” Indeed, it is not even a “racial” preference. [FN24] Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

FN24. The preference is not directed towards a “racial” group consisting of “Indians”; instead, it applies only to members of “federally recognized” tribes. This operates to exclude many individuals who are racially to be classified as “Indians.” In this sense, the preference is political rather than racial in nature.<sup>15</sup>

In simple terms, the Court found that membership in an Indian tribe was a political distinction and not a racial distinction and, therefore, the preferences based on membership did not violate the Equal Employment Opportunity Act of 1972<sup>16</sup> or the Due Process Clause of the Fifth Amendment. The *Mancari* distinction has then lead many to state that Indians are a political group not a racial group. I was therefore criticized for putting too much of a spotlight on Indians as a racial group which some feared would cause the Supreme Court to revisit the concept and overturn *Mancari*, which could then in turn eliminate Title 25 to the United States Code as being racially motivated and unconstitutional.<sup>17</sup>

As a civil rights lawyer, I know the keen distinction between race and tribal membership. My father was assaulted and stabbed 27 times for walking into a “whites only” establishment in 1939. The six men who jumped him didn’t ask if he was an enrolled member of a federally recognized tribe. They made a facial, racial judgment that he was an Indian in a place Indians were not allowed. While our tribe is a federally recognized tribe, my father was not enrolled, nor am I. But, by the Cohen definition and that of the Handbook of North American Indians, we are clearly both Indians. In my father’s case, he spoke a little of the tribal language but never taught any of it to his sons because he wanted us to “fit in” to Anglo-society without any linguistic impediment that may come with having spoken a language other than English as a first language. He was raised in an Indian home but not on an Indian reservation. When he walked into grocery stores in Southern California in the 1960’s people would shout, “Hey, Chief!” to him. Clearly, socially, he was an Indian. In that bar in 1939, he certainly got “racially Indian” treatment.

---

13. 417 U.S. 535 (1974).

14. There are 573 tribes in the United States that the federal government agrees that it has a government-to-government relationship with. These tribes are known as “federally recognized” and are on a list published annually in the Federal Register. With very limited exception, membership in a tribe is governed by the tribes’ rules and regulations on membership. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

15. *Morton v. Mancari*, 417 U.S. 535,553–554 (1974).

16. 42 U.S.C. 2000e *et seq.*

17. Title 25 of the U.S. Code is “Indians.” We are the only racial group in America to have our own title in the United States Code.



As a civil rights lawyer, I know the keen distinction between race and tribal membership.

As his sons, while a great many details are not necessary here, my brothers and I also experienced racialized treatment growing up. Let your imagination wander through facing the use of derogatory terms like “half-breed” or “redskin” to describe you and the general social stigma that leads to having your girlfriend beaten with a soup ladle by her mother for going out with you because of your Indian background. When you get caught pitching pennies with white kids, you and the Hispanic boy get suspended for being “the ring leaders” while the white kids have notes sent home to their parents. You get kicked off the cross-country team because your long hair violates the school’s dress code.<sup>18</sup> It’s all the usual stuff that gives you a negative racialized experience. We faced the social rejection based on Indian status. Alternatively, I have been elected President of the National Native American Bar Association three times. I have social acceptance by the Indian community as an Indian. So, while we might not be enrolled members of our tribe, we *are* Indians.

In the federal criminal code, United States Code Title 18, there are a pair of statutes most lawyers have never heard of called the Indian Country Crimes Statutes:

Sec. 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.<sup>19</sup>

This section shall not extend to offenses committed by *one Indian* against the person or property of *another Indian*, nor to *any Indian* committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.<sup>20</sup>

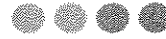
---

18. Forget that you wear your hair uncut for religious reasons; the First Amendment does not protect Indians at your high school.

19. Indian Country is also a legal term of art defined at 18 U.S.C. § 1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

20. 18 U.S.C. § 1152 (emphasis added).



## Being an Indian is not just membership in a federally recognized tribe.

### Sec. 1153. Offenses committed within Indian country

(a) *Any Indian* who commits against the person or property *of another Indian or other person* any of the following offenses, ... within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.<sup>21</sup>

When examining these statutes, courts have routinely held that being Indian is an element of the crime that must be proven by the prosecuting United States Attorney. Consider the recent case of *United States v. Stymiest*,<sup>22</sup> where the following jury instruction was given at the end of the trial in a prosecution under 18 U.S.C. §1153:

The second element is whether Matthew Stymiest is recognized as an Indian by the tribe or by the federal government or both. Among the factors that you may consider are:

1. enrollment in a tribe;
2. government recognition formally or informally through providing the defendant assistance reserved only to Indians;
3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction;
4. enjoying benefits of tribal affiliation; and
5. social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.

It is not necessary that all of these factors be present. Rather, the jury is to consider all of the evidence in determining whether the government has proved beyond a reasonable doubt that the defendant is an Indian.

It is pretty clear in this context that being an Indian is not just membership in a federally recognized tribe. The distinction between being an Indian and not Indian is important. If an Indian and a non-

---

21. 18 U.S.C. § 1153(emphasis added).

22. 581 F.3d 759, 767 (8th Cir. 2009).

Indian assault and do serious bodily harm to a non-Indian within Indian Country, they will be charged under different laws and be tried in different courts. Because of 18 U.S.C. § 1153 the Indian will be charged with a federal crime in federal court while the non-Indian will be charged for a state crime and tried in state court.<sup>23</sup> Even where the penalties or the elements of the crime are different between the two statutes, the Supreme Court has approved of the distinction:

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.<sup>24</sup>

This case stands for the proposition that no matter what the Supreme Court does next term in the Texas case, Indians can still be targeted by colleges and law schools for diversity preference. Not the race of Indians, but Indians who meet the *Mancari* standard and are enrolled members of federally recognized tribes.

In what could be a very interesting turn of events, if the Court were to forbid the use of race in admissions, more Indians could in fact be admitted in to law school. The National Native American Bar Association has argued that half or more of all of the people in law school today who claim to be Indians really are not but have checked the box to receive the diversity points. This then allows law schools to say they have significant numbers of Indian students when they really don't. If the use of race in admissions is forbidden there will be no market for non-Indians to lie about being Indian. If law schools keep their diversity commitment and start asking for enrollment numbers and tribal affiliation non-Indians will not be able to lie about being Indian, and so only actual Indians will be counted as Indians by law schools.

I told you, Indians are different.

---

23. See generally *United States v. McBratney*, 104 U.S. 621 (1881).

24. *United States v. Antelope*, 430 U.S. 641, 645 (1977) (citing *Morton v. Mancari*, 417 U.S. 535 (1974)) (citation omitted).



I told you, Indians are different.