

The Michigan Indian Tuition Waiver is Based on a Political Relationship, not a Racial Classification

INTRODUCTION

Act 174 of 1976, codified as Section 390.1251 of Michigan Comp. Laws, provides a waiver of tuition for North American Indians in Michigan public community colleges or public universities – and at tribal community colleges participating in the tuition waiver program. The Act provides:

390.1251 Waiver of tuition for North American Indians; qualifications; participation of federal tribally controlled community college; eligibility for reimbursement.

Sec. 1.

(1) A Michigan public community college or public university or a federal tribally controlled community college described in subsection (2) shall waive tuition for any North American Indian who qualifies for admission as a full-time, part-time, or summer school student, and is a legal resident of the state for not less than 12 consecutive months.

(2) A federal tribally controlled community college may participate in the tuition waiver program under this act and be eligible for reimbursement under section 2a if it meets all of the following:

(a) Is recognized under the tribally controlled community college assistance act of 1978, Public Law 95-471, 92 Stat. 1325.

(b) Is determined by the department of education to meet the requirements for accreditation by a recognized regional accrediting body.

The Nottawaseppi Huron Band of Potawatomi, Little Traverse Bay Bands of Odawa Indians and Sault Ste. Marie Tribe of Chippewa Indians (“the Michigan tribes”) understand the State is considering which current programs are now invalid under the Michigan Civil Rights

Initiative, Proposal 06-2, a constitutional amendment approved by the voters last year. The amendment, *inter alia*, bans:

“public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.”

As the Michigan tribes show in this brief, the tuition waiver in Section 390.1251 remains valid under the newly-adopted constitutional amendment because it does not accord preferential treatment based on race, color, ethnicity or national origin. The United States Supreme Court has specifically held that tribal status is a political category – based on the relationship between tribes as sovereign entities and other governments. Since the tuition waiver is afforded only to members of recognized Indian tribes, a tuition waiver for Indian tribal members is a political classification, not a classification based on race. Our detailed analysis follows.

ANALYSIS

The Michigan Indian tuition waiver (“MITW”) remains valid because it is based on a political relationship, not a racial classification. The United States Supreme Court has uniformly held that statutes dealing with members of recognized tribes are not based on impermissible classifications such as race. *E.g.*, *United States v. Antelope*, 430 U.S. 641, 646 (1977). Instead, such statutes are based on the unique legal and political status of indigenous Indian tribes that are recognized by and enjoy a trust relationship with the United States. That is the basis for the Supreme Court's unanimous decision in *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (“BIA”) brought a class-action lawsuit challenging a statutory employment preference for Indians in the BIA. The

Supreme Court explained that the employment preferences did not constitute "racial discrimination," or even a "racial" preference because the preference, as applied, is granted to Indians as members of quasi-sovereign tribal entities. 417 U.S. 535, 553-54 (1974). Recently, in *Rice v. Cayetano*, 528 U.S. 495 (2000) the Supreme Court explicitly reaffirmed the treatment of Indian tribes as explained in *Mancari* as political in nature, rather than racial.

The *Cayetano* Court explained that in *Mancari*, the issue has been a statutory "preference which favored individuals who were 'one-fourth or more degree Indian blood and member[s] of a Federally-recognized tribe.'" 528 U.S. at 519, quoting *Mancari*. 417 U. S., at 553, n 24. The Court explained in *Cayetano* that "although the classification (in *Mancari*) had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather "only to members of 'federally recognized' tribes." 528 U.S. at 519-520, quoting *Mancari* at 417 U.S. at 553 n 24. The Court in *Cayetano* concluded that:

[b]ecause the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution.

528 U.S. at 520. Because the MITW – like the employment preference in *Mancari* – is also based on a political relationship, it should not be considered a racial classification under the recent Constitutional amendment.

The Michigan legislature amended the MITW to clarify that it was intended to apply only to members of federally-recognized tribes by adding the following language:

For the purposes of this act, "North American Indian" means a person who is not less than 1/4 blood quantum Indian and certified by a person's tribal association.

Michigan Compiled Laws § 390.1252. A similar quarter-blood requirement was also sustained by the Court in *Mancari*, and is likewise valid in the MITW. The Supreme Court has always understood that members of Indian communities share the same or similar race. *Montoya v. United States*, 180 U.S. 261, 266 (1901); *United States v. Kagama*, 118 U.S. 375, 378 (1886); *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831). The Court has never concluded, however, that legislation singling out members of recognized Indian tribes is tantamount to discrimination on the basis of race.

To this contrary, a number of federal courts have upheld Indian preferences based on blood quantum. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (noting that for the BIA preference to be applied "an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe") (quoting 44 BIAM 335, 3.1); *Mullenberg v. United States*, 857 F.2d 770, 772 (Fed. Cir. 1988) ("Blood quantum classification for employment is permissible for Indian status . . ."); *Alaska Chapter, Associated General Contractors of American, Inc. v. Pierce*, 694 F.2d 1162, 1168 (9th Cir. 1982) ("If the preference in fact furthers Congress' special obligation, then *a fortiori* it is a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian.") (citing *Mancari*). See also *American Federation of Government Employees, AFL-CIO v. United States*, 330 F.3d 513, 523-4 (D.C. Cir.) ("We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional."), *cert. denied*, 540 U.S. 1033 (2004). Therefore, using blood quantum to define eligibility for preferences as used in the MITW is manifestly constitutional.

The Michigan Supreme Court also recently acknowledged that Indian tribes are “distinct political communities,” with governmental sovereignty. *Taxpayers of Michigan Against Casinos v. State*, 685 N.W.2d 221, 227 (Mich. 2004) (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)), *cert. denied*, 543 U.S. 1146 (2005). See also *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (1889) (“[Indians and Indian tribes] did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.”).

So long as states act in a manner consistent with the special political relationship between the federal government and Indian tribes, they may also take action that benefits recognized Indian tribes and their members. *E.g.*, *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979) (state hunting and fishing regulations); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 733 (9th Cir. 2003) (state gaming laws), *cert. denied*, 543 U.S. 815 (2004); *McBride v. Shawnee County, Kansas Court Services*, 71 F. Supp. 2d 1098, 1102 (D. Kan. 1999) (state recognition of Native American Church); *St. Paul Intertribal Housing Board v. Reynolds*, 564 F. Supp. 1408, 1412 (D. Minn. 1983) (state housing programs); *Livingston v. Ewing*, 455 F. Supp. 825 (D. N.M. 1978) (state arts and crafts preference), *aff'd*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979); *In re Interest of Phoenix L.*, 708 N.W.2d 786, 797 (Neb. 2006) (state Indian child adoption law); *Krueth v. Independent School District No. 38, Red Lake, Minnesota*, 496 N.W.2d 829, 836-37 (Minn. App. 1993) (state preference in employment to Indian teachers). In *Livingston*, for example, the Tenth Circuit upheld a state law granting a monopoly to Indian traders at a public market in Santa Fe to the exclusion of non-Indian traders on the basis that states may enact legislation for the benefit of

Indian people. *See id.* 601 F.2d at 1116. The court focused on the State of New Mexico's interest in "acquiring, preserving and exhibiting historical, archeological and ethnological interests in fine arts." *Id.* at 1115. Importantly, the court construed the relationship to the Indian artists and the City as an employment interest in accordance with federal Indian preference statutes. *See id.* at 1114. As such, the court seemed to suggest that the federal statute (25 U.S.C. § 2000e-2i) operated to authorize the State to grant Indian preference in employment in a manner consistent with the federal government's policy granting such preferences. *See id.* *See also* Lawrence R. Baca, *American Indians, The Racial Surprise in the 1964 Civil Rights Act: They May, More Correctly, Perhaps, Be Denominated a Political Group*, 48 HOWARD L. J. 971 (2005). In other words, if the state alleges a legitimate non-racial reason for the state law or program or a federal statute granting Indian preference in employment or contracting, then the state's law is constitutional under the Fifth and Fourteenth Amendment.

The federal government also has often legislated in the field of Indian affairs in a manner to allow states to legislate in a manner consistent with federal policy. For example, in 1934, Congress granted lands at the Mount Pleasant Indian School to the State of Michigan provided that the State continued to provide education to the students housed there. *See An Act Granting Certain Property to the State of Michigan for Institutional Purposes*, 48 Stat. 353 (1928-1934). This statute, in conjunction with a letter from William Comstock to the Secretary of the Interior, was considered by the federal government to be a delegation of the education portion of the trust responsibility. *See* William Comstock, Letter to Secretary of the Interior, Honorable Harold I. Ickes (May 28, 1934); Brief of Amici Curiae Bay Mills Indian Community et al., at 15, *Grutter v. Bollinger*, 539 U.S. 306 (2003) ("[T]he education of Indian children in California, Idaho, Michigan, Minnesota, Nebraska, Oregon, Texas, Washington, and Wisconsin was the total

responsibility of the state and not the Federal Government.”) (quoting *Special Subcommittee on Indian Education of the Senate Commission on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge*, S. Rep. 501, 91st Cong. Sess. CII (1969)).

One state court explicitly acknowledged that federal educational policy authorizes a state statute granting Indian preference in employment to Indian teachers. In *Kreuth*, the State of Minnesota provided Indian preference in employment to public school teachers. See 496 N.W.2d at 833 (citing MINN. STAT. § 126.501). The State had no direct federal grant of authority to take this action, but the Minnesota Court of Appeals upheld the preference, relying principally on *Mancari* and applying the rational basis test. See *id.* at 835-37. The court made a specific conclusion of law that Indian preferences are not racial, but instead are political. See *id.* at 837. In Michigan, the *Kreuth* argument may be even stronger, because there is evidence of a direct federal grant of authority authorizing the state to take on the education portion of the trust responsibility.

In addition, the Michigan Department of Treasury has entered into omnibus tax agreements with eight Michigan Indian tribes. See Michigan Department of Treasury, Native American Tax Agreements, http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---00.html (last visited January 8, 2007). The State also has entered into a Government to Government Accord with all 12 of Michigan’s federally recognized Indian tribes, an accord that has been implemented by Governor Granholm. See Executive Directive No. 2004-05, http://www.michigan.gov/gov/0,1607,7-168-36898_36900-92821---00.html (last visited January 8, 2007); see also Executive Directive No. 2001-2 (earlier version from Governor Engler). As part of this government to government relationship, the State and Indian tribes have entered into a water resources accord, see Intergovernmental Accord Concerning Protection of Shared Water

Resources, http://www.michigan.gov/documents/Accord_91058_7.pdf (last visited January 8, 2007), and coordinating economic development resources, see Office of the Governor, "Governor, Tribal Leaders Sign Accord on Coordinating Economic Development Resources," <http://www.michigan.gov/gov/0,1607,7-168--118070--,00.html> (last visited January 8, 2007). A political relationship consistent with federal Indian law is cemented by these agreements and relationships.

Finally, it is well settled in Michigan and elsewhere that statutes should be construed to avoid constitutional difficulties, especially if the language of the statute does not compel only one reading. See *Evans Products Co. v. State Bd. of Escheats*, 307 Mich. 506, 533-535, 12 N.W.2d 448 (1943). No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act. *Sears v. Cottrell*, 5 Mich. 251 (1858). See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Foster et al. v. Essex Bank*, 16 Mass., 245 (1819); *Ex parte McCollom*, 1 Cow., 564 (NY, 1823); *Clark v. The People*, 26 Wend., 599 (NY, 1841); *Lane v. Dorman*, 3 Scam., 238 (Ill., 1841); *Morris v. The People*, 3 Denio, 381 (NY, 1846); *Flint River S. B. Co. v. Foster*, 5 Ga., 194 (1848). See also *Green v. Graves*, 1 Doug. Mich., 352 (1844), where these principles are fully recognized. More recently, the Michigan Supreme Court concluded that:

"instead of seeking for excuses for holding acts of legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not to hold the law invalid unless the opposition between the

Constitution and the law be such that the court feels a clear and strong conviction of their incompatibility with each other."

In re Watson, 293 Mich. 263, 291 N.W. 652, 658 (1940).

CONCLUSION

Because the MITW is not based upon race, ethnicity or national origin, but upon a political classification founded on a relationship between tribes and other governmental entities, it retains validity under the recent Civil Rights Initiative, Proposal 06-2, amending the Michigan Constitution.

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