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ARTICLES

TRIBAL MEMBERSHIP AND STATE LAW AFFIRMATIVE ACTION BANS: CAN MEMBERSHIP IN A FEDERALLY RECOGNIZED AMERICAN INDIAN TRIBE BE A PLUS FACTOR IN ADMISSIONS AT PUBLIC UNIVERSITIES IN CALIFORNIA AND WASHINGTON?

CRUZ REYNOSO & WILLIAM C. KIDDER***

The group at the statistical bottom of all the scales thought to measure lack of opportunity is American Indians. A line of viable Supreme Court authority holds that equal protection of the law does not require strict scrutiny of laws singling out Indians for advantage or disadvantage, when "Indians" is understood to mean members of federally recognized tribes rather than Indians by ethnicity.

Judge Steve Russell¹

* Boochever and Bird Professor of Law, King Hall, University of California Davis, School of Law; Associate Justice, California Supreme Court (Ret.). Professor Reynoso has also served as the vice-chair of the United States Commission on Civil Rights and as the chief negotiator for the State of California in reaching compacts with Indian gaming tribes. This article is dedicated to the loving memory of my wife Jeannene Reynoso.

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1. Steve Russell, *American Indians in the Twilight of Affirmative Action*, 2 CHICAGO POL'Y REV. 37, 37 (1998). As non-native authors writing about matters of American Indian higher education policy, we begin with this quotation because, while we hope our paper serves as a tool to bring an important and overlooked issue to the attention of University of California, California State University and legislative policymakers in California, we also recognize that the paper's core ideas about tribal membership and affirmative action are hardly our unique "discovery." Russell's article, for example, received a national award from the Wordcraft Circle of Native Writers and Storytellers. At the time of that writing, he was president of the Texas Indian Bar Association and was writing in a context similar to the present situation in California under Proposition 209. In *Hopwood v. Texas*, the Fifth Circuit repudiated the diversity rationale as a compelling interest and placed onerous restrictions on applications of the remedial rationale for affirmative action, thus effec-

INTRODUCTION

The 2000 Census indicates that 1 out of every 6.6 American Indians is a California resident.² Accessibility for American Indian students continues to be a challenge in higher education, particularly at selective public institutions in California restricted by a state law affirmative action ban (Proposition 209). For example, the fall 2005 freshmen class at the nine campuses of the University of California (UC) included 144 American Indian students out of over 33,000 California residents (0.48%).³ At UC Davis, located a few miles from California's only tribal community college, only 18 of 4,254 California resident freshmen were American Indians, including zero of the 900 students entering the College of Agricultural and Environmental Sciences.⁴ Similarly, the 2005 freshmen class at UC Berkeley included only 11 American Indians out of 3,747 in-state residents, and at UCLA there were 17 American Indians out of 4,165 students.⁵ These three UC campuses had a combined total of 46 American Indians in 2005, whereas in 1995, prior to Proposition 209 and a Regent resolution banning affirmative action, there were 56 American Indian freshmen at UC Berkeley, 45 at UC Davis and 42 at UCLA.⁶ When controlling for growth in the size of freshmen class between 1995 and 2005, American Indian freshmen enrollments at UC Berkeley, UCLA and UC Davis declined by a remarkable 74%.⁷

At the same time, the problem of declining American Indian freshmen enrollment is not isolated to highly selective campuses like UC Berkeley. Rather, across the entire UC and California State University (CSU) systems, the college-going rate for American Indian high school graduates declined considerably between 1995 and 2005.⁸ As indicated in Chart 1 below, the California

tively banning race-conscious admissions at public and private higher education institutions in Texas. 78 F.3d 932 (5th Cir. 1996), *rev'd in part* by *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. STELLA U. OGUNWOLE, CENSUS 2000 BRIEF: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION 4 (Feb. 2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>.

3. U.C. OFF. PRESIDENT, APPLICATION, ADMISSIONS AND ENROLLMENT OF CALIFORNIA RESIDENT FRESHMEN FOR FALL 1995 THROUGH 2005 1 (Aug. 2006), available at http://www.ucop.edu/news/factsheets/Flowfrc_9505.pdf.

4. *Id.*

5. *Id.*

6. *Id.*

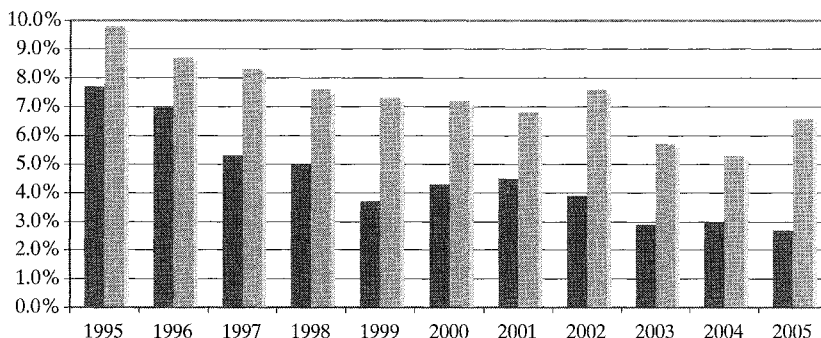
7. *Id.*

8. We use 1995 as a baseline rather than 1997 (the last year with affirmative action in UC undergraduate admissions) because in July of 1995 the UC Regents passed Standing Policy 1 (SP-1) — Adoption of Resolution: Policy Ensuring Equal Treatment — Admissions — ending affirmative action, setting the stage for Proposition 209 and substantial ensuing media coverage. While SP-1 did not take effect until the 1998 entering class, it, in combination with Proposition 209, appears to have had

Postsecondary Education Commission (CPEC) estimates that the UC college-going rate for California's American Indians dropped from 7.7% in 1995 to 2.7% in 2005, a decline of nearly two-thirds. CPEC estimates that the CSU college-going rate for California's American Indians dropped from 9.8% in 1995 to 6.6% in 2005, a decline of almost one-third.

CHART 1⁹

■ UC System ▨ CSU System



Perhaps most discouraging, and consistent with our opening quote from Steve Russell about which group is at the “bottom of all the scales” is the fact that according to the latest CPEC data, American Indians were the only racial/ethnic group to experience substantial declines in college-going rates between 1995 and 2005 in *all three segments* of California public higher education (UC, CSU and California Community Colleges).¹⁰ Over the twenty-year period dating back to 1985, the historic lows for American Indians’ college-going rates in California all occurred recently (UC in 2005, CSU in 2004, community colleges in 2003).

Nationally, within the college-age population (18-24), the percentage of American Indians/Alaskan Natives enrolled in any

the effect of dampening application, admission and enrollment of underrepresented minorities to the UC system between 1995 and 1997. See U.C. OFF. PRESIDENT, UNDERGRADUATE ACCESS TO UC AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES 15 (Mar. 2003), available at http://www.ucop.edu/sas/publish/aa_final2.pdf.

9. CAL. POSTSECONDARY EDUC. COMM’N, COLLEGE-GOING RATES OF CALIFORNIA HIGH SCHOOL GRADUATES: STATEWIDE AND LOCAL FIGURES figs.1-4 (Draft Report Sept. 2006), available at http://www.cpec.ca.gov/Agendas/Agenda0609/Tab_07.pdf. College-going rates are calculated by “dividing the number of college freshmen by the number of high school graduates.” *Id.* at 1 n.1. In discussing this draft report, one UC faculty member involved in admissions policy noted that the overall 2005 college-going rate for all racial/ethnic groups combined (6.0%) is lower than UC’s estimates of 7%-8%. Note however, that this does not call into question the main point of Chart 1 (i.e., the *declining* rates for American Indians) since overall rates to UC were flat between 1995 and 2005. *Id.* at 4 fig.5.

10. *Id.* at figs.2 & 4.

college or university (17.7%) is less than half the rate for Whites (41.6%), and it is also lower than the rates for Latinos (23.5%) and African Americans (32.3%).¹¹

Yet, ten years after Proposition 209 first took effect at public universities in California, an important legal and educational question has heretofore been largely ignored at the policymaking level: can tribal membership, particularly membership in a federally recognized tribe, be a plus factor in public university admissions despite Proposition 209's prohibition on consideration of race, color, ethnicity, and national origin? Within the UC system, the only programs to allow tribal membership as an admissions factor are the UCLA School of Law and an affiliated graduate student program at the UCLA American Indian Studies Center. Tribal membership is not a factor in undergraduate admissions at the UC, nor is it a factor in the CSU system.

Current UC and CSU policy, notwithstanding a body of federal cases, dating back to the landmark 1974 Supreme Court ruling in *Morton v. Mancari*,¹² treat membership in a federally recognized American Indian tribe as a political classification, distinct from classifications based on race, ethnicity and national origin. Whereas federal courts reserve strict scrutiny for classifications based on race, ethnicity and national origin (including affirmative action programs), classifications based on membership in a federally recognized tribe are subject to the rational basis test, a far less stringent standard of review.

In addition to California, Washington state passed a ballot initiative in 1998 with identical wording as Proposition 209 (Initiative Measure 200, or "I-200"). Like California, Washington also has a sizable American Indian population and, as we explain later, for purposes of federal appellate court jurisdiction, Washington and California are both within the United States Court of Appeals for the Ninth Circuit. Moreover, Michigan now confronts the same issue, as Michigan voters approved an anti-affirmative action ballot initiative similar to Proposition 209 on the November 2006 ballot.¹³ In the interest of full disclosure, we should note our previous involvement with this issue. Professor Reynoso co-chaired the faculty task force at UCLA School of Law that in 2001 endorsed the use of federal tribal membership

11. CATHERINE FREEMAN & MARY ANN FOX, STATUS AND TRENDS IN THE EDUCATION OF AMERICAN INDIANS AND ALASKA NATIVES tbl.7.1b (Aug. 2005), available at <http://nces.ed.gov/pubs2005/2005108.pdf> (listing national college-going rates in 2003).

12. 417 U.S. 535, 553 n.24 (1974).

13. Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

as a factor in admissions.¹⁴ Mr. Kidder authored a memorandum asking the UC Davis Academic Senate's Admissions and Enrollment Committee to consider using tribal membership as a factor in undergraduate admissions.

I. FEDERAL CASE LAW

A. *Membership in an American Indian Tribe is a Political Classification*

Because "American Indian" and "Native American" are racial/ethnic classifications, it is often implicitly assumed that membership in an American Indian tribe is, by extension, also a racial/ethnic classification. There is some factual basis for making such an assumption, since approximately two-thirds of federally recognized tribes in the continental U.S. have specific Indian ancestry requirements (the most common is a 25% Indian blood quantum requirement),¹⁵ but as we will discuss shortly, such a view is too simplistic. Moreover, owing to the unique political relationship that evolved between American Indian tribes and the U.S. government, membership in a federally recognized American Indian tribe is a political classification distinguishable from racial/ethnic classifications.

California's Proposition 209 and Washington's I-200 both state: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁶ Yet, most of the time American Indians and/or Native Americans are not specifically mentioned in connection with the programs and policies being challenged as discriminatory and/or "preferential" under Proposition 209.¹⁷ In Proposition 209 cases where American Indians are mentioned (typically challenges to terminate affirmative action programs), it is usually regarding provisions treating American Indians as a racial/ethnic classification, rather than challenges to programs restricting benefits to members of federally recognized American Indian tribes.¹⁸ For instance, a

14. CAROLE GOLDBERG ET AL., REPORT OF THE UCLA SCHOOL OF LAW ADMISSIONS TASK FORCE (Jan. 2001) (on file with author).

15. Eva Marie Garrouette, *The Racial Formation of American Indians: Negotiating Legitimate Identities Within Tribal and Federal Law*, 25 AM. INDIAN Q. 224, 224-25 (2001).

16. CAL. CONST., art. I, § 31(a) (2006); WASH. REV. CODE § 49.60.400(1) (2006).

17. See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000); *Coral Constr., Inc. v. City & County of San Francisco*, 116 Cal. App. 4th 6 (2004); *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal. App. 4th 359 (2005); *Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161 (2005).

18. See *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 66, 69 (2001) (challenging a provision of the California Lottery that for contracting purposes de-

case involving a Sacramento contracting program defined Native American, for purposes of eligibility as a minority-owned business enterprise, as including “all persons having origin in any of the original peoples of North American [sic] or the Hawaiian Islands, in particular American Indians, Eskimos, Aleut or Native Hawaiians.”¹⁹

The situation is similar in Washington. One prominent I-200 case that does not mention Native Americans/American Indians is the Seattle School District K-12 integration case in which the Washington State Supreme Court ruled that race as a tie-breaker in school assignment did not violate I-200 (the U.S. Supreme Court granted review of this case on the accompanying federal constitutional question).²⁰ Likewise, in a challenge to affirmative action at the University of Washington Law School that was partly rendered moot by I-200, American Indians were not specifically mentioned nor was a program for federally recognized tribes at issue.²¹

While the cases on Proposition 209 and I-200 are silent on the issue of membership in a federally recognized American Indian tribe, for purposes of federal Indian law, the definition of “American Indian” has both an ancestry component as well as a tribal affiliation component.²² The leading United States Supreme Court case addressing this issue is *Morton v. Mancari*. In *Mancari*, non-Indian employees challenged, on Title VII and constitutional grounds, provisions of the Indian Reorganization Act, which directed that qualified Indians be given a hiring preference for positions within the Bureau of Indian Affairs (BIA).²³ The Court found that the “overriding purpose” of the Indian Re-

financed “socially and economically disadvantaged persons” to include “Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians)” and challenging another section of Government Code covering professional bond services that defined “minority” as an “ethnic person of color including American Indians”). See also *Coal. Econ. Equity v. Wilson*, 122 F.3d 692, 698 (1997); *Crawford v. Huntington Beach Union High Sch., Dist.*, 98 Cal. App. 4th 1275 (2002).

19. *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 294 n.3 (2004).

20. *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (2003). The Ninth Circuit, sitting en banc, upheld the use of an integration tiebreaker in the Seattle District’s open choice, noncompetitive, public high school assignment plan. *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir.) (en banc), *rev’d*, 127 S.Ct. 2738 (2007).

21. *Smith v. Univ. of Washington Law Sch.*, 2 F. Supp. 2d 1324 (W.D. Wash. 1998), *aff’d*, 233 F.3d 1188, (9th Cir. 2000). See also *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999).

22. NELL J. NEWTON, ET AL., *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* 171-72 (2005 ed.) (defining “Indian as a person meeting two qualifications: (a) that some of the individual’s ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual’s tribe or community”).

23. *Mancari*, 417 U.S. at 537-39.

organization Act was to facilitate Indian tribes having “a greater degree of self-government, both politically and economically.”²⁴ The Court unanimously upheld the BIA policy, finding it was “reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.”²⁵ *Mancari* applied rational basis review, rather than strict scrutiny, because it found the BIA policy “was not even a ‘racial’ preference.”²⁶ In an important footnote the Court explained:

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.²⁷

Finally, the *Mancari* Court declared, “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”²⁸

The principle of *Mancari* was reaffirmed a few years later in *United States v. Antelope*, a case involving criminal prosecution under the Major Crimes Act.²⁹ The Court in *Antelope* unanimously rejected an equal protection challenge by tribal members claiming invidious racial discrimination, and relied upon *Mancari* in declaring, “[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as “a separate people” with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political com-

24. *Id.* at 542.

25. *Id.* at 554.

26. *Id.* at 553.

27. *Id.* at 554 n.24. (The policy in *Mancari* did have a racial component in the sense that eligibility required that “an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.” Thus, the fact that most federally recognized tribes determine eligibility for their membership rolls based partly upon degree of American Indian ancestry should not by itself transform an admission policy from a political to a racial/ethnic classification).

28. *Id.* at 555.

29. *United States v. Antelope*, 430 U.S. 641 (1977). Unlike *Mancari*, *Antelope* disadvantaged American Indians (or at least some individual defendants). The Major Crimes Act, subjected Indian tribal members who commit certain offenses within Indian country to the same laws and penalties as other persons committing any such offenses within the exclusive jurisdiction of the U.S (i.e., federal jurisdiction). See 18 U.S.C. § 1153. In *Antelope*, if a non-Indian had committed the same crime in Indian country (killing a non-Indian in the course of burglary and robbery) the case would have been prosecuted under Idaho state law, where more evidence would be required for a conviction.

munities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians'"³⁰

In the late 1990s, when California's Proposition 209 and Washington's I-200 first took effect, it appeared that the legal landscape was becoming increasingly inhospitable to *Mancari's* principle that membership in a federally recognized American Indian tribe is a political classification subject only to rational basis review. Indeed, in *Williams v. Babbitt*, Judge Kozinski of the Ninth Circuit wrote in dicta that the logical application of *Adarand v. Constructors, Inc. v. Peña* — the 1995 Supreme Court contracting affirmative action case — would indicate that "*Mancari's* days are numbered."³¹ The Ninth Circuit panel in *Williams* did not reach the issue of whether strict scrutiny applies because the plaintiffs prevailed on their first argument that the Interior Board of Indian Appeals' interpretation of the Reindeer Industry Act could not be upheld even under the relaxed *Mancari* standard.³²

Soon after *Williams*, in *Malabed v. North Slope Borough*, a district court struck down an employment priority policy for members of federally recognized tribes (i.e., Inupiat Eskimos).³³ *Malabed* declared the policy favoring members of federally recognized American Indian tribes to be a violation of borough law and that it should be regarded as a classification based on national origin.³⁴ While *Malabed* was first decided on the basis of borough law, in addressing federal constitutional law, the court relied upon *Adarand* and the dicta in *Williams* in declaring, "The continuing validity of *Mancari's* analysis is subject to some question."³⁵

Yet, as Judge Posner once cautioned in an affirmative action case, "[T]here is a reason that dicta are dicta and not holdings,

30. *Id.* at 646 (citing *Mancari*, 417 U.S. 535).

31. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (citing *Adarand Constructors, Inc.*, 515 U.S. 200 (1995)).

32. *See Williams*, 115 F.3d at 663-66.

33. *Malabed v. North Slope Borough*, 42 F. Supp. 2d 927 (D. Alaska 1999), *aff'd on state law grounds*, 70 P.3d 416 (Alaska, 2003), *aff'd on other grounds*, 335 F.3d 864 (9th Cir. 2003).

34. *See Malabed*, 42 F. Supp. 2d at 930-31 ("In a nutshell, NSB's argument is that the ordinance provides a preference for Native Americans, a class which takes its definition from federal law and is not a racial or national origin classification. The argument is persuasive as far as it goes, but does not address the fact that the basis upon which federal law recognizes Indians or Native Americans as a distinct class is the fact that Native Americans are members of what were originally independent sovereign nations, later reduced to dependent sovereigns subject to the superior sovereignty of the United States [citation omitted]. In other words, the very thing that makes Native Americans a distinct class in federal law is their origin in independent nations. Thus, discrimination in favor of Native Americans is by definition discrimination based upon national origin.").

35. *Id.* at 938.

that is, are not authoritative.”³⁶ Here, the dicta in *Williams* and *Malabed*, announcing *Mancari*’s likely demise, was premature in light of subsequent Supreme Court and Ninth Circuit rulings.³⁷

In the 2000 case of *Rice v. Cayetano*, the Supreme Court both reaffirmed *Mancari* and to some extent limited *Mancari*’s applications.³⁸ In *Rice*, a white rancher in Hawaii challenged a state law that restricted voting for trustees of the Office of Hawaiian Affairs to Hawaiians defined as “descendants of aboriginal peoples inhabiting the Hawaiian Islands in 1778.”³⁹ Though *Rice* involved a state classification, *Mancari* was implicated because the agency was created under the Statehood Admission Act in which Hawaii agreed to adopt the federal Hawaiian Homes Commission Act (i.e., a federal obligation setting aside certain public lands in light of the manner in which the U.S. annexed Hawaii and dispossessed Native Hawaiians).⁴⁰

In *Rice*, the State of Hawaii argued that exclusion of non-Hawaiians from voting was permissible under the *Mancari* line of cases allowing the differential treatment of certain members of Indian tribes because Native Hawaiian is a status similar to Indians in organized tribes.⁴¹ Thus, the Court could have used the occasion to announce that *Mancari* was no longer good law and that strict scrutiny would heretofore invariably apply to classifications pertaining to American Indians. But in *Rice*, the Court declined to make such a bold break from the past. Instead, the Court decided the case on the narrower proposition that even if the *Mancari* rationale were to be extended to Native Hawaiians,

36. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996).

37. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that only the Supreme Court retains “the prerogative of overruling its own decisions”).

38. *Rice v. Cayetano*, 528 U.S. 495 (2000).

39. *Id.* at 509.

40. For historical background on the role of the U.S. military in the illegal overthrow of the Hawaiian kingdom and the U.S. annexation of Hawaii a few years later, see Annmarie M. Liermann, Comment, *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509, 509 (2001) (“In January 1993, the United States took the extraordinary step of apologizing for its wrongdoing. Even more extraordinarily, the United States issued this apology to a native people. Public Law 103-150 . . . apologized to the Hawaiians who, prior to the illegal overthrow of their government with the help of the United States in 1893, existed as a self-governing people. As evidenced by the passage of the Apology Resolution, Congress and President Bill Clinton duly acknowledge that Hawaiians ‘never directly relinquished their claims to their inherent sovereignty.’”); See also *id.* at 516-17 (explaining that Queen Lili’uokalani conditionally abdicated her throne to avoid bloodshed when 200 U.S. Marines were placed in front of her palace to block the Queen from introducing a new constitution that threatened the economic interests of the sugar cane industry, and that in 1897 about 95% of Hawaiian adults signed petitions protesting annexation).

41. *Rice*, 528 U.S. at 518-19.

the voting scheme for trustees of the Office of Hawaiian Affairs would be invalid under the Fifteenth Amendment.⁴² The recent edition of *Cohen's Handbook of Federal Indian Law* (a federally funded publication designed to reflect the consensus view of legal scholars in the field of Indian law) summarizes the import of *Rice* as follows:

Rice v. Cayetano reaffirms *Morton v. Mancari*, even as some of the language may be read to limit its applications. Reaffirmation of *Morton v. Mancari* occurs when the Court states that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. Potential containment occurs when the Court emphasizes particular features of the federal law upheld in *Morton v. Mancari* — particularly the fact that the regulation, though not the statute, required tribal membership as well as Indian ancestry, and the agency affording the employment preference was the Bureau of Indian Affairs, an entity characterized as *sui generis* . . . [then explaining why there is a greater burden to justify racial distinctions in state and federal elections than in other contexts].

In sum, the unique status of Indian tribes under the Constitution and treaties establishes a legitimate legislative purpose for singling out Indians as a class. Legislation rationally related to this purpose is not proscribed by the equal protection principle. Legislation dealing with Indians as a discrete class, but not reasonably related to their federal status should be tested against the stricter equal protection standards prohibiting discrimination based on race, ancestry, or national origin.⁴³

After *Rice*, several Ninth Circuit rulings reaffirmed the principle in *Mancari* that tribal membership is a political classification. A leading case on point is *Kahawaiolaa v. Norton*, in which the court applied rational basis review and upheld the Interior Department's BIA regulations that precluded Native Hawaiians from seeking status as a federally recognized American Indian tribe.⁴⁴ In this case, unlike *Williams*, the Ninth Circuit expressly reached the *Mancari* issue of whether to apply rational basis review (rather than strict scrutiny) because the court found it nec-

42. *Id.* at 522 ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.").

43. NEWTON ET AL., *supra* note 22, at 930-31. See also CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 47 (Hardy Myers et al. eds., 3d ed. 2004) ("In short, although *Rice* can be read to reaffirm *Mancari's* characterization as 'political' of a tribal membership requirement that had an ancestral core, the Court was unwilling not only to extend that characterization beyond Indian tribes but also to credit the contention that the earlier holding could be justified solely on the basis of ancestry.").

44. *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied* 125 S.Ct. 2902 (2005).

essary to reject the plaintiffs' lead argument that strict scrutiny should apply.⁴⁵ In *Kahawaiolaa*, the court reaffirmed the distinction in *Mancari* between political and racial classifications: "[T]he recognition of Indian tribes remains a political, rather than racial determination. Recognition of political entities, unlike classifications made on the basis of race or national origin are not subject to heightened scrutiny."⁴⁶ In rejecting strict scrutiny, the *Kahawaiolaa* court was cognizant of the implications of its holding for programs benefiting American Indian tribes.⁴⁷

Another recent case is *Means v. Navajo Nation*, in which the Ninth Circuit also reached and rejected the equal protection argument that *Adarand* effectively overrules *Mancari*.⁴⁸ In upholding the 1990 amendments to the Indian Civil Rights Act — a federal statute subjecting members of other American Indian tribes to tribal criminal jurisdiction on reservation land — the court cited *Kahawaiolaa* and *Rice* in finding, "Means argues that *Mancari* is undermined by *Adarand Constructors, Inc. v. Peña*, but both the Supreme Court and our court have continued to rely on *Mancari*, and we are bound to follow it under the doctrine of *Agostini v. Felton*."⁴⁹

Likewise, in *Artichoke Joe's v. Norton*, the Ninth Circuit affirmed a ruling of the Eastern District of California, which applied *Mancari's* rational basis test rather than strict scrutiny in upholding California's Proposition 1A, which allows the Governor to make compacts with federally recognized Indian tribes for casino-style gaming on tribal lands.⁵⁰ We shall return to *Ar-*

45. *Id.* at 1278-79.

46. *Id.* at 1279.

47. *Id.* at 1279 n.4 ("We are also quite mindful that the application of strict scrutiny in this instance might have profound consequences in other contexts. As in *Mancari*, North American Indian tribes have often urged that a rational basis examination should apply to programs that benefit tribes.")

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

49. *Id.* at 932 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). *Agostini* involved a First Amendment Establishment Clause challenge to a program that sent public school teachers into parochial schools to provide remedial education. Relevant to the reference above, the *Agostini* Court declared, "We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Id.* at 237 (citation omitted). See also *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (reaffirming *Mancari* in the context of a FAA aircraft noise limitation rule that exempted flights from an Indian reservation, and was found to be rationally related to the government's trust obligation to the tribe: "Although the Air Tour Association contends that *Adarand* effectively overruled *Mancari*, the Supreme Court has made clear that the lower courts do not have the power to make that determination And this circuit has continued to apply *Mancari* post-*Adarand*." (citations omitted)).

50. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 731-36 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).

tichoke Joe's in Part II when discussing a parallel California state court case.

Most recently, in *Doe v. Kamehameha Schools*, the Ninth Circuit, sitting *en banc*, upheld the admission policy at the Kamehameha Schools, a private, non-profit K-12 educational institution established through a charitable testamentary trust of the descendant of the Hawaiian monarchy, for the education of Native Hawaiians.⁵¹ While the majority opinion assumed that "Native Hawaiian" is a racial classification for purposes of ruling on the Schools' admission policy, the concurring opinion by five Ninth Circuit judges declared: "A narrower ground for sustaining Kamehameha Schools' admissions policy is that 'Native Hawaiian' is not merely a racial classification. It is also a political classification."⁵² The concurring opinion relies upon *Mancari* in stating that Congress is empowered to legislate on behalf of Native Hawaiians by virtue of their unique status as an indigenous people with whom the U.S. has established a trust relationship.⁵³ By extension, if political status can perhaps be extended to Native Hawaiians, the political (as opposed to racial) nature of a classification based on membership in a federally recognized American Indian tribe is all the more secure as a legal doctrine.

B. *Congress' Unique Obligation toward Indian Tribes*

A central theme in modern federal Indian law doctrine is the promotion of Indian self-determination.⁵⁴ The U.S. Senate has praised self-determination as "the most successful policy of the United States in dealing with the Indian tribes," in part because such a policy "rejects the failed policies of termination and paternalism . . . recognizing that cultural pluralism is a source of

51. *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (*en banc*) (ruling that the Schools' admission policy that required nearly all students to have at least one Native Hawaiian ancestor was valid under 42 U.S.C. § 1981).

52. *Id.* at 850 (Fletcher, W., J., concurring).

53. *Id.* at 850-53.

54. Notions of sovereignty and self-determination involve important cultural and political dimensions not addressed in this paper. See, e.g., Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZ. ST. L.J. 1, 1 (2002) ("Sovereignty is a vital concept to Native people. As Coeur d'Alene tribal leader David Matheson observes, '[t]ribal sovereignty is more than a legal doctrine, it is our existence and our continued survival.' Unfortunately, sovereignty is also one of the most misunderstood concepts within Western jurisprudence. The Native nations of North America have lived and died to protect and preserve their sovereignty."); Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (2000) ("The challenge lies in negotiating that clash between values and principles imbedded in traditional law and those imbedded in western law. Decolonization is not easily accomplished, whether one is struggling to build a nation-state or exercising self-determination within a nation.").

strength.”⁵⁵ The Chairman of the Hoopa Valley Tribe in Northern California notes:

By establishing the policy of tribal self-determination in 1975, Congress set out a new and progressive agenda for Indian Country that was based on the fundamental rationale under which treaty-making itself was based. Treaties were based on the understanding that tribes have functioning governments that have inherent sovereign powers to control and direct affairs that are carried out within their territory.⁵⁶

In this context, it is important to note that the Ninth Circuit has recognized the importance of leadership training to the goals of strengthening tribal self-sufficiency and sovereignty.⁵⁷ In a different context, leadership training was also approvingly mentioned by the Supreme Court in *Grutter v. Bollinger*,⁵⁸ which upheld the University of Michigan Law School’s affirmative action program for American Indians (based on race, not tribal membership), African Americans, and Latinos. One reason the *Grutter* Court found that racial and ethnic diversity in the student body is a compelling governmental interest is the connection between affirmative action and leadership training at selective institutions: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”⁵⁹ In the *Grutter* case, several American Indian tribes in Michigan filed a brief supporting the Law School’s program, arguing that affirmative action fostered leadership training that is crucial to the effective management of tribal affairs.⁶⁰

55. S. Res. 277, 106th Cong. (2000).

56. *Regarding Trust Reform and Related Matters, Before the S. Comm. on Indian Affairs* 3 (May 2003) (statement of Clifford Marshall, Chairman Hoopa Valley Tribe), available at <http://indian.senate.gov/2003hrsg/052103hrgr/marshall.PDF>.

57. *Cf. Alaska Chapter, Associated Gen. Contractors of America Inc., v. Pierce*, 694 F.2d 1162, 1170 (9th Cir. 1982) (upholding a HUD regulation implementing a preference to Indian-owned economic enterprises for contracts to build housing for Indians under *Mancari*, in part because, “One of the purposes of the Indian Self-Determination Act is to develop leadership skills in Indians. 25 U.S.C. § 450(a). Encouraging and assisting Indian-owned businesses helps develop such leadership and furthers the government’s trust obligation to help the Indians develop economic self-sufficiency.”).

58. 539 U.S. 306 (2003).

59. *Id.* at 332.

60. Brief of the Bay Mills Indian Community et al. in Support of Respondents in *Grutter v. Bollinger* 2-3 (Feb. 2003), available at http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um/Indians-gru.pdf. The Michigan tribes, many of which provided a land grant in a treaty which led to the creation of the University of Michigan, argued:

The tribal leaders who signed the Fort Meigs Treaty had the foresight to recognize that educating their children and future leaders was essential to coping with the increasingly complex issues facing their tribes. Indeed, today the *Amici* recruit Native American students at the University of Michi-

Accordingly, a key rationale for taking into account tribal membership in UC admissions can be the strengthening of tribal self-determination and sovereignty through educational leadership training. The UC and CSU systems currently award three-quarters of all the bachelor's degrees granted by California colleges and universities,⁶¹ which is why the data on American Indians' low college-going rates (discussed earlier in Chart 1) are particularly alarming. The UC is the exclusive pathway to leadership for American Indian students (and others) in California who aspire to become doctors, lawyers and Ph.D's while paying public in-state tuition rates.⁶² Such a self-determination purpose could be concretely expressed, for example, by giving American Indian tribal members who already demonstrate community leadership potential (by virtue of their involvement in tribal and American Indian cultural activities) more of a plus factor than those who do not.⁶³

There are some historical precedents outside the admissions context for our proposal within UC, albeit on a much more modest scale. UC maintains accords/cooperative agreements with the pueblos adjacent to the Los Alamos National Laboratory, including a pledge by UC to improve educational opportunities for American Indians.⁶⁴ In addition, the UC Office of the President and the UC Irvine and UC Riverside Chancellors collaborated with Sherman Indian High School in the development of a path-

gan Law School to draft and enforce tribal laws, to staff tribal courts and law enforcement programs, and defend tribal rights and resources Furthermore, if other law schools were similarly prevented from considering race in admission decisions, the *Amici* would be unable to fill important governmental positions with qualified candidates, therefore impeding the *Amici*'s ability to exercise their sovereign authority and undermining the federal government's policy of self-determination for all Indian tribes. See also Expert Report of Faith Smith, President of Native American Educational Services College, in *Grutter v. Bollinger*, reprinted in 12 LA RAZA L.J. 397, 397 (2001) (describing the need for Native American attorneys to advance the "protection of tribal natural resources, sovereignty, equal access to public resources for tribal members, and child and family welfare").

61. CAL. POSTSECONDARY EDUC. COMM'N, CALIFORNIA BACCALAUREATE PRODUCTION AND LABOR MARKET DEMAND 2 (2005), available at <http://www.cpec.ca.gov/FactSheets/FactSheet2005/FS05-06.pdf>.

62. CAL. EDUC. CODE § 66010.4(c), available at <http://www.ucop.edu/acadinit/mastplan/ucmission.htm>.

63. A policy developed in collaboration with tribal leaders would obviously have a greater chance of success than one developed in a vacuum by UC admission policymakers.

64. *Laboratory, Santa Clara Pueblo Officials Sign Reaffirmation Agreement*, LANL News, Dec. 23, 1997, available at http://lanl.gov/news/index.php?fuseaction=home.story&story_id=1702 ("All the cooperative agreements with the pueblos now include an educational initiative, in which the Laboratory, UC and DOE pledge to improve educational opportunities for Native Americans at the Laboratory."); *Lab, Accord Pueblo Governors Discuss Planning, Partnering Efforts*, LANL News, June 13, 2003, available at <http://www.lanl.gov/orgs/pa/newsbulletin/2003/06/13/text02.shtml>.

breaking college-preparatory program for American Indian students.⁶⁵

II. CALIFORNIA'S LEGAL CONTEXT

A. *State Authority to Promote a Federal Policy*

As discussed earlier, *Mancari* and subsequent cases require that a policy taking into account membership in a federally recognized tribe must be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”⁶⁶ This poses an additional legal hurdle for state or local government programs (compared to federal programs), but does not prohibit such programs. As noted in *Cohen’s Handbook of Federal Indian Law*:

State action presents additional equal protection questions. Under the supremacy clause, states must observe federal laws and treaties, and when the federal standards in these laws and treaties are valid under the fifth amendment, state action in accordance with them does not violate the equal protection clause of the fourteenth amendment.⁶⁷

One prominent example where courts (federal and state) have recognized the State of California’s power to treat federally recognized tribes differently is in negotiating compacts for Indian gaming under Proposition 1A, approved by California voters in 2000.⁶⁸ As noted earlier, the Ninth Circuit rejected an equal protection challenge to gaming compacts in *Artichoke Joe’s v. Norton*, affirming the district court’s granting of summary judgment to both the state and federal defendants.⁶⁹ A year before *Artichoke Joe’s* reached the Ninth Circuit, in *Flynt v. California Gambling Control Commission*, a California Court of Appeal, citing *Mancari*, upheld California’s Proposition 1A as rationally related to the goal of “promoting tribal economic development, self-sufficiency, and strong tribal governments.”⁷⁰

The appellants in *Flynt*, who owned card rooms that were threatened economically by the slot machines and other forms of gambling allowed at Indian casinos, cited *Williams* in arguing that the Proposition 1A gaming compacts between the State of

65. Press Release, U. C. Off. President, Sherman Indian High School Collaboration, (Apr. 22, 1988) (on file at Bancroft Library, UC Berkeley).

66. *Morton*, 417 U.S. at 555.

67. NEWTON, ET AL., *supra* note 22, at 931-33 (citing *Artichoke Joe’s v. Norton* and other cases).

68. Proposition 1A amended the California Constitution, and authorized the Governor “to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.” CAL. CONST., art. IV, § 19(f).

69. *Artichoke Joe’s*, 353 F.3d 712.

70. 104 Cal. App. 4th 1125, 1145 (2002).

California and 62 federally recognized tribes violated their equal protection rights and should be struck down under strict scrutiny review.⁷¹ The court in *Flynt*, relying upon *Mancari* and *Antelope*, held that the rational relationship test was the proper standard because “tribal Indians belong to a political group that is specifically recognized by federal law as a sovereign nation.”⁷² The *Flynt* court was persuaded by the district court’s analysis of the same issue (later affirmed) in *Artichoke Joe’s*: “As *Mancari* illustrates, a tribal preference is not transformed from a political to a racial classification that requires strict scrutiny merely because the vehicle for the preference consists of individual members of tribes.”⁷³

The appellants in *Flynt* also argued that under *Williams*, the more relaxed *Mancari* standard must be limited to “uniquely Indian matters such as self-governance.”⁷⁴ On this point, the court in *Flynt* observed that *Williams* was not consistent with earlier Ninth Circuit case law,⁷⁵ and that, in any event, “Judge Kozinski’s provocative dicta” in *Williams* involved a factually distinguishable (hypothetical) scenario.⁷⁶

The court’s reasoning in *Flynt* is consistent with *Cohen’s Handbook of Federal Indian Law*, in which the editors cite numerous other state laws in observing:

Many states have enacted protective laws or benefits respecting Indians, which are similar to or even parallel with federal statutes. A few eastern states made treaties with tribes. When these laws or treaties conflict with federal laws, they are invalid. But the Supreme Court held long ago that the federal rela-

71. *Id.* at 1140-41.

72. *Id.* at 1141.

73. *Id.* at 1142 (quoting *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1132 (E.D. Cal. 2002)).

74. *Id.* at 1143.

75. *Id.* at 1144 n.17 (“The decision and analysis in *Williams* has not escaped criticism. ‘Out of antipathy to *Mancari’s* lax standard, Judge Kozinski may be attempting to introduce more bite into it than the Supreme Court ever intended.’ (quoting Carole Goldberg, *American Indians and “Preferential Treatment”*, 49 UCLA L. REV. 943, 960 (2002)). We note that *Williams’s* suggestion that *Mancari* is limited to classifications ‘that affect uniquely Indian interests’ has not been found to be persuasive even by the Ninth Circuit. For example, in *Alaska Chapter Associated Gen. Contr. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), another panel of that court cited cases where the United States Supreme Court relied upon *Mancari* and applied the rational basis test to interests ‘which are much broader than tribal self-government’.” (citations omitted).

76. *Id.* at 1144-45 (“We believe that Judge Kozinski’s provocative dicta, when considered in context, can best be understood as casting constitutional doubt on Indian-run gaming monopolies formed solely for business purposes untethered to any declared federal objective of strengthening tribal self government or promoting the tribe’s economic development. That is not the situation here.”).

tionship with tribes does not preclude protective state laws which do not infringe on federally protected rights.⁷⁷

Included among these state laws designed to benefit American Indians are California's Business and Professions Code § 17569 (prohibiting fraudulent imitation of Indian-made arts and crafts),⁷⁸ free university tuition in Montana for federally recognized tribal members and college scholarships in Florida and South Dakota for members of recognized tribes.⁷⁹

There are, however, a couple adoption cases in which California state courts did not follow the reasoning in *Mancari* regarding benefits based on tribal status being political rather than racial. In the case of *In re Santos Y.* the appeal court applied strict scrutiny in holding that the Indian Child Welfare Act — which directs that when a child of a tribal member is put up for adoption priority be given to parents of the same tribe — was unconstitutional as applied.⁸⁰ In this case, the juvenile court was reversed after it ordered a child removed from his foster parents who wished to adopt the child and to whom the child became attached. The biological mother was an enrolled member of the Minnesota Chippewa Tribe Grand Portage Band, and the Band urged placement with an extended family member who lived on the reservation in Minnesota.⁸¹ The court in *In re Santos Y.* relied upon *Williams* and *Malabed* in treating the political classification principle dismissively:

Post-*Adarand* Ninth Circuit Court of Appeals cases have focused on the text of *Mancari*, rather than on the footnote language that characterized the BIA preference as more political than racial, and have limited application of the rational basis test to legislation involving uniquely Indian concerns. We do likewise, and do not find child custody or dependency proceedings to involve uniquely Native American concerns.⁸²

Even if this characterization of Ninth Circuit case law were true years ago, that is no longer the case today in light of the aforementioned discussion of *Kahawaiola*, *Means* and *Artichoke Joe's*.

77. NEWTON, ET AL., *supra* note 22, at 931-32 (citing *New York ex re. Cutler v. Dibble*, 62 U.S. 366 (1859)).

78. We are unaware of any published opinions involving legal challenges to Business and Professions Code § 17569's focus on "authentic American Indian labor." This statute is mentioned by the California Supreme Court (in a post-*Hi Voltage* case) as one of several examples of the State's "traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 964 (2002).

79. NEWTON, ET AL., *supra* note 22, at 932.

80. 92 Cal. App. 4th 1274 (2001).

81. *Id.* at 1318-22.

82. *Id.* at 1320-21 (citing *Dawavendewa v. Salt River Project Agr. Imp.*, 154 F.3d 1117 (9th Cir. 1998); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997); *Malabed v. North Slope Borough*, 42 F. Supp.2d 927 (D. Alaska 1999)).

Thus, *In re Santos Y.* rests on a shaky foundation for the same reasons described above regarding *Williams* and *Malabed*. Another reason to distinguish cases like *Flynt* and *Artichoke Joe's* from earlier adoption cases like *In re Santos Y.* and *In re Bridget R.*⁸³ is that in the former, California officials and state agencies were named defendants. Thus, it is logical to expect that complex federal/state law issues related to *Mancari* were given a fuller airing in *Flynt* and *Artichoke Joe's*.

An earlier California case consistent with *Flynt* and *Artichoke Joe's* is *Long v. Chemehuevi Indian Reservation*, in which the court sustained the Chemehuevi Indian Tribe's demurrer in a wrongful death action occurring at a marina alongside the Colorado River, on the grounds that the Tribe's sovereign immunity derives from its federally recognized status as a political entity.⁸⁴

With respect to state and local programs outside California, there are conflicting holdings in a few other earlier cases.⁸⁵ As for admission (or financial aid) policy at public universities in California and Washington, numerous pieces of federal legislation reflect a policy that consistently promotes the attainment of higher education for tribal members,⁸⁶ so a strong argument can

83. *In re Bridget R.* 41 Cal. App. 4th 1483 (1996).

84. *Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853, 860 (1981) ("[T]his country's policies toward the Indian nations demonstrates that the sovereign immunity of the Indian tribes is based on political, rather than racial, considerations and does not violate equal protection under either state or federal Constitutions The immunity of the Chemehuevi Tribe, reflecting legitimate federal policy, is distinctly nonracial in purpose and effect. There has been no racial discrimination here.")

85. *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1529-31 (D. N.M. 1990). In *Tafoya*, which involved the preferential granting of business licenses to members of tribes in New Mexico, the district court found the delegation of federal authority to be lacking, and struck down the program under strict scrutiny review. *Tafoya* is distinguishable from our discussion of a change in UC policy for two reasons: (1) the program only applied to *state residents* and excluded members of federally recognized tribes from Arizona, for example; and (2) perhaps more importantly, the stated purpose of the ordinance was not to strengthen tribal sovereignty, but rather to "preserve, protect and promote the educational, cultural and artistic interest" in the Old Town area of Albuquerque. *Id.* at 1528-30.

Cases in which courts upheld, under *Mancari*, state and local preferences for members of federally recognized tribes include *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (Museum of New Mexico, supported by the State of New Mexico and the City of Santa Fe, could allow only members of recognized tribes to sell jewelry and arts and crafts on the grounds of the museum); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408, 1411 (D. Minn. 1983) (permissible to use state and local funds for urban housing program with a rental preference for families whose head of household was a member of a federally recognized American Indian tribe); *Krueth v. Independent School Dist.*, 496 N.W. 3d 829 (Minn. Ct. App. 1993) (permissible under *Mancari* for school districts with ten or more American Indian students to depart from seniority rules in retaining teachers who are members of federally recognized tribes).

86. See, e.g., Higher Education Tribal Grant Authorization, 25 U.S.C. § 3301 (2000) (directs BIA to make grants to tribes to permit the tribes to provide financial assistance to individual Indian students for the costs of attendance at institutions of

be made that a properly designed policy at UC or CSU is advancing such a federal policy.⁸⁷

For example, a recent report by the Native American Rights Fund found that twenty-four states have laws providing tuition waivers, scholarships or grants to American Indian college students, including California and Washington.⁸⁸ The fact that many states and public institutions have tuition waivers for American Indians that either reduce tuition to in-state levels (e.g., Idaho, Washington, University of Arkansas at Little Rock, Southern Utah University)⁸⁹ or forgo tuition expenses entirely for members of some or all federally recognized tribes (e.g., two-year and four-year colleges in Michigan, Montana, Massachusetts, University of Maine, University of Minnesota at Morris)⁹⁰ confirms that

higher education — redesignated as the National Fund for Excellence in American Indian Education, 108 Pub. L. No. 267, 118 Stat. 797); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450(a), (f) (1975) (permitting tribes to operate federally funded educational programs); Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501 (2002) (directing BIA to make grants to tribes operating BIA-funded schools); Indian Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2213 (codified as amended at 25 U.S.C. 458-458(e)) (authorizing contracts with states for school construction on Indian lands).

87. For example, in *St. Paul Intertribal Housing Bd. v. Reynolds*, the court applied trust doctrine principles and determined that the state-sponsored housing program also fell under the trust doctrine if it was rationally related to the “government’s unique obligation toward the Indians.” 564 F. Supp. 1408, 1413-14 (D. Minn. 1983) (citations omitted).

88. NATIVE AM. RIGHTS FUND, COMPILATION OF STATE INDIAN EDUCATION LAWS 145-70 (Oct. 2005), available at <http://narf.org/pubs/edu/blue.pdf>.

89. *Id.*; See also College Menominee Nation, *Tuition Waivers for Native American Students* (undated) (college financial aid webpage listing several state and university programs), available at <http://www.menominee.edu/newcmn1/FinancialAid/TuitionWaiversForNativeAmericanStudents.htm>; Julie Peterson, *U Will Honor Tuition Waivers for Native American Students*, U. REC., Sept. 5, 1995, available at http://www.umich.edu/~urecord/9596/Sep05_95/2.htm.

90. NATIVE AM. RIGHTS FUND, *supra* note 88, at 145-70. See also Michigan Dept. of Labor & Economic Growth, *Michigan’s 28 Public Community Colleges 2003-2004 North American Indian Tuition Waivers* (Nov. 2004) (in 2003-04 Michigan Community Colleges provided 2,200 tuition waivers to American Indian students, with a monetary value over \$1.5 million dollars), available at http://www.michigan.gov/documents/North_American_Indian_Tuition_Waivers_Report_2003-04_123920_7.pdf; Massachusetts Commission on Indian Affairs, *Tuition Waiver Guidelines* (undated) (members of federally recognized tribes who are state residents eligible for tuition waivers), available at http://www.mass.gov/dhcd/components/Ind_Affairs/pages5.htm; College of Menominee Nation, *supra* note 89; David Eppich, *Native American Tuition Waiver Briefing Paper* (Dec. 2004) (detailed history of state-financed tuition waiver program for American Indians at Fort Lewis College pursuant to a 1910 Congressional act transferring the federal land of the Fort Lewis Indian School to the State of Colorado), available at http://www.fortlewis.edu/shared/content_objects/about_flc/native_american_tuition_waiver_history.pdf; Univ. So. Maine, *North American Indian Tuition Waiver/Scholarship Program* (undated) available at <http://www.usm.maine.edu/eo/culture/nascholarship.htm>; Bob San & Judy Riley, *Dedicated to the Native American*, U. MINN. NEWS, Apr. 21, 2005 (waiver program at the University of Minnesota at Morris, which was an Indian boarding school until the early 1900s), available at http://www1.umn.edu/umnnews/Feature_Stories/Dedicated_to_the_Native_American.html.

taking into account membership in a federally recognized tribe at public institutions of higher learning is advancing a federal policy of educational attainment for American Indians.⁹¹ Indeed, a California law that predates Proposition 209 and has not been challenged since is California Education Code § 68077, which stipulates:

Notwithstanding Section 68062, a student who is a graduate of any school located in California that is operated by the United States Bureau of Indian Affairs, including, but not limited to, the Sherman Indian High School, shall be entitled to resident classification. This exception shall continue so long as continuous attendance is maintained by the student at an institution.⁹²

In other words, if a graduate of the BIA-operated Sherman Indian High School (in Riverside) attends UC or CSU, he or she can pay in-state tuition even if that student's permanent residence was in Arizona or another state.

That two dozen states have laws providing tuition waivers, scholarships or grants to American Indian college students is unsurprising given that in higher education, state institutions assume a larger role with respect to American Indians than is the case in many other areas affecting the lives of American Indians.⁹³ In California, public universities play the dominant role in statewide baccalaureate education: UC and CSU combine to award 74% of all bachelor's degrees in the State.⁹⁴ Conversely, it is noteworthy that D-Q University, a community college in Da-

91. Likewise, the Prelaw Summer Institute Program for American Indians and Alaskan Natives — a BIA-funded academic preparation program serving American Indian students nationwide — bases eligibility on membership in a federally recognized tribe. Interview with Heidi Nesbitt, Director of the Pre-Law Summer Institute at the American Indian Law Center, University of New Mexico (August 2005). Apparently per BIA requirements, non-members may also be eligible by showing they are one-quarter Indian blood and providing an explanation for why they are not tribal members. Ms. Nesbitt also reports that the Institute does offer admission to a limited number of American Indians who are members of state-recognized tribes, but it relies on private donations rather than BIA funds for such students. *See also* Pre-Law Summer Institute Application, available at <http://lawschool.unm.edu/ailec/plsi/application-requirements.htm> (last visited Mar. 1, 2007).

92. CAL. EDUC. CODE § 68077.

93. There is some suggestion in Congressional reports that that the federal government completely delegated responsibility to California in the area of education, but from what we can gather, that is an overstatement reflective of the termination period in federal Indian law, which is an outdated congressional policy. *See e.g.*, Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge, S. Rep. 501 91st Cong. Sess. XII 30 (1969) (“Since the 1930’s nine states (California, [. . .]) have assumed total responsibility for the education of their Indians, but data on Indian education from most of those States . . . is far from impressive.”), available at <http://www.tedna.org/pubs/Kennedy/toc.htm>.

94. CAL. POSTSECONDARY EDUC. COMM’N, *supra* note 61, at 2.

vis, is the only tribal college in the entire State, and it recently closed after losing its accreditation and its BIA funding.⁹⁵

Finally, to the extent that the UC Regents' 1995 Standing Policy 1 (SP-1) Resolution (prohibiting race-conscious admissions) might be interpreted as imposing an additional hurdle, the Regents' unanimous decision to rescind SP-1 in 2001 renders that a moot point.⁹⁶

B. *Scholarly Opinion About Proposition 209 and Tribal Membership*

While Judge Kozinski's opinion in *Williams* was dismissive of the *Mancari* political classification rationale (and he was strongly criticized for this⁹⁷), it is far from the case that all those who might be labeled political conservatives and/or affirmative action opponents are similarly inclined. A prominent example is UCLA School of Law professor Eugene Volokh, who served as a Legal Advisor to the "Yes on 209" campaign and was a leading public advocate for Proposition 209.⁹⁸ Volokh authored a 1997 article in the *UCLA Law Review* on how to interpret Proposition 209 in which he writes:

Under federal constitutional law, classifications turning on a person's membership in an Indian tribe are generally not seen as being based on race or national origin. Because an Indian tribe is not just an ethnic group but a political one, the Court has viewed "preferences" for "members of federally recog-

95. Robin Hindery, *California's Only Tribal College Close to Collapse After 35 Years*, ASSOCIATED PRESS, Aug. 13, 2006, available at <http://www.signonsandiego.com/news/state/20060822-0103-tribalcollege.html> (last visited Oct. 8, 2007); Sharon Stello, *D-Q U. ponders future after losing accreditation*, DAVIS ENTERPRISE, Jan. 24, 2005, available at <http://www.davisenterprise.com/articles/2005/01/24/news/342new1.txt>.

96. Cathy Cockrell, *Regents Rescind SP-1, SP-2: Chancellor, Students Applaud Decision*, DATELINE UC DAVIS, May 25, 2001, available at http://www.dateline.ucdavis.edu/052501/DL_SP1SP2.html.

97. Carole Goldberg, *Critical Race Studies: Descent into Race*, 49 UCLA L. REV. 1373, 1380 (2002) ("*Williams v. Babbitt* uses an interpretation of the Reindeer Act as the occasion for lashing out against what it perceives as racially based preferences for Indians. The upshot of the approach taken in *Williams v. Babbitt* is that Indians will only be entitled to favorable federal legal treatment, even treatment necessary to repair the effects of prior harmful U.S. policies, only if that treatment aids them in performing their culture to the satisfaction of non-Indians - that is, by 'living according to some putative nineteenth-century lifestyle.' In other words, Indian cultures must cease to be vital, living, changing cultures, and Indian people must question who they are if they don't live as their great-great-grandparents did. Alaska Natives could have been spared this outcome if the *Williams* court had embraced an alternative, well-supported constitutional theory of Congress's power to legislate for the benefit of Indian nations.").

98. See, e.g., Eugene Volokh & Sally Pipes, *Women Need Not Fear the Civil Rights Initiative*, L.A. TIMES, Jan. 24, 1996, at B9; Eugene Volokh homepage, available at <http://www.law.ucla.edu/volokh/> (see section on affirmative action/Proposition 209).

nized tribes” as “political rather than racial in nature.” [citing *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)] This makes sense . . . Tribal Indians, unlike other Californians, belong to a political group that’s specifically recognized by federal law and the U.S. Constitution, not merely to an ethnic group that has no independent legal standing . . . It thus seems proper to follow the federal constitutional example, and view classifications based on Indian-tribe membership as not being based on race (or ethnicity or national origin) for CCRI purposes.⁹⁹

Volokh’s law review article goes on to state, “The State may therefore legitimately want to consider a prospective employee’s, student’s, or contractor’s Indian-tribe affiliation in seeking to better serve the needs of this separate political community.”¹⁰⁰

III. POLICY, POLITICAL & FEASIBILITY CONSIDERATIONS

A. *Proportion of Tribal Members in California’s College Pipeline*

While there are complicated legal questions surrounding the use — in public university admissions in California and Washington — of membership in a federally recognized American Indian tribe, this is an area where political and policy considerations may loom even larger. Perhaps the thorniest issue involving a change in UC/CSU admissions with respect to American Indian tribes — one with both political and legal dimensions — is that some American Indian tribes and nations would be eligible while others would not, with *Rice* and *Kahawaiolaa* suggesting that federal recognition is the dividing line.¹⁰¹

Currently, the BIA recognizes 561 tribes and nations, including 109 California-based tribes.¹⁰² To our knowledge, little if any-

99. Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1358-59 (1997).

100. *Id.* at 1359. See also *id.* at n.71 (citing *Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853, 860, 171 Cal. Rptr. 733, 737 (1981) (“[T]he sovereign immunity of the Indian tribes is based on political, rather than racial, considerations and does not violate equal protection under either state or federal Constitutions.”); *Krueth v. Independent Sch. Dist. No. 38*, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993) (“[P]references for American Indians are not racial but political when the preferences apply to members of federally recognized tribes.”); cf. *In re Bridget R.*, 41 Cal. App. 4th 1509-10 (holding that discrimination based on tribal status is permissible only so long as the particular Indian has ‘social, cultural or political tribal affiliations’—apparently beyond mere membership—with his tribe; thus, though, is the only case we have seen that has required such a fact-specific inquiry.).

101. See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000).

102. Dept. of the Interior, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 70 FED. REG. 71194 (Nov. 2005). See also 25 C.F.R. § 83.2 (2007) (“Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their govern-

thing has been recently published on the tribal affiliations of California's potentially college-bound American Indian students. Thus, from the vantage point of a UC or CSU admissions policymaker, an obvious starting point for grappling with this issue is the simple feasibility question of whether there are sufficient numbers of American Indian applicants (or potential applicants) who are members of federally recognized tribes for an admissions plus factor to make a significant difference.

The UC online undergraduate admissions application contains an open-entry box for American Indians/Alaska Natives to "Please Specify Tribal Affiliation," though the application makes clear that information is used for statistical purposes only.¹⁰³ Our findings from the UC Davis applicant pool, while not definitive statewide, are encouraging. In the 2005 and 2006 applicant pools to UC Davis (freshmen and transfer combined), 95% of American Indian applicants specified a tribal affiliation of some sort. Only 5% of American Indian applicants to Davis declined to state or were unable to state a tribal affiliation.¹⁰⁴ Part of the reason we think this is encouraging is that, for whatever reason, the 95% figure for the Davis applicant pool is substantially higher than comparable data from the 2000 Census, where 62% of American Indians in California specified their tribal affiliation.¹⁰⁵

Chart 2 below indicates the top ten most common tribal affiliations in the 2005-2006 UC Davis applicant pool and in California's American Indian population generally (2000 Census data). There is a high degree of overlap between the tribes designated by college-bound American Indians applying to UC Davis and the state's American Indian population, and some of the tribes in the Davis applicant columns but not listed in Census column were close to being in the top ten (e.g., Creek and Chickasaw). Given the fact that the average freshman in the UC system applied to 4.3 UC campuses in 2005, it is likely that the

ment-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.").

103. University of California, 2005-06 Application for Undergraduate Admission and Scholarships, Section XII, Question 136 (2005).

104. Most American Indians in this 5% category simply left the tribal affiliation question blank, a few others wrote things like "unknown," "no affiliation," and we also included a student who indicated that he/she had "1/32" ancestry in a recognized tribe (since there is a far greater likelihood that such a person is not an actual enrolled member of that tribe).

105. U.S. Census Bureau, Summary File 1, Tables PCT 2-3, available at http://factfinder.census.gov/servlet/DTGeoSearchByListServlet?ds_name=DEC_2000_SF1_U&state=dt. We calculated percentages based on the California total for American Indians/Alaskan Natives alone (210,772 of 341,816) as well as for American Indians/Alaskan Natives in combination with other races (401,788 of 648,200).

American Indian applicant pool at other UC campuses overlaps extensively with the pool at UC Davis.

CHART 2: "TOP TEN" TRIBAL AFFILIATIONS IN THE UC DAVIS 2005-2006 APPLICANT POOL AND IN CALIFORNIA'S GENERAL POPULATION (2000 CENSUS)

UC Davis 2005 American Indian Applicants (freshmen and transfer)	UC Davis 2006 American Indian Applicants (freshmen and transfer)	2000 Census Figures for California ¹⁰⁶
1. Cherokee	1. Cherokee	1. Cherokee
2. Choctaw	2. Sioux	2. Apache
3. Sioux	3. Choctaw	3. Choctaw
4. Miwok	4. Apache	4. Navajo
5. Chippewa	5. Blackfoot	5. Blackfeet
6. Mohawk	6. Comanche	6. Sioux
7. Navajo	7. Miwok	7. Pueblo
8. Blackfeet	8. Navajo	8. Yaqui
9. Creek	9. Osage	9. Chippewa
10. Delaware	10. Chickasaw	10. Iroquois
Top 10 = 66.5% of all American Indians (141 of 211)	Top 10 = 68.5% of all American Indians (189 of 276)	Top 10 = 32.2% of all American Indians¹⁰⁷ (of 648,200)

B. *California's Unique History and the Plight of Unrecognized Tribes*

Chart 2 raises another thorny political and policy issue: The largest tribes in the UC Davis applicant pool and in the 2000 Census data for California are overwhelmingly tribes with ancestral ties outside of California. The 2000 U.S. Census indicates

106. U.S. Census Bureau, Summary File 1, Table PCT3, available at http://factfinder.census.gov/servlet/DTGeoSearchByListServlet?ds_name=DEC_2000_SF1_U&state=dt. Percentages calculated based on the California total for American Indians and Alaskan Natives alone or in combination with other races (n = 648,200).

107. For purposes of internal consistency, the 2000 Census Top 10 figures in Chart 2 exclude what was actually the second-most common tribal affiliation category in California: "Latin American" Indian (9.8% of the Census total). This is excluded because for legal purposes it is a national origin (ancestry) category rather one that is or could be federally recognized as a political classification. Nor does it indicate a single tribe in a geographic and cultural/historical sense (spanning from northern Mexico to Tierra del Fuego). It is conceivable that excluding from consideration Latin American and Canadian indigenous people would be objectionable to some UC faculty (e.g., the Native American Studies Department at UC Davis has, as its mission, studying the "history and traditions of the indigenous peoples of North, Central and South America,"), but to do otherwise would arguably transform a political classification into a racial/ethnic one, and jeopardize, vis-à-vis Proposition 209, any consideration of tribal membership in UC admissions.

that only three tribes in Northern and Central California (Bishop, Hoopa Valley, and Yurok) have populations on reservation land of 1,000 or more.¹⁰⁸ The discouraging numbers of California-based tribes are not surprising, given the grim historical legacy of how American Indians have been treated in this State, which we briefly review below. Conversely, the prevalence of out-of-state tribes in California reflects a long-range migration trend from rural to metropolitan areas, much of which is attributable to the federal government's post-World War II terminationist and relocation policies, particularly under President Eisenhower.¹⁰⁹ Faced with desperate poverty and unemployment on reservations, thousands of American Indians were enticed by BIA recruiters, promises such as "Do you want to go to California or somewhere to get a job?" and slick relocation brochures portraying American Indians enjoying the fruits of employment and material prosperity.¹¹⁰ In the 1950s, the BIA opened relocation field offices in Los Angeles, San Jose and San Francisco where American Indians were provided meager job training and counseling services, and the bureau intentionally "tried to discourage returns by moving Indians to cities furthest from their homes."¹¹¹

That California's federally recognized tribes have meager land holdings compared to other western states and that California has more unrecognized tribes, are facts explained by the Gold Rush era in the State's history.¹¹² In 1850, immediately after California became a state, its Senators introduced legislation to divest American Indians of their land claims, and Congress authorized the President to study the "California situation and negotiate treaties with the various Indian tribes in California."¹¹³

108. U.S. Census Bureau, State by American Indian Area / Alaska Native Area / Hawaiian Home Land, available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US06&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-redoLog=false&-mt_name=DEC_2000_SF1_U_GCTPH1_ST8&-format=ST-8.

109. Larry W. Burt, *Roots of the Native American Urban Experience: Relocation Policy in the 1950s*, 10 AM. INDIAN Q. 85 (Spring 1986).

110. *Id.* at 89-90.

111. *Id.* at 88-93.

112. See Stephen Magagnini, *California's Lost Tribes—An 'Invisible' People Battle Ignorance, Injustice*, SACRAMENTO BEE, June 29, 1997, available at http://www.sacbee.com/static/archive/news/projects/native/day3_main.html ("About 75,000 California Indians from 80 tribes — more than any other state — aren't considered real Indians by the Bureau of Indian Affairs (BIA) because they don't belong to federally recognized tribes or reservations. Some of the most ancient tribes in California, and some of the most respected elders, aren't government-approved Indians."). A list of U.S. tribes that are not federally recognized but have petitioned for recognition is available at <http://www.kstrom.net/isk/maps/tribesnonrec.html> (last visited Mar. 15, 2007).

113. Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 PACIFIC L.J. 391, 403 (1986) (quoting 9 Stat. 544, 558).

In 1851-52 commissioners appointed by President Millard Fillmore negotiated eighteen treaties, and it is estimated that the tribes and bands agreeing to these treaties represented one-third to one-half of Indian tribal members then living in California.¹¹⁴ At that time, California Indians had aboriginal title to almost 75 million acres of land; the treaties ceded about 9 million acres to the tribes.¹¹⁵ With the Senate's advice and consent pending, federal officials induced California Indians to move to the land tracts designated to become reservations.¹¹⁶

As the Gold Rush ushered in a dramatic increase in the state's Anglo population — many of whom lusted for overnight wealth and were hostile, indeed murderous, in their treatment of California Indians — treaty opponents gained the political upper hand. The Governor and both houses of the California Legislature successfully pressured U.S. Senators to reject ratification of the treaties in 1852.¹¹⁷ The Indians who had moved to the new "reservations" at the prompting of federal officials were caught in what amounted to a "bait and switch," rendering them homeless. The Senate classified the treaties as secret until it published them in 1905 amidst public outcry, at which point their disclosure prompted Congress to approve a token 7,500 acres in *rancheria* land for homeless tribes.¹¹⁸

At the end of the day, however, we believe that the inclusive potential of allowing membership in a federally recognized tribe as a factor in UC admissions or financial aid far outweighs the exclusionary limits associated with the fact that some California tribes are not recognized. Out of 276 American Indian applicants to UC Davis in 2006, *only three* (1%) were definitely from California tribes that are not federally recognized. Perhaps there are a few more among the five percent of American Indian applicants to Davis who did not specify a tribal affiliation.

C. UCLA School of Law: A Promising Case Study

As we briefly noted in our introduction, in 2001 a UCLA School of Law faculty Admissions Task Force, which was co-chaired by Professors Reynoso and Carole Goldberg (an expert

114. *Id.* at 403.

115. *Id.* at 403-04.

116. *Id.* at 406.

117. *Id.* at 404-06; See generally CAROLE GOLDBERG & DUANE CHAMPAGNE, A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES 1, 121 (1996), available at <http://www.aisc.ucla.edu/ca/Tribes.htm>.

118. GOLDBERG & CHAMPAGNE, *supra* note 117, at 121 ("The unratified treaties were withheld from the American public until 1905. Following disclosure of these treaties, a large public outcry led Congress and the President to establish sixty-one small reservations or *rancherias*, totaling approximately 7,500 acres, for the settlement of homeless Indians.").

in federal Indian law and director of the UCLA's Joint Degree Program in Law and American Indian Studies¹¹⁹), approved the use of "membership in a federally recognized Indian tribe or nation" as one of the discretionary factors permissible in the admissions process.¹²⁰

Regarding UCLA and the other UC Law Schools, we do not have tribal affiliation data on individual applicants similar to the undergraduate applicant pool at UC Davis. It is noteworthy, however, that since adopting the aforementioned admissions policy change, UCLA has been able to enroll more American Indian law students than Boalt Hall at UC Berkeley and King Hall at UC Davis. In 2002-2005, UCLA School of Law enrolled 18 American Indians (1.45% of 1,238 entering students), which is one more than the combined total of 17 (0.91% of 1,868 entering students) at Boalt Hall and King Hall.¹²¹ By comparison, during the first four years after affirmative action was prohibited at the UC law schools under Proposition 209 and the Regents' SP-1 Resolution (1997-2000), the enrollment of American Indians at UCLA School of Law (0.72% of 1,252) was nearly indistinguishable from Boalt Hall and King Hall (0.63% of 1,760).¹²² The data therefore suggests that UCLA School of Law's policy, allowing for the limited consideration of membership in a federally recognized American Indian tribe, likely made a difference.¹²³ We urge other UC and CSU graduate and professional schools to take a closer look at the UCLA School of Law's approach and

119. See, e.g., Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002); Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Influence of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123 (1994).

120. CAROLE GOLDBERG ET AL., *supra* note 14, at 12-14. At the UCLA School of Law about 60% of the class is admitted based upon academic index scores, 23% based on a combination of socioeconomic disadvantage and academic promise, 5% on academic promise and contributions to joint degree programs and concentrations, 6% on commitment to the public interest law program, and 6% on other discretionary factors, which includes membership in a federally recognized tribe.

121. U. C. OFF. PRESIDENT, UNIVERSITY OF CALIFORNIA'S LAW SCHOOLS (Oct. 2005), available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawper.pdf>. 2006. Updated data was not yet available at the time of this writing. We excluded data from UC Hastings College of Law in San Francisco because Hastings data are not consistently maintained by the UC Office of the President. Hastings has a separate governance structure apart from the UC Regents.

122. *Id.* Here we excluded the 2001 entering UC law student data because the change in UCLA's policy was approved by the faculty in January 2001, in the middle of the Law School's admission cycle. See CAROLE GOLDBERG ET AL., *supra* note 14, at 1. Note that SP-1 took effect at UC graduate and professional schools in 1997, a year ahead of the UC undergraduate campuses. Thus, in the beginning of our paper, 1997 is treated as the last year with affirmative action for purposes of UC undergraduate admissions.

123. Additional information about tribal membership information considered at UCLA School of Law is available from Professor Goldberg, an Indian law expert at the Law School.

see if similar efforts might be supported by their faculty and approved by their university counsel.

At the undergraduate level, the kind of change we are recommending for consideration would require UC system-wide approval from the UC Board of Admissions and Relations with Schools (BOARS) before any individual UC campus could take action. BOARS promulgated *Guidelines for Implementation of University Policy on Undergraduate Admissions*, which were updated in 2002 and endorsed by the Regents.¹²⁴ While the BOARS guidelines note that “Faculty on individual campuses should be given flexibility to create admission policies and practices,”¹²⁵ the guidelines do not contemplate tribal membership as being included among the fourteen factors. Likewise, BOARS guidelines cover admission by exception; presumably UC campuses would want to have a policy regarding tribal membership that could be flexibly applied to both “UC eligible” and “admission by exception” applicants.¹²⁶

CONCLUSION: WHERE DO WE GO FROM HERE?

As we noted at the beginning of this paper, there were only 11 American Indians in the 2005 freshmen class at UC Berkeley, 17 at UCLA and 18 at UC Davis (0.38% of almost 12,200 California resident freshmen). American Indian freshmen enrollment proportions at these three UC campuses dropped by nearly three-quarters between 1995 and 2005. While existing UC academic preparation programs (formerly known as outreach) are vitally important in a post-affirmative action environment, our limited data from UC Davis suggests that these race-neutral programs are helping too few of the 3,000 or so American Indian students who graduate from California public high schools each year. In 2005, over 6,000 UC Davis freshmen applicants (out of a total of 29,300 applicants) participated in one or more academic preparation programs, including: UC Davis Early Academic Outreach Program (EAOP), UC Davis Educational Talent Search (ETS), UC Davis Upward Bound, UC EAOP, Mathematics, Engineering, Science Achievement (MESA), Upward Bound, Talent Search, Puente, and Pre-University Service Pro-

124. UC BOARS, GUIDELINES FOR IMPLEMENTATION OF UNIVERSITY POLICY ON UNDERGRADUATE ADMISSIONS (2002), available at <http://www.ucop.edu/ucophome/coordrev/policy/1-30-02admissions.pdf>.

125. *Id.* at 2 (Guiding Principle No. 5).

126. Many of the UC faculty who serve on BOARS and the Academic Senate wrote a paper identifying shortcomings with the current “UC eligibility” construct and discussing possibilities for reform. Michael Brown et al., “*Eligibility*,” *Campus Selection and Diversity*, (Oct. 2006) (paper presented at the UC Berkeley Warren Institute’s Conference on “Equal Opportunity in Higher Education: Proposition 209 — Past and Future.”).

grams. Yet, only 29 (0.48%) UC Davis applicants participating in these academic preparation programs were American Indian.¹²⁷

The aforementioned data also means that in the typical freshmen seminar at UC Davis, UCLA or UC Berkeley, and even in many large lecture courses with several hundred students, one can expect that there are zero American Indians participating in classroom discussion. Under these circumstances, it can be difficult for American Indian students to develop a sense of community with other American Indian classmates and to find support structures that foster academic success. Patricia Gurin, who provided the critical research on the educational benefits of diversity which the Supreme Court found compelling in *Grutter*, reports on the harmful classroom effects of being a token minority, when a student “is often given undue attention, visibility, and distinctiveness, which can lead to greater stereotyping by majority group members.”¹²⁸ Other studies specifically addressing the experiences of American Indians at highly selective universities report similar problems with tokenism and undue visibility.¹²⁹

The UC Regents recognize that a core part of UC’s mission is to enroll a student body that “encompasses the broad diversity of backgrounds characteristic of California.”¹³⁰ And UC campuses are likewise committed to the idea that diversity is critical

127. Because data are collected separately by program, this figure double-counts students who participated in more than one program. It may simply be that residential segregation patterns in California allow race-neutral academic preparation programs to connect to a larger proportion of African Americans and Latinos. All California counties where American Indians are over 5% of the population are in rural northern and northeastern parts of the state with very small populations (Alpine, Inyo, Del Norte, Humboldt, Trinity, Mendocino, Siskiyou, Modoc, and Mariposa counties). See ALEJANDRA LOPEZ, *THE LARGEST AMERICAN INDIAN POPULATIONS IN CALIFORNIA: HOUSEHOLD AND FAMILY DATA FROM THE CENSUS 2000* 1, 2 tbl.1 (Mar. 2002), available at http://ccsre.stanford.edu/PUBL_demRep.htm. These are areas where, for logistical reasons, scarce outreach dollars cannot stretch as far as they can in more urban areas. Conversely, although a large share of American Indians in California are in urban areas like Los Angeles, they tend to be more evenly spread out than African Americans or Latinos.

128. Patricia Gurin et al., *Diversity in Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 360 (2002). See also Mischa Thompson & Denise Sekaquaptewa, *When Being Different Is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 ANALYSES SOC. ISSUES & PUB. POL’Y 183 (2002).

129. Bryan McKinley Jones Brayboy, *Hiding in the Ivy: American Indian Students and Visibility in Elite Educational Settings*, 74 HARVARD EDUC. REV. 125 (2004).

130. UC B. ADMISSIONS RELATIONS WITH SCH., INCLUSIVENESS INDICATORS REPORT (2006) (quoting Regent Resolution RE-28, approved in 2001), available at <http://ucaccord.gseis.ucla.edu/indicators/PDF/Inclusivenessreport.pdf>. UC’s charter legislation directs it to admit “a representation of students . . . [so] that all portions of the state shall enjoy equal privilege therein.” See Organic Act, Section 14, 1868 Cal. Stat. 248.

to the endeavor of higher education.¹³¹ Our paper offers one path for UC (and CSU) to improve access for American Indian students. Apart from the primary rationale of promoting sovereignty through educational leadership (discussed in Part I.B), our proposal also has the potential to enhance the educational benefits of diversity for students from all backgrounds. As the Supreme Court found in *Grutter*, the educational benefits of diversity are both “substantial” and “real.”¹³²

131. At our campus, for example, the UC Davis Principles of Community begin by stating, “The University of California, Davis, is first and foremost an institution of learning and teaching, committed to serving the needs of society. Our campus community reflects and is a part of a society comprising all races, creeds and social circumstances.” In addition, UC Davis Academic Senate Regulation 522 requires “A course in the social-cultural diversity component is any course that deals with issues such as race, ethnicity, social class, gender, sexuality, or religion.” The Principles of Community, available at <http://principles.ucdavis.edu/default.html> (last visited Dec. 12, 2007).

132. In *Grutter*, the Court declared:

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding”, helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” . . . These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.” . . . In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” . . . These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

539 U.S. at 330-31.