Legality of California Native American Hiring Preferences for Tribal Liaison Role

Introduction

Establishing a hiring preference for California Native American tribal citizens to serve as Tribal Liaisons in lead agencies was an idea that came to light in some of ELI's interviews conducted in 2022. A threshold inquiry is whether such hiring preferences are permissible under both federal and California constitutional law. Review of case law, existing statutory codes, and scholarly and other expert opinions indicate that they may be permissible in the narrow state/local agency employment classification of Tribal Liaison, with the following two conditions met:

- The Tribal Liaison is an enrolled member of a California Native American Tribe.
- The hiring preference is specific to *federally recognized* Tribes, especially *if* the role's function extends beyond matters pertaining to Tribal Cultural Resources or Traditional Tribal Cultural Places.

Two further conditions are recommended:

- The agency position involved is *limited to that of Tribal Liaison* (or similar title) whose role presumes the existence of a *government-to-government relationship* between the state and Tribes.
- The Tribal Liaison's duties and responsibilities directly pertain to promoting Tribal self-government and greater participation in agency decision-making with implications for Tribes and their interests.[1]

[1] This condition recognizes that, unlike the federal government, California does not maintain a trust relationship with Tribes. However, this does not eliminate the potential for a non-trustee government-to-government relationship between the state and Tribes in recognition of the latter as sovereign entities.

Indian hiring preferences under federal equal protection and employment law

Under the U.S. Constitution, Equal Protection claims against the *federal* government are cognizable under the Fifth Amendment's Due Process Clause.[2] Equal Protection claims against *states* (or their political subdivisions) are cognizable under the Fourteenth Amendment's Equal Protection Clause.[3]

Courts apply one of three levels or standards of judicial scrutiny in both evaluating laws found to infringe fundamental constitutional rights and when a government action involves a "suspect classification," including race and national origin.[4] In the Equal Protection context:

- **Strict scrutiny** requires the government to demonstrate the law is necessary to achieve a *compelling state interest* and is *narrowly tailored* to achieve that interest.[5]
- **Intermediate scrutiny** requires the government to demonstrate the challenged law or policy furthers an *important government interest* by means *substantially related* to that interest.[6]

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[2] U.S. CONST. amend. V ("No person shall [. . .] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

[3] U.S. CONST. amend. XIV § 1 ("...nor shall any state [...] deny to any person within its jurisdiction the equal protection of the laws."). *See, e.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[4] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

[5] While there is a wide variety of specific examples, there is no clear, context-neutral definition of "compelling interest" in Supreme Court cases. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (ensuring basic human rights); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982) ("safeguarding the physical and psychological well-being of a minor"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (eradicating discrimination against female citizens); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 586 (1983) (raising revenue); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (combatting terrorism).

[6] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 570-71 (1996). It is often applied to certain protected classes as well as some First Amendment issues.
https://www.law.cornell.edu/wex/intermediate_scrutiny.

- **Rational basis** provides that a law or policy is held valid if it is *rationally related* to a *legitimate governmental interest*.[7]

In the landmark 1974 *Morton v. Mancari* opinion, the Supreme Court established two elements in which a hiring preference for Native Americans ("Indian hiring preference") is subject to the less stringent rational basis standard of review.[8] Four non-Indian Bureau of Indian Affairs (BIA) employees brought a class action suit, claiming that the BIA's employment preference for qualified Indians, provided by the Indian Reorganization Act of 1934, contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment.[9] Section 11 of the Equal Employment Opportunity Act of 1972 had extended Title VII of the Civil Rights Act to proscribe discrimination in most federal employment on the basis of race.[10]

The Court found the Indian hiring preference did *not* constitute invidious discrimination in violation of the Fifth Amendment's Due Process Clause. The opinion gave two rationales for its decision. *First*, the Court declared the hiring preference did not merit strict scrutiny because it did not even constitute "racial discrimination."[11] Membership in a federally recognized Tribe is a *political status* and not a racial classification. This stance turned on an argument made in oft-cited Footnote 24:

> 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. The eligibility criteria appear in 44 BIAM 335, 3. 1: ". . . an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe . . .[12]

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[7] Rational basis does not involve suspect classifications or fundamental rights. https://www.law.cornell.edu/wex/rational_basis_test

[8] 417 U.S. 535 (1974).

[9] *Id.* at 538 (The BIA policy granted a preference for both the initial hiring stage and in competing for promotions).

[10] *Id.* at 540.

[11] *Id.* at 551, 553-54.

[12] *Id.* at 553-54 n.24 (emphasis added). Legal scholars have recognized that, as a practical matter, eligibility to become an enrolled member of a tribe is often conditioned on blood quantum and therefore race. Indeed, the challenged BIA policy itself required individuals possess at least one-quarter Indian blood to qualify for the preference. *See* Bethany R. Berger, *Reconciling Equal Protection*

Second is the Federal government's trustee ("guardian-ward") relationship with *federally recognized* Tribes, which is based on the unique legal status Indian Tribes hold under federal law and Congress' plenary power as established via treaties and its assumption of a trustee, or guardian role.[13] The Court recognized Congress' "unique obligation" toward Indians.[14]

Under the rational basis standard of review, the Indian preference was reasonably and directly related to a legitimate, nonracially based goal:[15] The federal government's "legitimate interest" was: (1) promotion of Tribal self-government and sovereignty; and (2) ensuring the BIA was accountable to the needs of its constituency.

Critical to the opinion was recognition of BIA as *sui generis* as an agency.[16] Specifically, the hiring preference gave Indians greater representation within an agency charged with "administer[ing] matters that affect Indian tribal life," or carrying out obligations of that federal trust relationship.[17]

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and Federal Indian Law, 98 CAL. L. REV. 1165, 1185 (2010). *See also* Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFFS. 1, 3 (2020) ("Although the precise parameters remain vague, a federally recognized Indian tribe must comprise, to some substantial extent, people who are racially Indian."). *Id.* at 22 ("Most federally recognized Indian tribes generally require some measure of Indian descent as a condition for membership, such that even an employment preference limited only to members of Indian tribes would indirectly incorporate a racial component."). However, this is not a fixed requirement, as Tribes may decide to change qualifications for membership. Nor does a lineal descent requirement necessarily implicate a genetic nexus to the North American continent's Indigenous population prior to colonization. *See, e.g.*, *Tribal Registration*, CHEROKEE NATION (June 28, 2022), https://www.cherokee.org/all-services/tribal-registration/ (last visited June 28, 2022) ("The basic criteria for CDIB/Cherokee Nation tribal citizenship is that an application must be submitted along with documents that directly connect a person to an enrolled lineal ancestor who is listed on the "Dawes Roll" Final Rolls of Citizens and Freedman of the Five Civilized Tribes.").

[13] *Mancari*, 417 U.S. at 551.

[14] *Id.* at 555 ("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.").

[15] *Id.* at 554.

[16] *See also* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 158 n.25 (2008) ("Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.").

[17] *Mancari*, 417 U.S. at 540-41.

The Court explained:

> "[I]t is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council."[18]

The Court upheld *Mancari* in subsequent opinions.[19] However, neither the Supreme Court nor other federal courts have explicitly applied the reasoning as a bright-line, two-element test.[20] At times, courts have held the first element alone—affirming a *political status* rather than racial classification, based on enrolled membership in a federally recognized Tribe—as dispositive of rational basis standard of review, and regardless of whether the legislation or policy implicated the unique federal trust responsibility or involved an agency or policy framework specifically intended to carry out those obligations.

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[18] *Id.* at 553-54. The Court also invoked the doctrine against implied repealers. Title VII of the Civil Rights Act of 1964 proscribed racial discrimination in *private* employment, and explicitly exempted from its coverage the preferential employment of Indians by Indian Tribes or by industries located on or near Indian reservations, also known as the Section 703(i) Indian Preference Exemption. *Id.* at 545, 547.

[19] *See, e.g*., Rice v. Cayetano, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (invalidating, primarily for Fifteenth Amendment reasons, Hawaiian constitutional provisions limiting the franchise to vote for trustees to the Office of Hawaiian Affairs, to only "Hawaiians," defined as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The Court upheld the logic of *Mancari*, which "presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs." *Id*. at 519-20.).

[20] Doran, *supra* note 12, at 26 ("The Court has relied on *Mancari* six times to reject equal-protection challenges to classifications involving Indians or Indian tribes, but it has equivocated between the 'political rather than racial in nature' rationale and the 'unique obligation' rationale). In *Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont.*, the Court utilized both rationale in rejecting an equal protection challenge. 424 U.S. 382 (1976). In some cases, it has rejected equal protection challenges by relying solely on the "political rather than racial in nature" rationale. *United States v. Antelope*, 430 U.S. 641 (1977), *and Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In others, it exclusively applied the "unique obligation" rationale. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Rsrv.*, 425 U.S. 463 (1976), *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977), *and Wash. v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Some subsequent circuit and district court decisions followed the *Mancari* decision faithfully in noting the necessity of the second element. For example, the Ninth Circuit Court of Appeals in its 2014 *Equal Employment Opportunity Commission v. Peabody Western Coal Company* decision supported Indian hiring preferences outside of the ambit of BIA, but in the context of coal mining leases enacted under a federal law.[21] The Appeals Court's holding turned on the permits being issued by a federal agency, the Department of the Interior, under a federal law, the Indian Mineral Leasing Act, which Congress specifically intended to promote tribal sovereignty and self-government.[22] But other courts determined that only the first element was sufficient for rational-basis review, even when applying *Mancari* to *state* legislation giving a preference to Indians, including when making hiring decisions.[23]

The Supreme Court also permitted differential treatment among different Indian Tribes in its 1977 *Delaware Tribal Business Committee v. Weeks* decision, in which the Court addressed Congress' distribution of an award by the Indian Claims Commission for claims arising out of an illegal sale of Delaware tribal lands in the nineteenth century.[24] In upholding the

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[21] 773 F.3d 977 (9th Cir. 2014).

[22] *See id.* (*Peabody* centered on two coal mining leases the Department of the Interior approved under the Indian Mineral Leasing Act, which required Peabody to give employment preference to members of the Navajo Nation. The Equal Employment Opportunity Commission (EEOC) argued the tribal hiring preference constituted national origin discrimination in violation of Title VII of the Civil Rights Act of 1964. The Ninth Circuit found the Tribal hiring preference constituted a permitted political classification; here, where "differential treatment serves to fulfill the federal government's special trust obligation to the tribes as quasi-sovereign political entities." The Court also cited the Section 703(i) Indian Preference Exemption.).

[23] *See, e.g.*, *Krueth v. Independent Sch. Dist. No. 38, Red Lake, Minn*., 496 N.W.2d 829 (Minn. Ct. App. 1993) (review denied, April 20, 1993) (Minnesota Court of Appeals upheld under Fourteenth Amendment Equal Protection Clause a state statute, Minnesota Statute § 126.501.1, allowing the Red Lake School District to give preference to Indians during reductions in force); *see also* Patricia A. Kaplan, *When States' American Indian Teacher Preferences in Public Schools Violate Equal Protection under the Fourteenth Amendment: Krueth v. Independent Sch. Dist. No. 38, Red Lake, Minn.*, 17 HAMLINE L. REV. 477 (1994) (arguing that, "absent a specific expression of congressional intent to authorize state preferences, state laws that prefer Indians are outside the exception to strict scrutiny Equal Protection review of racial classifications.").

[24] 430 U.S. 73 (1977). This case centered on the history of the Delawares, who were forced from their traditional lands westward. This including one group that migrated to Indiana; eventually, the main body by the 1850s settled in Kansas on what purportedly under an 1818 treaty would be a permanent reservation. However, in 1866, the group signed a treaty under which they moved to Oklahoma to live with the Cherokees ("Cherokee Delawares"). Another group never joined the main body on the Kansas reservation and instead migrated to Oklahoma where they settled with the Wichita and Caddo Indians ("Absentee Delawares"). Both groups obtained federal recognition. *Id.* at

differentiation between the two groups of Delawares, the Court wrote that "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'"[25] Critically, one rationale given by the Court was that the group left out of the award distribution, the Kansas Delawares, were not a recognized tribal entity, and had earlier severed their relations with the Tribe under the option provided by a treaty entered into in 1866.

Similarly, in the Ninth Circuit's *Peabody* decision, the Court recognized the leases gave a hiring preference to members from one Tribe over others, as distinct from general preferences for Indians over non-Indians. The Ninth Circuit cited the Supreme Court's upholding of differential treatment among Indian Tribes in *Delaware Tribal Business Committee*, stating "[w]here the exploitation of mineral resources on a particular Tribe's reservation is concerned, the federal government's responsibility necessarily runs to that Tribe, not to all Indians."[26]

76-77. Twenty-one Delawares on the earlier Kansas reservation, however, elected under the 1866 treaty to sever ties with the tribe, receiving 20 acres of land in Kansas in fee simple and a "just proportion" of the tribe's credits ("Kansas Delawares"). This group did not constitute a federally recognized tribe. *Id.* at 78. A treaty signed in 1854, while the main body of Delaware still resided on the Kansas reservation, obligated the U.S. to sell certain trust lands at public auction, but the U.S. breached the treaty and sold the lands privately. *Id.* at 79. The Cherokee and Absentee Delawares brought separate claims before the Indian Claims Commission and the Commission in the 1960s awarded the Tribes damages. Congress appropriated funds to pay the award under Pub. L. 92-456 providing for distribution, which was limited to those two tribes and left out the Kansas Delaware. *Id.* at 79-82. The Kansas Delawares argued their exclusion from the award denied them equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 75, 82.

[25] *Id.* at 85. (quoting *Mancari*, 417 U.S. at 555.).

[26] *Id.* at 22-23. In *Dawavendewa v. Salt River Agr. Imp. and Power Dist.* (*Dawavendewa I)*, the Ninth Circuit had previously made a somewhat convoluted argument that the Section 703(i) exemption applied to only a "broad nonpolitical class" of "Indians" and Congress did not similarly carve out a similar exemption based on tribal affiliation, but that this suggested only that Congress had not seen the need to do so, because it already understood that tribal affiliation constituted a political classification. 154 F.3d 1117 (9th Cir. 1998). That case involved a Hopi Indian denied employment at a power station on a Navajo reservation, and the court found that in certain circumstances, a tribal hiring preference can give rise to a Title VII national origin discrimination claim. In the later *Dawavendewa II* case, the Ninth Circuit noted that it had limited the scope of its earlier decision, stating that it had *not* held the power company's hiring practices violated Title VII. *Dawavendewa v. Salt River Agr. Imp. and Power Dist. (Dawavendewa II)*, 276 F.3d 1150 (9th Cir. 2002). *Peabody* reaffirmed the rejection of *Dawavendewa I*, holding that tribal hiring preference is a political classification. 773 F.3d 977, 980 (9th Cir. 2014) (drawing heavily on principles articulated in *Morton v. Mancari*, 417 U.S. 535 (1974)).

Additional opinions—including those issued by Ninth Circuit courts—highlighted that legislation giving preference to Indians should relate to "Indian land, tribal status, self-government or cultur[al]" issues" to pass *Mancari*'s rational-basis test.[27]

Application of Mancari to state and local Indian hiring preferences

States are subject to the Fourteenth Amendment's Equal Protection clause under the U.S. Constitution, and often have adopted their own equivalent constitutional provisions.[28]

However, there is no trust, or guardian-ward relationship between states and Tribes; neither do state legislatures hold plenary powers over Tribes and tribal land equivalent to that of Congress.[29] The cornerstone 1832 Supreme Court decision in *Worcester v. Georgia* established Congress' plenary authority over Tribes, while firmly denying states have jurisdiction over tribal matters.[30] The Court in its 2022 *Oklahoma v. Castro-Huerta* opinion overruled *Worcester* with regard to state law having no force in Indian country, holding that both federal and state governments have concurrent jurisdiction to prosecute crimes committed by non-Indian defendants against Indian victims in Indian country. However the opinion denied neither the trust relationship nor Congress' plenary authority, and

[27] *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997).

[28] E.g., CONN. CONST. art. 1, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."); NEV. CONST. art. 1, § 24 ("Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.").

[29] Doran, *supra* note 10, at 9 ("[T]he congressional plenary power is exclusive of state power; it is the federal government, not state governments, that exercises this complete regulatory authority over Indians and Indian tribes.").

[30] 31 U.S. 6 Pet. 515, 520 (1832). "The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the Government of the United States." The *Worcester* opinion is part of the "Marshall" trilogy, comprising also *Johnson v. M'Intosh*, 21 U.S. 543 (1823) and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). A narrow exception being when delegated such authority under federal legislation, such as Public Law (PL) 280, enacted by Congress in 1953. Pub.L. 83–280, August 15, 1953, codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321.

recognized federal preemption of state law where state law unlawfully impinges on tribal self-government.[31]

Courts in the Ninth Circuit have recognized this distinction in issuing decisions regarding state and locally enacted policies giving preferences to Indians.[32] However, courts have upheld under the Fourteenth Amendment Equal Protection clause state policies "singling

[31] *Oklahoma v. Castro-Huerta*, 597 U.S. ___ (2022*)*. The Court held that Indian country is not separate from state territory, and that federal and state governments have "concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country" unless either (1) preempted; or (2) "the exercise of state jurisdiction would unlawfully infringe on tribal self-government under the *Bracker* balancing test." *Id.* at 1-2, 4-6, 7, 18. *See also id.* at 8, 16 (neither the General Crimes Act nor PL-280 preempt state jurisdiction in Indian country). Under the *Bracker* balancing test, "preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government" and "the Court considers tribal interests, federal interests, and state interests."*Id.* at 18. The majority opinion concludes "a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority" and "a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant." *But see id.* at 13 ("the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty.") (J. Gorsuch, dissenting). Notably, the majority opinion cited primarily cases holding states have jurisdiction to prosecute crimes committed by non-Indians against non-Indians, and not non-Indians against Indians*. See id.* (citing United States v. McBratney, 104 U. S. 621, 623–624 (1882); New York ex rel. Ray v. Martin, 326 U. S. 496, 499 (1946); County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U. S. 251, 257–258 (1992)). The opinion does not reach crimes involving *Indian* defendants. *See id.* at 8 n.2 ("To the extent that a State lacks prosecutorial authority over crimes committed by Indians in Indian country (a question not before us), that would not be a result of the General Crimes Act. Instead, it would be the result of a separate principle of federal law that, as discussed below, precludes state interference with tribal self-government.") *and* 19 n. 6 ("this case does not involve the converse situation of a State's prosecution of crimes committed by an Indian against a non-Indian in Indian country. We express no view on state jurisdiction over a criminal case of that kind.").

[32] *See, e.g.*, *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1531 (D. N.M. 1990) (found a licensing scheme permitting only New Mexico residents who are members of federally recognized tribes to sell wares in Albuquerque's Historic Old Town Zone unconstitutional under the Privileges and Immunities Clause by according varying rights to residents and non-residents of New Mexico, as well as under federal and state Equal Protection Clauses because (1) Congress' unique obligations to Indians do not extend to the City; and (2) the city "has no particularized interest in furthering Indian interests which is comparable to that of the Bureau of Indian Affairs").

out tribal Indians" when enacted in response to a federal legislative scheme, which are permitted under Congress' plenary powers.[33]

The Ninth Circuit Court of Appeals (which encompasses California) therefore stresses that hiring preferences must be constitutional under both federal *and* state Equal Protection provisions. The 2003 *Malabed v. North Slope Borough* decision is controlling authority.[34] The case involved a North Slope Borough, Alaska ordinance giving hiring preference in Borough employment to members of federally recognized Indian Tribes.[35] The District Court certified to the Alaska Supreme Court the question of whether the ordinance violated the Alaska Constitution's guarantee of equal protection; the Circuit Court's decision turned on the state court's response that it did.[36] The state court applied strict scrutiny, holding the hiring preference was unconstitutional "because the borough lacks a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted is not closely tailored to meet its goals."[37] The Circuit Court further explained that the Supreme Court in *Mancari* held Indian hiring preferences as not based on suspect classification, and therefore subject to the lower rational-basis standard of review, because the facts of the case were confined to the BIA as a *sui generis* agency.[38]

Application of Mancari and its progeny to California

California's Proposition 209, approved by voters in 1996, added to the state constitution Section 31, which states: "The state shall not discriminate against, or *grant preferential*

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[33] *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. [...] States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians.") (citing *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974)). *See also* 1 Cohen's Handbook of Federal Indian Law § 14.03 (2019) ("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.") (emphasis added).

[34] *See* 335 F.3d 864 (9th Cir. 1999).

[35] *Id.* at 866.

[36] *Id*. at 868; *see* ALASKA CONSTitution, art. I, § 3.

[37] *Malabed v. North Slope Borough*, 70 P.3d 416, 427 (Alaska 2003). This refers to the strict scrutiny test, although the language outwardly muddles elements of both strict scrutiny and rational basis review (e.g., "legitimate interest" rather than "compelling interest").

[38] *Id.* at 868 n.5; *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979).

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."[39] This provision specifically proscribes public agencies from establishing a hiring preference on the base of race, ethnicity, or national origin.

The Office of the California Attorney General Generally addressed the constitutionality of Indian hiring preferences under state law in only a single issued Opinion, and that within a narrow set of circumstances.[40]

The Opinion concluded that Proposition 209 did not prohibit the California Department of Transportation from incorporating hiring preferences, as established by Tribal Employment Rights Ordinances (TEROs), into highway construction and maintenance contracts for work performed on state-held legal rights of way located on Indian lands. This conclusion turned on the fact that Congress had explicitly authorized Tribes to adopt and enforce TEROs,[41] stating that:

> The preferential scheme embodied in a TERO is valid under Proposition 209 because it is predicated (1) *on a federal statutory invitation in furtherance of a federal interest*, (2) on *federal recognition of the affected tribe* and that tribe's promulgation of a federally permissible implementing ordinance, (3) on the fact that *the preference benefits only enrolled members of Indian tribes and not persons merely of Indian ancestry*, and (4) on the fact that the preference is limited to federal-aid highway projects on state rights of way running through Indian lands over which the affected tribe exercises governmental authority.[42]

Therefore, and incorporating the Ninth Circuits *Malabed* decision, the rule in California permits Indian hiring preferences within the framework of federal legislation that passes *Mancari*'s rational basis test. Beyond that, there is no explicit statement whether there are

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[39] CAL. CONST. art. 1, § 31 (emphasis added).

[40] OFFICE OF THE ATTORNEY GENERAL, OPINION OF EDMUND G. BROWN, JR. AND DANIEL G. STONE, No. 07-304 (Ca. 2010).

[41] The Opinion also cited the Indian exemption, § 703(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(i)), as well as *Artichoke Joe's California Grant Casino v. Norton*: "[W]hen a state law applies in Indian country as a result of the state's participation in a federal scheme that 'readjusts' jurisdiction over Indians, that state law is reviewed as if it were federal law. If rationally related to both Congress' trust obligations to the Indians and legitimate state interests, the state law must be upheld." *Id.* at 10-11 (citing *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003)).

[42] *Norton*, 353 F.3d at 15.

circumstances that would render Indian hiring preferences at state and local agencies constitutional under Proposition 209.

State agency Indian hiring preferences in practice

Lack of a clear rule has not prevented California and other states from establishing Indian hiring preferences for state-level appointed positions that have an important oversight role in furthering a state-tribal relationship.

The California legislature established the Office of the Governor's Tribal Advisor in 2019. The relevant statutory provision states that the Tribal Advisor "shall be an enrolled member of a federally recognized tribe in California."[43]

Colorado, Nebraska, and Montana offer similar examples, with only Colorado's hiring preference post-dating *Mancari.* The Colorado Commission of Indian Affairs (CCIA) was established in 1976, within the Office of the Lieutenant Governor. The executive director is appointed by the Commission and "must be an enrolled member of a federally recognized Indian tribe."[44] Montana's analogous statute establishes the Office of the State Director of Indian Affairs, who "must be appointed by the governor from a list of five qualified Indian applicants agreed upon by the tribal councils of the respective Indian tribes of the state.[45] The executive director of Nebraska's Commission on Indian Affairs "shall be an enrolled member of a Nebraska tribe or a legal resident of the State of Nebraska of Indian descent."[46]

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[43] Cal. Gov't Code §12012.3. Added by Stats. 2018, Ch. 801, Sec. 2. (AB 880) (effective January 1, 2019). As of the time of drafting, the authors could not locate legislative history addressing the legality of this particular provision.

[44] P. 34, H 1213 (1976, Second Regular Session), https://lawcollections.colorado.edu/colorado-session-laws/islandora/object/session%3A4609; Co. Rev. Stat. §24-44-105: "The commission may employ an executive director to carry out the day-to-day responsibilities and business of the commission. The executive director is an ex officio member of the commission and must be an enrolled member of a federally recognized Indian tribe." HB 1198 (2013) changed that the executive director *must* (rather than *shall*) be an enrolled member of a federally recognized Indian tribe.

[45] Mont. Code Ann. §2-15-217. The State Director was originally the "coordinator" of Indian affairs, established in 1951. En. Sec. 2, Ch. 203, L. 1951; amd. Sec. 12, Ch. 237, L. 1967; amd. Sec. 2, Ch. 319, L. 1969; amd. Sec. 2, Ch. 160, L. 1974; R.C.M. 1947, 82-2702; amd. Sec. 14, Ch. 184, L. 1979; MCA 1979, 2-15-1111; amd. and redes. 2-15-1813 by Sec. 12, Ch. 274, L. 1981; Sec. 2-15-1813, MCA 1993; redes. 2-15-217 by Sec. 2, Ch. 52, L. 1995; amd. Sec. 8, Ch. 512, L. 1999; amd. Sec. 3, Ch. 164, L. 2009. *See also* MONTANA LEGISLATIVE SERVICES DIVISION & MARGERY HUNTER BROWN INDIAN LAW CLINIC. TRIBAL NATIONS IN MONTANA: A HANDBOOKS FOR LEGISLATORS 19 (Rev. 2020).

[46] Neb. Rev. Stat. §81-2503 ("The commission shall be a legal entity with the power to receive and administer funds from state, federal, tribal, and other sources, and to employ and fix the compensation of an executive director of its own choosing who shall be an enrolled member of a

Notably, these roles and entities may be considered *sui generis* in a manner at least partially equivalent to the BIA, in that they oversee state-tribal relations.

Tribal hiring preferences for Tribal Liaisons under California

The above analysis indicates that Indian hiring preferences for Tribal Liaison (or similar) positions at California state and local lead agencies would be permissible under both federal and state constitutional law, but only if *Mancari*'s categorization of tribal citizens as a political classification rather than suspect classification carries over and the existence of a trustee relationship is not mandatory.

First is consideration of federal constitutional law. Such hiring preferences may not qualify for the lowered judicial review standard of rational basis if both *Mancari* elements must be met. The first element is met easily: the preference implicates political status and not a racial classification if limited to enrolled members of a federally (or potentially state) recognized Tribe in California. Additionally, *Malabed* is not directly applicable. In the facts of that case, the hiring preference was applied to Borough employment across the board, rather than only to *sui generis* agencies or roles tied to Tribal matters and the promotion of tribal self-government.

The first part of the second element—the existence of the trustee relationship—is not so clearly met. However, it should be recognized that, while states do not have the same trustee relationship with Indian Tribes as does the federal government, an increasing number of states now formally recognize a distinctively government-to-government relationship with Tribes and enacting legislation, executive orders, and policies promoting tribal self-government.[47] California is one such example. Executive Order B-10-11

Nebraska tribe or a legal resident of the State of Nebraska of Indian descent. An office for the executive director shall be provided."). Neb. Laws 1971, LB 904, § 3 (continues the Commission on Indian Affairs, set up during the Interim Study Committee since the 1969 session.) Neb. Laws 1976, LB 986, § 8; R.S.1943, (1987), § 81-1216.

[47] *See* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 180-81 (2008) (inquiring "can the states expand upon the political relationship between the federal government and Indian tribes by enacting their own Indian affairs legislation without congressional approval?" and recognizing that "a new and more dynamic relationship between states and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law-jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority-through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.").

"recognizes and reaffirms the inherent right of these Tribes to exercise sovereign authority over their members and territory" and declares the state's commitment to "effective government-to-government relationships between the State and the Tribe."[48] The state legislature in both Senate Bill 18 and Assembly Bill 52 recognizes "California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments." Application of rational-basis review would be appropriate under a rethinking of the key aspect of the second element as furthering the cause of Indian self-government rather than as carrying out obligations inherent in the trustee relationship. It would not be under a bright-line application of the Supreme Court's reasoning in *Mancari.* However, and as discussed above, the Supreme Court has not been consistent in considering the existence of a trustee relationship as dispositive.

Beyond that, the next question is whether a hiring preference for Tribal citizens in the role of Tribal Liaison passes strict scrutiny review—not just under federal but also under California constitutional law.[49] The answer is not clear cut, given the lack of a consistent and accepted definition of "compelling government interest."[50] Courts make the determination on a case-by-case basis, and federal (not California, as explained below) cases applying strict scrutiny to race-conscious hiring generally involve affirmative action and diversity policies,[51] which are not particularly relevant to an Indian hiring preference for a Tribal Liaison position. State and local agencies could, for example, maintain a compelling government interest in furthering a positive government-to-government

[48] Ca. Exec. Order B-10-11 (2011).

[49] Some legal scholars continue to maintain that "State-law preferences and dispreferences for Indians and Indian tribes remain subject to strict scrutiny and so generally fail the equal-protection requirement, except when state law implements a delegation of federal power." Doran, *supra* note 10 at 9. *Id.* at 44-45 ("Except for state laws resting on a delegation of legislative authority from Congress under its plenary power, state Indian laws generally would be subject to strict scrutiny."). *See also* OPINION No. 07-304, *supra* note 40, at n.46 (noting that "A different question would be presented were a state agency to implement a wholly self-initiated Indian hiring preference."). *Id.* at 15 ("our state's constitutional provision, like the federal Equal Protection Clause, would bar a California public agency from adopting or incorporating any *general* employment practices or policies giving advantages or preferences to Native American workers or applicants on the basis of Native American ancestry.").

[50] *N. Coast Women's Care Med. Grp., Inc.*, *v. San Diego County Superior Ct.*, 189 P.3d 959 (Cal. 2008) (ensuring full and equal access to medical treatment irrespective of sexual orientation). *Catholic Charities of Sacramento, Inc., v. Superior Ct.*, 85 P.3d 67 (Cal. 2004) (eliminating gender discrimination). *American Academy of Pediatrics v. Lungren* 940 P.2d 797 (Cal. 1997) (protecting the health and welfare of children and in preserving and fostering the parent-child relationship). *Citizens Against Forced Annexation v. Loc. Agency Formation Comm'n*., 32 Cal. 3d 816 (Cal. 1982) (facilitating annexations via permitting unincorporated areas to join cities).

[51] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

relationship with sovereign Tribal nations, safeguarding the health and wellness of Tribal citizen (who are also California citizens), and protecting the state's cultural patrimony (as inclusive of Indigenous culture). The state of California has, as expressed in legislative and gubernatorial policies, underlined the importance of developing a robust government-to-government relationship between California and its political subdivisions and California Native American Tribes.[52] Senate Bill 18 (SB 18) and Assembly Bill 52 (AB 52) proclaim as specific objectives ensuring California Native American Tribes have greater participation in influencing decisions that impact their own critical interests. The question turns on whether these expressions in aggregate rise to the level of "compelling government interest."

This Indian hiring preference would be narrowly tailored. It would apply *only* to those limited categories of state and local employees whose role is specifically dedicated to furthering that government-to-government relationship—making the position *sui generis*. This preference could also alleviate concerns raised in the 2010 California Attorney General's opinion: it would not constitute a *general* employment practice, and eligibility would be based on Tribal citizenship (enrolled membership) and not on Native American *ancestry.*

Additionally, not only the Fourteenth Amendment but also Title VII of the Civil Rights Act of 1964 applies to public employers, as noted above. This includes state and local governments.[53] Title VII prohibits discrimination in hiring on the basis of "race, color, religion, sex, or national origin,"[54] but also contains an explicit carve-out where an otherwise protected classification is intrinsic to carrying out the functions of the job. This is the *bona fide occupational qualification* (BFOQ) affirmative defense, which allows employers to make hiring decisions on the basis of religion, sex, or national origin where "reasonably necessary to the normal operation of that particular business or enterprise."[55]

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[52] *See also* Exec. Order N-15-19 (establishing the California Truth & Healing Council); Cal. Assembly J.R. No. 42 Indigenous peoples: declaration of rights (endorsing the principles of the United Nations Declaration on the Rights of Indigenous Peoples).

[53] 42 U.S.C. § 2000e(f) ("The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence *shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision*.") (emphasis added).

[54] 42 U.S.C. § 2000e-2(a).

[55] Title VII of the Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees…on the basis of his

Critically, the BFOQ defense *does not include race or color as a permitted category*. The challenged qualification must also "relate to the 'essence' or to the 'central mission' of the employer's business."[56] Legal scholars further note that common types of BFOQ defenses include safety, authenticity, and privacy.[57] There may be an argument that a hiring preference for Tribal citizens falls under the category of "national origin," although the "essence" or "central business" of a lead agency is broader than that of, for example, the California Office of the Tribal Advisor. The "central business" of the *role* is maintain a robust government-to-government relationship with Tribes and carry out meaningful consultation that leads to consensus; in this role, intimate understanding of the Tribal perspective and ability to establish trust can be considered critical.

California's Proposition 209, however, entirely forecloses all of the options to pass strict scrutiny described above. The state constitution now explicitly prohibits preferential treatment in public employment, even if it would pass muster under strict scrutiny review.[58] Section 31's BFOQ carve-out applies only to gender, and does not extend to national origin.[59]

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religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise") (emphasis added).

[56] *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (regarding a safety-related gender requirement, the challenged qualification "relate[s] to the 'essence' or to the 'central mission' of the employer's business.").

[57] Ernest F. Lidge II., *Law Firm Employment Discrimination in Case Assignments at the Client's Insistence: A Bona Fide Occupational Qualification*, 38 CONN L. REV. 159, 165 (2005); *see also* Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ*, 35 U.S.F. L. REV. 473, 477-78 (2001).

[58] CAL. CONST. art. 1, § 32(a) ("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."). *See also, e.g.*, *Connerly v. State Personnel Board*, 112 Cal. Reptr. 2d 5, 27-28 (Cal. Ct. App. 2001) ("Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny. [...] To the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action.").

[59] CAL. CONST. art. 1, § 32(c) ("Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on *sex* which are reasonably necessary to the normal operation of public employment, public education, or public contracting.") (emphasis added). There are two other situations in which preferential hiring is permitted ("(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section; (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.").

Yet there remain two avenues which are not mutually exclusive. The first is carrying over the reasoning of *Mancari*'s first element—that citizenship in a Tribe is a *political classification*, as recognized by the federal (or even state)[60] government—as dispositive , and the position's role as *sui generis* in advancing state-tribal relations, a legitimate government interest. The categorization is not of a suspect classification, such as race or national origin, but rather rests on enrolled membership in a Tribe and so does not fall within the constitutional proscription. The second is to, in an overabundance of caution, amend Section 31 by adding "member of a California Native American Tribe" to the existing BFOQ carve-out.

The remaining question is whether, in the state context, federal recognition of the applicant's Tribe is a dividing line.[61] That may not be the case if a government-to-government relationship between a state and resident Tribes is formally recognized and considered separately from the federal trust relationship; indeed, some states do separately recognize non-federally recognized Tribes.[62] California does distinguish between the two categories, but in various circumstances that favor federal recognition, such as in certain state agency consultation policies.[63] The hiring preference for the Governor's Tribal

[60] The unique relationship between Tribes and the federal government does not carry over to states. However, and as described in Article 1, Section 8, Clause 3 of the U.S. Consultation, the federal government is conferred the authority to regulate interactions with Tribes. Federal recognition is conferred through treaties, congressional acts, executive orders, administration actions, or federal court decisions. To the extent these instruments are binding on states is unclear; however, it is reasonable to maintain that it is national rather than subnational governments that have preeminent authority in the recognition of sovereign entities. Yet, as discussed, states may also initiate their own, independent processes to recognize Tribes, which may coexist rather than be preempted by federal processes.

[61] Cruz Reynoso & William C. Kidder, *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*, 27 CHICANO-LATINO L. REV. 29 (2008) (arguing that public university admissions processes may factor in a preference for college applicants who are members in a federally recognized tribe, and recognizing the hurdle of *Mancari's* second element for state or local programs establishing a preference for Indians).

[62] *See, e.g.*, *Virginia Indians*, SECRETARY OF THE COMMONWEALTH, https://www.commonwealth.virginia.gov/virginia-indians/ (last visited Mar. 11, 2022) (listing 11 Virginia state-recognized Tribes).

[63] *See* Tribal Communication and Consultation Policy, CA Dept. of Fish & Wildlife Dept'l Bulletin No. 2014-07, at 2 n.1 (2014) ("The Department acknowledges that federally recognized tribes have a unique political status and jurisdiction and exercise governmental powers over activities and members within their territory. For that reason, for purposes of this Policy the Department will consult with non-federally recognized tribes and tribal communities acknowledged by the NAHC in generally the same manner as it does federally recognized tribes only with regard to Cultural Resources issues").

Advisor is also limited to enrolled members of a federally recognized Tribe. More recently, in 2022, the University of California—a state entity—adopted a policy of waiving tuition and student services fees for California residents who are members of federally recognized Tribes.[64] The University policy explicitly does not apply to members of Tribes without federal recognition and spokespeople affirmatively cited Proposition 209 as the rationale.

Yet neither Senate Bill 18 nor Assembly Bill 52 distinguishes Tribes without federal recognition, and the state agency consultation policies which do make the distinction *also contain a carve-out as pertaining to Tribal Cultural Resources*. A Tribal liaison, as the individual responsible for managing consultation with Tribes regarding Tribal Cultural Resources and Traditional Tribal Cultural Places, fulfills the laws' obligations to non-federally recognized Tribes as well as federally recognized ones. The Native American Heritage Commission (NAHC) also lists both federally and non-federally recognized Tribes,[65] but NAHC's jurisdiction is limited to the identification, cataloguing, and protection of California Native American cultural resources.[66]

Prudence nevertheless dictates limiting the hiring preference to enrolled members of federally recognized Tribes, given Proposition 209's focus is on the characteristics of the public employee rather than on the people that such a public employee has responsibilities toward.

Conclusion

Review of case law, actual practice, and insights from legal scholars suggest that establishing hiring preference for California Native Americans to serve in the role of Tribal Liaison could be constitutionally permissible in California so long as the preference is limited to enrolled members of federally recognized Tribes. Notwithstanding the lack of a trustee relationship, the argument is strengthened when the role presumes a government-

[64] *See, e.g.* Hallie Golden, *University of California to waive tuition for Native students – but not for all*, THE GUARDIAN (Apr. 30, 2022) https://www.theguardian.com/us-news/2022/apr/30/university-california-waive-tuition-native-students ("Stett Holbrook, a spokesperson for the UC president's office, said the university system's decision to limit the initiative to members of federally recognized tribes stems from Proposition 209, which prohibits affirmative action based on race at California public universities."). The goal of the policy is to address the underrepresentation of Native Americans in California's higher education student body. The Federated Indians of Graton Rancheria established a separate scholarship fund intended to benefit University of California students from non-federally recognized tribes.

[65] Cal. Pub. Res. Code § 21073 (" 'California Native American tribe' means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004.").

[66] Cal. Pub. Res. Code § 5097.91-5097.94.

to-government relationship between the State and Tribes and its function is to promote Tribal self-government and greater participation in agency decision-making with implications for Tribes.