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# INDIAN EMPLOYMENT PREFERENCE: LEGAL FOUNDATIONS AND LIMITATIONS

## I. INTRODUCTION

In recent years, Native Americans have been increasingly active in identifying and protecting their legal rights and resources. Much of the development in the law has been in areas involving natural resources such as land,<sup>1</sup> minerals,<sup>2</sup> water,<sup>3</sup> and hunting and fishing rights.<sup>4</sup> There has also been development in the area of tribal sovereignty.<sup>5</sup>

Another area of imminent importance to the tribes concerns protection of their legal rights and human resources.<sup>6</sup> Increased economic development on reservations, especially in the area of subsurface minerals,<sup>7</sup> has brought about an increase in the number of non-Indians living on, or near, reservations. This, in turn, has led to political, social,

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1. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (which held that the Nonintercourse Act, 25 U.S.C. § 177 (1976), imposed a fiduciary role upon the United States to protect lands of a tribe covered by the Act, regardless of whether the tribe was recognized by the federal government).

2. *See, e.g.*, Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n, 578 F.2d 289 (10th Cir. 1978) (striking down a Federal Energy Regulatory Comm'n's regulation which had disqualified the Tribe from charging small producer rates); United States v. City of Pawhuska, 566 F.2d 1132 (10th Cir. 1977) (reversing the district court's order that upon payment of damages for trespass, the city would be vested with fee title to tribal mineral rights).

3. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963) (holding that tribes are entitled to sufficient water to supply future as well as present needs, based upon the amount of practicably irrigable acreage on a reservation).

4. *See, e.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) (treaties protecting the "right of taking fish . . . in common with all citizens," secure to the tribes a right to harvest an equitable share of anadromous fish passing through tribal fishing areas). *Id.* at 662.

5. The concept of tribal sovereignty includes such notions as: self-determination, *see* Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450n (1976); sovereign immunity, *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); as well as inherent sovereign power, *see* United States v. Wheeler, 435 U.S. 313 (1978) (tribal power to punish criminal conduct of tribal members is a retained power and is not derived from the federal government).

6. *See* I AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 347-48 (1977):

Discussions of human resources on Indian reservations invariably center around such issues as idleness, unemployment, and welfare. Depending on whose figures are accepted, 30-70% of Indian adults are described as unemployed. And implicit in these descriptions is both a moral judgment and a fatalistic acceptance.

But of course, the human resources question can be approached from the opposite standpoint. The large number of people unemployed can be viewed as a positive factor. They can be described as a large labor pool. They can be viewed as a potential resource for development, just as minerals and timber are potential resources for development.

*Id.*

7. *Id.* at 338-39.

and cultural problems on the reservations.<sup>8</sup> Development of tribal human resources will reduce the need for non-Indian labor, thus slowing the influx of non-Indians. Consequently, such development will help to alleviate problems of Indian unemployment and poverty.

Indian employment rights, specifically those concerning employment preference for Indians on or near reservations, as well as within those branches of the federal government directly serving Indians, are necessary to enable tribes to protect and develop their human resources. The federal government has taken part in this development, but Indian tribes must play the prominent role.

This paper briefly examines Indian employment preference at the federal, state, and tribal levels. The emphasis will be on tribal employment preference laws, their legal foundations and their limitations. Most tribes have retained the sovereign power to regulate the conduct of employers on their reservations in order to permit implementation of such preference ordinances. Although other legal grounds for this power exist, inherent tribal sovereignty is the most important one. The Indian Civil Rights Act (ICRA)<sup>9</sup> is potentially the greatest limitation on the exercise of tribal sovereignty in this area. The ICRA's requirements of equal protection and due process, and the impact these requirements may have in limiting the extent to which tribal preference ordinances may be imposed, will also be discussed.

## II. FEDERAL INDIAN EMPLOYMENT PREFERENCE

### A. *Background*

Employment preference for Indians has existed since 1834<sup>10</sup> and

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8. *Id.* at 342-43.

9. 25 U.S.C. §§ 1301-1341 (1976).

10. *See* 25 U.S.C. § 45 (1976) (originally enacted as Act of June 30, 1834, ch. 162, § 9, 4 Stat. 737) (employment of interpreters "or other persons employed for the benefit of the Indians"). Other general employment preference statutes were subsequently enacted: 25 U.S.C. § 46 (1976) (originally enacted as Act of May 17, 1882, ch. 163, § 6, 22 Stat. 88, and Act of July 4, 1884, ch. 180, § 6, 23 Stat. 97) (employment of clerical, mechanical, and other help on reservations and about agencies); 25 U.S.C. § 44 (1976) (originally enacted as Act of August 15, 1894, ch. 290, § 10, 28 Stat. 313) (employment of herders, teamsters, and laborers, "and where practicable in all other employments" in the Indian service); 25 U.S.C. § 274 (1976) (originally enacted as Act of June 7, 1897, ch. 3, § 1, 30 Stat. 83) (employment as matrons, farmers, and industrial teachers in Indian schools); 25 U.S.C. § 47 (1976) (originally enacted as Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861) (general preference as to employment of Indian labor and purchase of products of Indian industry). 25 U.S.C. § 472 (1976) (originally enacted as Act of June 18, 1934, ch. 576, § 12, 48 Stat. 984) (known as the Wheeler-Howard Act or the Indian Reorganization Act). *See* Morton v. Mancari, 417 U.S. 535, 541 & n.8 (1974).

continues to comprise part of the federal government's Indian policy.<sup>11</sup> Congress, by providing employment preferences, intended to give Indians control over their internal affairs.<sup>12</sup> The early statutes, however, were unsuccessful in achieving this intent. Indians were required to qualify under civil service standards and to compete with non-Indians. This was a serious disadvantage when one considers that "the Indians were denied or did not have access to education and were accorded no merit for the life knowledge and skill obtained outside of the standards of formal education."<sup>13</sup>

The Indian Reorganization Act of 1934 (IRA)<sup>14</sup> was enacted to abolish the disadvantages suffered by Indians. Section twelve of the IRA,<sup>15</sup> providing for Indian hiring preferences within the Bureau of Indian Affairs (BIA) "without regard to civil-service laws," was intended "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."<sup>16</sup> The BIA, however, never adequately put preference into operation.<sup>17</sup> For almost forty years, until the 1970's, preference was

11. Recently, the Department of the Interior promulgated regulations, pursuant to § 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b) (1976), requiring that preferences be given to Indians in employment, training, and subcontracting under certain categories of contracts. 44 Fed. Reg. 62,510 (1979) (to be codified in 41 C.F.R. §§ 14-1.354, -7.5002 to .5003).

12. In *Morton v. Mancari*, 417 U.S. 535 (1974), the United States Supreme Court noted:

The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.

*Id.* at 541-42 (footnotes omitted).

13. Funke, *Educational Assistance and Employment Preference: Who Is An Indian?*, 4 AM. IND. L. REV. 1, 8-9 (1976).

14. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified in 25 U.S.C. §§ 461-466, 470-471, 473-476, 478-479 (1976)).

15. 25 U.S.C. § 472 (1976):

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

*Id.*

16. *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (footnote omitted). See generally *Hearings on S.2755 and S.3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. pt. 2, 256 (1934) (statement by Senator Wheeler, co-sponsor of the Indian Reorganization Act, 25 U.S.C. §§ 461-466, 470-471, 473-476, 478-479 (1976); S. REP. No. 1080, 73d Cong., 2d Sess. 1 (1934); *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 39 (1934); 78 CONG. REC. 9270 (remarks of Senator Hastings), 11,123 (remarks of Senator Wheeler), 11,727, 11,729, 11,731-32 (remarks of Representative Howard) (1934); *Morton v. Mancari*, 417 U.S. 535, 541 & n.9, 543 & n.15 (1974); *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, 960 & n.4 (10th Cir. 1970).

17. See *Freeman v. Morton*, 499 F.2d 494, 496 (D.C. Cir. 1974); 1 AMERICAN INDIAN POLICY

limited to initial employment and reinstatement, and was inapplicable to filling vacancies, making promotions, or providing for lateral transfers. This policy was changed in 1972.<sup>18</sup> Moreover, the Department of the Interior has recently revised its preference regulations for contracts, subcontracts, grants, and subgrants under section seven of the Indian Self-Determination and Education Assistance Act.<sup>19</sup>

### B. *Present Status*

Several other statutes provide for general Indian employment preference in such areas as health,<sup>20</sup> education,<sup>21</sup> and construction<sup>22</sup>

REVIEW COMMISSION, FINAL REPORT 244, 271 (1977); S. TYLER, A HISTORY OF INDIAN POLICY 225-26 (1973).

18. Department of Interior News Release, June 23, 1972, "Interior Expands Policy of Indian Preference in Bureau of Indian Affairs"; *See* Morton v. Mancari, 417 U.S. 535, 538 & n.3 (1974); Freeman v. Morton, 499 F.2d 494, 496 (D.C. Cir. 1974); S. TYLER, A HISTORY OF INDIAN POLICY 225-26 (1973). *See also* Oglala Sioux Tribe v. Andrus, 603 F.2d 707 (8th Cir. 1979) (civil service regulations governing conflicts of interest do not apply even when originally hired on a competitive basis); Tyndall v. United States, No. 77-0004 (D.C. Cir. April 22, 1977) (Indian Health Service of the Department of Health, Education and Welfare consented to be bound by the preference statutes, 25 U.S.C. §§ 44-47, 472 (1976)).

19. 44 Fed. Reg. 62,510 (1979); *See* note 11 *supra*. *See also* Act of December 5, 1979, Pub. L. No. 96-135, 93 Stat. 1056 (amending 5 U.S.C. §§ 3502, 8336, 8339 (1976)).

20. 25 U.S.C. § 1612 (1976) (providing for a health profession recruiting program for Indians through grants to locate Indians with potential for education or training in the health professions and to assist them in receiving the necessary education); 25 U.S.C. § 1633 (1976) (providing for preference to Indians and Indian firms in the construction and renovation of health facilities of the Indian Health Service). *See also* Act of December 5, 1979, Pub. L. No. 96-135, 93 Stat. 1056 (amending 5 U.S.C. §§ 3502, 8336, 8339 (1976)).

21. 20 U.S.C. § 3385(d) (1976 & Supp. II 1978) provides:

The Commissioner is also authorized to make grants to institutions of higher education and to State and local educational agencies, in combination with institutions of higher education, for carrying out programs and projects—

(1) to prepare persons to serve Indian students as teachers, administrators, teacher aides, social workers, and ancillary educational personnel; and

(2) to improve the qualifications of such persons who are serving Indian students in such capacities. Grants for the purposes of this subsection may be used for the establishment of fellowship programs leading to an advanced degree, for institutes and, as part of a continuing program, for seminars, symposia, workshops, and conferences. In carrying out the programs authorized by this subsection, preference shall be given to the training of Indians.

*Id.* *But see* 25 U.S.C. § 2011 (1976) (permitting tribal organizations to waive the applicable preference laws); 20 U.S.C. § 1119(a) (1972) which had provided a preference for Indians to serve as elementary and secondary school teachers but was repealed by the Educational Amendments Act of 1976, Pub. L. No. 94-482, 90 Stat. 2152.

22. *See* 25 U.S.C. § 1633 (1976). *See also* 25 U.S.C. § 450e(b) (1976) which provides:

Any contract, subcontract, grant or subgrant pursuant to this Act, . . . [the Act of April 16, 1934, as amended], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the

and, in some instances, were enacted for specific tribes.<sup>23</sup> In addition, Title VII of the Civil Rights Act of 1964<sup>24</sup> exempts from its provisions both private employers located on or near Indian reservations<sup>25</sup> and Indian tribes.<sup>26</sup> Federal contractors located on or near a reservation are permitted to give employment preference to Indians.<sup>27</sup> In addition to the federal statutes permitting or requiring Indian employment pref-

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administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

*Id.* On October 31, 1979 the Department of the Interior promulgated new regulations requiring that preference be given to Indians in employment, training, contracting, and subcontracting under certain categories of contracts. 44 Fed. Reg. 62,510 (1979) (to be codified in 41 C.F.R. § 14-1.354, -7.5002 to .5003).

23. 25 U.S.C. § 633 (1976) provides:

Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to sections 631-640 of this title, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment.

*Id.*

24. Title VII of the Civil Rights Act of 1964 *as amended* by Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 2000e, 42 U.S.C. (1976)).

25. 42 U.S.C. § 2000e-2(i) (1976):

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

*Id.*

26. 42 U.S.C. § 2000e(b) (1976) provides:

For the purposes of this subchapter—

(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

*Id.*

27. 41 C.F.R. 60-1.5(a)(6) (1979):

*Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word 'near' would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

*Id.*

erence, Indians acquire added protection through laws which prohibit employment discrimination on the basis of race, color, religion, sex, or national origin. Although in certain instances employment discrimination in favor of Indians is permitted, employment discrimination against Indians is illegal.<sup>28</sup>

Section 12 of the IRA<sup>29</sup> and the BIA's new policy of granting preference to qualified Indians for training, for appointment to original or vacated positions, and for reinstatement and promotion,<sup>30</sup> was upheld by the United States Supreme Court in *Morton v. Mancari*.<sup>31</sup> In *Mancari*, non-Indian BIA employees brought a class action claiming that the Indian preference statutes had been repealed by the Equal Employment Opportunity Act of 1972<sup>32</sup> (EEOA) and that they were unconstitutional as a denial of property without due process of law.<sup>33</sup> A three judge district court panel held that section 11 of the EEOA<sup>34</sup> implicitly

28. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, 2000e-16 (1976). See D. Press, *A Manual of Indian Employment Rights (1977)* (prepared by ACKCO, Inc., and R.J. Associates, Inc., under Contract Number 76095 with the Equal Employment Opportunities Commission):

At last count, there were over 20 different federal programs, administered by 15 different agencies, directed to the objective of eradicating discrimination and promoting equal opportunity in their employment. . . . For example, there is the Equal Employment Division in the Office of Revenue Sharing, which monitors non-discrimination in state and local governments that receive Revenue Sharing Grants. The Equal Opportunity Component in the Law Enforcement Assistance Administration (LEAA) monitors recipients of LEAA funds, and on and on.

*Id.* at 83.

29. 25 U.S.C. § 472. See also note 15 *supra*.

30. The Commissioner of Indian Affairs issued a directive setting forth the BIA's new policy in June of 1972:

The Secretary of the Interior announced today [June 26, 1972] he has approved the Bureau's policy to extend Indian Preference to training and to filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I [Commissioner of Indian Affairs, Louis R. Bruce] jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. The new policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy.

Personnel Management Letter No. 72-12, BIA, reprinted in *Morton v. Mancari*, 417 U.S. at 538 n.3. In *Mancari*, the Court characterized this new policy as "a logical extension of the Congressional intent" of § 12 of the IRA. *Id.* at 545.

31. 417 U.S. 535 (1974).

32. 42 U.S.C. §§ 2000e to 2000e-6, 2000e-8 to 2000e-9, 2000e-13 to 2000e-14, 2000e-16 to 2000e-17 (1976).

33. U.S. CONST. amend. V.

34. 42 U.S.C. § 2000e-16(a) (1976) provides:

All personnel actions affecting employees or applicants for employment (except with

repealed section 12 of the IRA because it prohibited racial discrimination in most federal employment practices. The court, therefore, never reached the constitutional issue.<sup>35</sup>

In rejecting the district court's interpretation of the EEOA, the Supreme Court examined the historical background and underlying intent of Congress in enacting both statutes. The Court also recognized that Congress had expressly exempted both private employers on or near a reservation and Indian tribes from coverage under Title VII.<sup>36</sup> The Court found "a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed."<sup>37</sup> Emphasis was also attached to the fact that after the EEOA was enacted, Congress passed two new Indian preference laws.<sup>38</sup>

In *Mancari*, a unanimous Supreme Court also upheld Indian employment preference against the challenge that it constituted an invidious racial discrimination in violation of the fifth amendment to the United States Constitution. Recognizing the "unique legal status" of

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regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the federal government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

*Id.*

35. 359 F. Supp. 585 (D.N.M. 1973).

36. 42 U.S.C. §§ 2000e(b), 2000e-2(i). See also notes 25-26 *supra*.

37. 417 U.S. at 548. The Court noted:

In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences on BIA employment; as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference.

*Id.* at 548.

38. The Court discussed 20 U.S.C. §§ 887c(a) and (d) (1976) (current version at Supp. II 1978). The Court stated:

It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

417 U.S. at 548-49. For a more recent congressional enactment, see Act of December 5, 1979, Pub. L. No. 96-135, 93 Stat. 1056.



Native American tribes<sup>39</sup> and "the plenary power of Congress" in legislating for federally recognized tribes,<sup>40</sup> the Court held that the preference involved did not constitute racial discrimination. Indeed, it did not even constitute a racial preference. Rather, the preference was 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.<sup>41</sup> Moreover, the preference was "reasonably and directly related to a legitimate, nonracially based goal."<sup>42</sup>

39. For the numerous occasions in which the Supreme Court has upheld legislation favorable to Indians see the Court's citations listed at 417 U.S. at 554-55.

40. *Id.* at 551. The Court noted:

The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce. . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes.

*Id.* at 551-52. See also *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

41. 417 U.S. at 553-54.

42. State statutes providing for Indian employment preference are to be analyzed according to traditional three tier analysis: strict scrutiny; rational basis; intermediate scrutiny. The level of judicial scrutiny to be applied when the Court finds a "suspect" class exists, such as an overt racial classification, see, e.g., *Korematsu v. United States*, 232 U.S. 214, 216 (1944), or when the court finds state action to infringe upon a fundamental right, is one of strict scrutiny. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). When neither a suspect classification nor a fundamental right is involved, the Court will apply the rational basis standard. The latter test involves almost complete deference to the determination that has been made by the legislature. To be upheld, it is only required that the classification be rationally related to legitimate legislative goals. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). In certain instances however, the Court has applied a middle level of scrutiny. This test requires that the classification involved serve "important governmental objectives" and "be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976) (involving classification based upon gender). See also *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (gender); *Levy v. Louisiana*, 391 U.S. 68 (1968). It is clear that the level of scrutiny to be applied is often determinative of the issue of constitutionality. See generally Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183 (1979).

With regard to state legislation providing for employment preference for Indians, there is a strong argument that strict scrutiny should not be applied. The distinction between Indians and non-Indians is perceivable as a political classification as opposed to a racial one, and therefore not suspect. The political nature and status of Indian tribes is based upon federal law and the notion of tribal sovereignty. *Morton v. Mancari*, 417 U.S. 535 (1974). It is also possible to argue that non-Indians do not possess any of the "traditional indicia of suspectness. The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In addition, it was recognized by the *Mancari* Court that Indian employment preference statutes do not involve the infringement of a fundamental right.

Even assuming that strict scrutiny is applicable, there may be state interests which qualify as compelling ones. These interests might include reducing unemployment near reservations and reducing problems arising in towns located near reservations which are caused directly or indi-

Mr. Justice Blackmun, writing for the Court, characterized the preference as "political rather than racial in nature" because it "applies only to members of 'federally recognized' tribes."<sup>43</sup>

rectly by unemployment on the reservation, such as loitering, vagrancy, public intoxication, and disorderly conduct. See *Livingston v. Ewing*, 601 F.2d 1110, 1115-16 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (finding a compelling state interest) (dicta). See also *Doores v. McNamara*, 476 F. Supp. 987, 994-95 (W.D. Mo. 1979) (finding that the Kansas City Board of Police Commissioners' affirmative action program satisfied compelling governmental action requirement so as not to violate the equal protection clause). But no state interest will be sufficient to uphold state action which conflicts with federal law. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

Inasmuch as strict scrutiny is inapplicable to determine the constitutionality of Indian employment preference statutes, either the rational basis test or the middle level of scrutiny should be applied. Application of either of these tests will result in a finding that the classification is constitutionally permissible.

It is unlikely that any substantive due process limitations will apply to the determination of the constitutionality of Indian employment preference statutes other than the requirement that the governmental action meet the strictures of the rational basis test. The Court has severely restricted the requirements of substantive due process in the area of economic regulation. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding an Oklahoma law making it illegal for anyone but a licensed optometrist or ophthalmologist to fit, replace, or duplicate lenses without a prescription).

43. 417 U.S. at 553 n.24. Later, Justice Blackmun reiterated the point:

The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.

*Id.* at 554.

One article has stated that "[t]he political classification is useful only in describing the group to whom the government owes a unique trust relationship." *Johnson & Crystal, Indians and Equal Protection*, 54 WASH. L. REV. 587, 597-98 (1979). In a footnote they state:

The Court's characterizing the classification as political, however, is not useful in determining what level of scrutiny to apply to federal Indian legislation in equal protection cases. A law may be suspect and subject to the strict scrutiny-compelling governmental interest test without discriminating against all members of a race. For example, if the state of Washington enacted a law that all tribal Indians in the state must ride in the rear of buses, or that all black members of the Democratic Party must use separate rest rooms, such a law, although depending in part on a political classification, would nonetheless be racially discriminatory. It would discriminate against many, although not all, Indians or blacks in the state and would be subject to strict scrutiny.

*Id.* at 598 n.78.

The statement that the "political" classification fails to determine what level of scrutiny applies is incorrect. To illustrate this, it is helpful to compare, by way of example, an employment preference statute with the laws posed in the above hypothetical. To argue that the classification is *not* "political" would require acceptance of one of the following theories to uphold such a legislative classification:

(1) It could be argued that a preference statute, though making a "racial" classification, does not involve an "invidious" discrimination and, therefore, is not subject to strict scrutiny. To support this theory it would be argued that the non-Indian class, which would be discriminated against, lacks any of the "traditional indicia of suspectness," *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See note 57 *infra* and accompanying text. In addition the assertion could be posed that this is a situation "where racial classifications are 'irrelevant and therefore prohibited.'" *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978). In further support of this argument it would have to be argued that the classification would not cause any stigma to attach to those discriminated against. *Id.* at 357-58.

### III. TRIBAL EMPLOYMENT PREFERENCE LAWS

Tribal governments have responded to the employment needs of Indians by enacting ordinances requiring businesses located on, and in some instances near,<sup>44</sup> a reservation to give employment preference to Indians.<sup>45</sup> Most ordinances empower the administering tribal agency to: (1) impose numerical hiring goals and timetables specifying the

(2) As an alternative, it could be argued that the preference statute is "benign" or "remedial." The statute, therefore, will receive scrutiny less than strict but more than that accorded under a rational basis test. *Id.* at 359. "[A] number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Califano v. Webster*, 430 U.S. 313, 317, (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). It should be noted that an Indian/non-Indian distinction would not "create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria" which caused Justice Powell, in *Bakke*, to distinguish the cases relating to gender discrimination. 438 U.S. at 302-03. *See also* *Califano v. Webster*, 430 U.S. 313 (1977) (dealing with gender based distinctions); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (gender); *Kahn v. Shevin*, 416 U.S. 351 (1974) (gender). The same would not pertain to laws in the hypothetical, which even if subject to classification as "benign" or "remedial", would not meet the "important governmental objectives" test of *Califano v. Webster*, 430 U.S. 313 (1977), and *Craig v. Boren*, 429 U.S. 190 (1976).

(3) Finally, it could be argued that even though strict scrutiny applies, there is a compelling governmental interest which would permit preference statutes, *see* note 61 *infra*, but not laws similar to those given in the above hypothetical.

While these alternative approaches exist, and may be upheld in some respects, *see* *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979), the Supreme Court, rather than adopting any of these alternative approaches, has consistently viewed the Indian/non-Indian distinction as a "political" classification and, therefore, has consistently applied the rational basis test. *United States v. Antelope*, 430 U.S. 641 (1977). In *Antelope*, the Court sustained the convictions of three Indians who, under federal law, had committed a first degree felony-murder. If these same individuals had been non-Indians, subject to the laws of Idaho, they could not have been convicted of a felony-murder because Idaho law does not have such a provision, and the prosecution would have been required to prove premeditation and deliberation. In sustaining the convictions, the Court held that the application of federal law was not based upon an impermissible racial classification, but rather on a permissible political classification. *See also* *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977), in which the Court held that Congress' omission of the descendants of a group of Delaware Indians, from funds in a distribution of a claims settlement did not violate the equal protection component of the Fifth Amendment. In *Fisher v. District Court*, 424 U.S. 382 (1976), the Court rejected the claim that denying members of the Northern Cheyenne Tribe access to Montana state courts in connection with an adoption proceeding within the exclusive jurisdiction of the tribal court constituted impermissible racial discrimination. The Court held that the exclusive jurisdiction of the tribal court was not based upon racial considerations, but rather, the political nature of the tribe.

44. The term "near" generally refers to a reasonable commuting distance from the reservation.

45. *E.g.*, Spokane Tribal Employment Rights Ordinance, Res. No. 1979-218 (July 31, 1979); Colo. River Indian Tribal Employment Rights Ordinance No. 32 (Sept. 8, 1979), Draft Guidelines ¶ 1. *See generally* D. Press, *supra* note 28. Some ordinances cover those businesses operating "within the exterior boundaries" of the reservation. *E.g.*, Crow Tribal Employment Rights Ordinance No. 79-27 (April 14, 1979); Seminole Tribal Employment Rights Ordinance No. C-109-80 (Jan. 11, 1980). There are 25 Indian Tribes with Indian employment preference ordinances in effect on their reservations. Letter from Eleanor Norton, Chair, E.E.O.C., to Udall, Chmn. House Comm. on Interior and Insular Affairs (Dec. 14, 1979).

minimum number of Indians an employer must hire;<sup>46</sup> (2) prohibit the use of job qualifications or personnel procedures which, by their nature, tend to disqualify Indians and which are not absolutely necessary for the employer's business;<sup>47</sup> (3) require employers to provide or participate in training programs designed to increase the pool of qualified Indians;<sup>48</sup> (4) establish counseling and support for Indian workers, in conjunction with federal and tribal offices, to assist Indian workers in regaining employment;<sup>49</sup> and (5) provide for other requirements designed to achieve increased Indian employment.<sup>50</sup>

Such ordinances generally apply to both Indian and non-Indian employers, whether or not directly contracting with the tribe, and to future as well as existing employers.<sup>51</sup> Existing employers are bound by the ordinance only with respect to new hiring, so that no existing employer is forced to fire any non-Indian employees.<sup>52</sup> The term "employer" applies to contractors, as well as subcontractors.<sup>53</sup> Employers covered by a preference ordinance may also be subject to its terms at any other facilities of the employer located near the reservation.<sup>54</sup>

Tribal ordinances establishing such preferential employment

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46. *E.g.*, Colo. River Indian Tribal Employment Rights Ordinance No. 32, § 6(a) (Sept. 8, 1979); *see* D. Press, *supra* note 28, at 17-24.

47. *E.g.*, Colo. River Indian Tribal Employment Rights Ordinance No. 32, § 6(d); *see* D. Press, *supra* note 28, at 24-28.

48. *E.g.*, Colo. River Indian Tribal Employment Rights Ordinance No. 32, § 6(b); *see* D. Press, *supra* note 28, at 32-34.

49. *E.g.*, Colo. River Indian Tribal Employment Rights Ordinance No. 32, § 6(g); *see* D. Press, *supra* note 28, at 164.

50. *See generally* D. Press, *supra* note 28, for an extensive overview of what other provisions are generally imposed.

51. *See generally* Colo. River Indian Tribal Employment Rights Ordinance No. 32, § 3; D. Press, *supra* note 28, at 43, app. A, at 10.

52. *See generally* D. Press, *supra* note 28, at 42-43, app. A, at 8, 10, 11. This provision may limit the power of those tribes, which are "employers" within the meaning of their ordinances, to fire non-Indians to hire tribal members. For example, in *Wardle v. Ute Indian Tribe* No. C-74-330 (D. Utah 1978) 5 Ind. L. Rep. L-20, the Ute tribe fired their non-Indian police chief to hire a member in his place, pursuant to a member employment preference policy but involving no ordinance similar to that described above. Under the Supreme Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976), tribes are generally permitted to fire tribal employees who do not have an enforceable expectation of continued employment under tribal law or by contract. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 577 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972). Arguably, a tribal employee obtains such an expectation under an employment rights ordinance which includes the tribe as an "employer" and provides that no non-Indian employee of an existing "employer" will lose his or her job to an Indian.

53. *See generally* D. Press, *supra* note 28, app. A, at 8.

54. *See* note 50 *supra*. *See also* D. Press, *supra* note 28, app. A, at 8; notes 203-06 *infra* and accompanying text. *But see* Memorandum from Thomas W. Fredericks, Associate Solicitor, Division of Indian Affairs, U.S. Dept. of the Interior, to Assistant Secretary of Indian Affairs, U.S. Dept. of the Interior (May 25, 1978) at 3-4 (concluding that such a provision in the Colville Employment Rights Ordinance, Res. No. 1977-842 of the Colville Bus. Council, was invalid).

rights for Indians also provide for monitoring and enforcement of the ordinance by requiring a tribe to assert civil jurisdiction over non-Indians doing business on the reservation.<sup>55</sup> Other sections provide for employee grievance procedures as well as for the establishment of a Tribal Employment Rights Office (TERO) to manage and coordinate implementation of the ordinance.<sup>56</sup>

### A. *Legal Basis*

Tribal authority to implement employment preference ordinances is derived from two sources: (1) the inherent sovereignty of the tribe; and (2) powers derived from tribal ownership of land.<sup>57</sup>

#### 1. Inherent Sovereignty

The notion that Indian tribes retain those aspects of sovereignty, giving them the power, where not expressly limited by the federal government, to govern within their territory, has existed since the days of the republic.<sup>58</sup> The Supreme Court has recently addressed the nature of this inherent tribal sovereignty:

The sovereignty that the Indian tribes retain is of a unique

55. See D. Press, *supra* note 28, at 22-24, app. A, at 17-19.

56. *Id.* at 9-10, 36-39, app. A, at 19-20.

57. See generally 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 154 (1977).

58. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556, 560-62 (1832). See, e.g., United States v. Wheeler, 435 U.S. 313 (1978); United States v. Mazurie, 419 U.S. 544 (1975); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Quiver v. United States, 241 U.S. 602 (1916); Talton v. Mayes, 163 U.S. 376 (1896); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1867); Ortiz-Barraza v. United States, 517 F.2d 1176 (9th Cir. 1975); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). Felix Cohen has set forth the underlying tenets of tribal sovereignty:

Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. N.M. ed. 1971) (emphasis in original). Cohen's analysis of the relevant case law led him to conclude that:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

*Id.* at 123 (footnotes omitted). See also Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 480-84 (1979).

and limited character. It exists only at the suffrance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.<sup>59</sup>

It is clear that the nature of this sovereign power is not absolute. In *Oliphant v. Suquamish Indian Tribe*,<sup>60</sup> the Supreme Court held that the exercise of criminal jurisdiction<sup>61</sup> by Indian tribes over non-Indians is inconsistent with the status of tribes as nations dependent upon the United States government.<sup>62</sup> Conversely though, *Oliphant* does not prohibit the exercise of civil regulatory jurisdiction by Indian tribes over non-Indians.<sup>63</sup>

The *Oliphant* ruling invalidated two arrests of non-Indian residents by the Suquamish reservation's tribal police.<sup>64</sup> One defendant, Oliphant, was charged with assaulting a tribal officer and resisting arrest. Another defendant, Belgarde, was charged with recklessly endangering a person's life and injuring tribal property.<sup>65</sup>

In reaching its decision, the Court relied on several closely related factors, precipitating the conclusion that Indian tribes cannot exercise criminal jurisdiction over non-Indians. First, the Court noted "the

59. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). In *Wheeler* a member of the Navajo Tribe was indicted by a federal grand jury for statutory rape after being convicted in a tribal court on a lesser charge. The defendant argued, and the district court agreed, that the federal prosecution was barred by the double jeopardy clause of the fifth amendment. The Supreme Court reversed, holding that the source of a tribe's power to try tribal offenders derived from the tribe's inherent sovereignty and not from any federally delegated powers. The Navajo Tribe has never given up its authority to punish tribal offenders, nor has that power been lost by virtue of the tribe's dependent status.

60. 435 U.S. 191 (1978).

61. The Supreme Court emphasized the criminal nature of the case before it. *Id.* at 195, 196 n.7, 208. See also Collins, *supra* note 58, at 508 & n.163.

62. 435 U.S. at 208.

63. *But see* *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, No. C-77-882M (W.D. Wash. July 27, 1978), 5 Ind. L. Rep. F-153, *appeal pending*. See notes 78-95 *infra* and accompanying text.

64. 435 U.S. 192-93. With regard to the reservation, the Court stated in a footnote that the population of the reservation was 2,928 non-Indians and only 50 Indians. *Id.* at 193 n.1. The Court also noted that 63% of the reservation was held in fee simple absolute by non-Indians.

The Suquamish Tribe had sought law enforcement assistance from both the local county and the BIA which said that the tribe would have to provide its own law enforcement out of tribal funds and with tribal personnel. At the time of Oliphant's arrest, the *only* law enforcement officers available were tribal deputies. These important facts, which were noted by the Ninth Circuit were not mentioned in the Supreme Court opinion. *Oliphant v. Schlie*, 544 F.2d 1007, 1013-14 (9th Cir. 1976), *rev'd sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

65. 435 U.S. at 194. For a more detailed account of the facts see the Ninth Circuit's opinion, 544 F.2d at 1013-14.

existence of comprehensive federal jurisdiction over the subject matter."<sup>66</sup> Second, the Court relied on what it deemed to be a "commonly shared presumption" of the three branches of government that Indian tribes lacked the power to try non-Indians on criminal matters.<sup>67</sup> Considering this factor, the Court looked to early treaties and attorney general opinions,<sup>68</sup> early court decisions,<sup>69</sup> and some congressional activity<sup>70</sup> for support. Third, the Court examined the dependency of Indian tribes and found that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*'"<sup>71</sup> Although the Court did not specify all of the "inherent limitations on tribal powers,"<sup>72</sup> it did give some examples.<sup>73</sup> Finally, the Court em-

66. Collins, *supra* note 58, at 479, 487-88, 490. This factor is closely related to an argument based upon preemption of tribal power by federal statutes that the Ninth Circuit rejected. 544 F.2d at 1010-11. The Supreme Court avoided express consideration of the preemption argument by deciding upon other grounds. See Collins, *supra* note 58, at 487 & n.52, 488.

67. 435 U.S. at 206. See Collins, *supra* note 58, at 492-97.

68. 435 U.S. at 197 n.8, 198-99, 201, 206. See Collins, *supra* note 58, at 492-93, 496-97.

69. 435 U.S. at 199-201, 204, 206. See Collins, *supra* note 58, at 492 nn.78-79.

70. 435 U.S. at 201-03 & n.14, 204-06. See Collins, *supra* note 58, at 493-95.

71. 435 U.S. at 208. This limitation does not apply to tribal powers over members within the reservation boundaries. *United States v. Wheeler*, 431 U.S. 313, 326 (1978). See Collins, *supra* note 58, at 497-98. See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980). The court held that the Jicarilla Apache Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers. The court stated:

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any nonmembers of their tribe. . . . For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." . . . For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence of inherent powers. The critical factor in the cases is whether important interests of the United States, other than Congress's basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private, voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than private, voluntary associations, . . . and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign nations.

*Id.* at 542 (emphasis is in original) (citations omitted).

72. 435 U.S. at 209.

73. 435 U.S. at 209, giving as examples: the power to convey land to anyone but the sover-

phasized that there was a federal overriding interest in protecting citizens "from unwarranted intrusions on their personal liberty."<sup>74</sup> The Court noted that few tribes had formal court systems or written laws which would afford non-Indians the same rights they were guaranteed under the Bill of Rights.<sup>75</sup>

In applying *Oliphant* to the question of tribal civil regulatory jurisdiction, the same factors must be examined and the federal, tribal, and state interests must be balanced.<sup>76</sup> *Oliphant* itself was expressly limited to criminal jurisdiction,<sup>77</sup> and its rationale is not applicable to civil regulatory jurisdiction. Conversely, there is not the same degree of federal statutory involvement in tribal civil matters as there is in tribal criminal matters.<sup>78</sup> Thus, if tribes are found to lack civil regulatory jurisdiction, then jurisdiction would be in the states.<sup>79</sup> However, states do not have the same protective motives for Indians and their land as does the federal government.<sup>80</sup>

In addition, the shared presumption of all three branches of government is that tribes do retain civil regulatory jurisdiction. Courts

eign, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); and the power to deal with foreign nations, *Cherokee Nation v. Georgia*, 31 U.S. (5 Pet.) 1 (1831).

74. 435 U.S. at 210.

75. *Id.* at 197, 210-11.

76. See Collins, *supra* note 58, at 491. Even though Collins questions the Court's application of these factors with regard to criminal jurisdiction in *Oliphant* itself, *id.* at 492-507, he uses these same factors in determining whether *Oliphant* covers civil regulatory jurisdiction. *Id.* at 508-10.

77. 435 U.S. at 195, 196 n.7, 208.

78. See Collins, *supra* note 58, at 509 & n.169; Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459, 1468 (1979) [hereinafter cited as *Balancing the Interests*]. Some civil matters which are governed by federal statute include: regulation of trade with Indians, 25 U.S.C. §§ 261-264 (1976); liquor controls, 18 U.S.C. §§ 1154-1156, 1161 (1976); and misrepresentation in the sale of "Indian" products, 18 U.S.C. § 1159 (1976).

79. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474 n.13, 481 n.17 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973). See Collins, *supra* note 58, at 509 & n.171. See also McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357 (1978), where the author states:

A tribe has interests in enforcing its civil regulatory laws over non-Indians to preserve law and order and to protect the lifestyle within the boundaries of its reservation. Unlike the tribal criminal laws in *Oliphant*, tribal civil regulatory laws can seldom be enforced in federal courts. To protect their interests, tribes need independent authority to compel non-Indians to comply through civil enforcement proceedings in tribal courts.

*Id.* at 420-21.

80. *Balancing the Interests*, *supra* note 78, at 1468-69 & nn.59-60. See *United States v. Kagama*, 118 U.S. 375, (1886):

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

*Id.* at 383-84 (emphasis in original).



have upheld tribal civil jurisdiction over non-Indians within the reservation since the early 1900's.<sup>81</sup> The Supreme Court in *Morris v. Hitchcock*<sup>82</sup> upheld an annual privilege or permit tax upon livestock of nonmembers of the Chickasaw Nation enacted by the legislature of the Chickasaw Nation. Even after the decision in *Oliphant*, the federal courts continued to support tribal civil jurisdiction over non-Indians.<sup>83</sup>

The executive branch has also supported tribal civil regulatory jurisdiction over non-Indians. As early as 1855 the Attorney General of the United States determined that tribes may exercise civil jurisdiction over non-Indians within their territory.<sup>84</sup> When Congress enacted the Indian Reorganization Act (IRA) in 1934, it authorized tribes to exercise powers "vested . . . by existing law" in addition to those specifically vested by the statute.<sup>85</sup> Contemporaneous with the enactment of the IRA, the Department of the Interior, as the administering agency, published an extensive analysis of the retained powers included within this phase.<sup>86</sup> In that analysis, the Department concluded that "over all

81. See *Morris v. Hitchcock*, 21 App.D.C. 565, *aff'd*, 194 U.S. 384 (1904) (upholding a tribal tax on non-Indian owned cattle which were grazed on tribal land based upon both a retained power to tax as well as the power to exclude non-members from the reservation and to condition entry); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (upholding a tribal severance tax on oil and gas as within the tribe's inherent sovereign powers); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959) (upholding a license tax on nonmembers leasing trust lands on the reservation for use of grazing and farm lands based on inherent sovereignty); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (upholding a grazing tax based on inherent sovereignty); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion*, 203 U.S. 599 (1906) (upholding a permit tax of a resident non-Indian, based in part upon the power to prescribe terms on which noncitizens may transact business on the reservation and in part upon retained sovereign powers); *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Indian Terr. 1900), *aff'd without opinion*, 105 F. 1003 (8th Cir. 1900) (tribal occupation tax on nonmember attorneys practicing law in federal courts located on the reservation upheld).

82. 194 U.S. 384 (1904).

83. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980); *Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366 (D.N.D. 1978) (eviction of nonmember Indian for failure to pay rent to Turtle Mt. Housing Auth. and holding over after termination of lease); *Wardle v. Ute Indian Tribe*, No. C-74-330 (D. Utah May 24, 1978) 5 Ind. L. Rep. L-20, *appeal pending* (release of non-Indian tribal police chief so that member of Tribe could be placed in that position); *Salt River Project Agricultural Improvement and Power District v. Navajo Tribe of Indians*, No. 78-352 (D. Ariz. July 11, 1978) *appeal pending*, (upholding possessory interest tax levied on mineral lessees of tribal lands).

A little over two months after its decision in *Oliphant*, the Supreme Court, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), stated: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 65.

84. 7 OP. ATT'Y GEN. 174 (1855). See also 17 OP. ATT'Y GEN. 134 (1881); 18 OP. ATT'Y GEN. 34, 36 (1884); 23 OP. ATT'Y GEN. 214, 217-18 (1900).

85. 25 U.S.C. § 476 (1976) "In addition to all powers vested in any Indian tribe or tribal council by existing law. . . ." *Id.*

86. *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934). This comprehensive statement of retained sovereign powers was relied upon after *Oliphant* in *United States v. Wheeler*, 435 U.S.

the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business . . . ."<sup>87</sup>

The new regulations<sup>88</sup> promulgated by the Department of the Interior pursuant to the Indian Self-Determination and Education Assistance Act<sup>89</sup> expressly recognize the authority of tribes to enact their own Indian preference requirements.<sup>90</sup> Moreover, the Associate Solicitor in the Division of Indian Affairs of the Department of the Interior has recently upheld the validity of civil jurisdiction over non-Indians with regard to the Colville Employment Rights Ordinance.<sup>91</sup>

Congress has recognized and supported tribal sovereignty to regulate non-Indians within their territory in a number of statutes. As noted above, section 16 of the IRA<sup>92</sup> was one such statute. Congress has also endorsed tribal regulation of non-Indians in other areas by making it a federal crime to violate tribal regulations governing liquor sales, hunting, and fishing.<sup>93</sup>

Finally, an important factor considered by the *Oliphant* Court was that the rights guaranteed to criminal defendants in state and federal

313, 317 n.7, 328 (1978), to show that the IRA did not create or delegate authority for Indian tribes to govern themselves.

87. 55 Interior Dec. at 50. See *id.* at 46; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-50 (Univ. N.M. ed. 1971).

88. 44 Fed. Reg. 62,510 (1979) (to be codified in 41 C.F.R. §§ 14-1.354, -7.5002 to .5003).

89. 25 U.S.C. § 450e(b) (1976).

90. Tribal preference requirements. (1) Where the work under a contract is to be performed on an Indian reservation, the procuring activity may supplement the clause set forth in § 14-7.5003 [44 Fed. Reg. 62,514-515] of this chapter by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. . . .

(2) Nothing in these regulations shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently developed tribal preference requirements shall not, except as provided in § 14-1.354(e)(1) above, become a requirement in contracts covered under this § 14-1.354 and must not hinder the Government's right to award contracts and to administer their provisions.

44 Fed. Reg. 62,513-14 (1979) (to be codified in 41 C.F.R. § 14-1.354(e)).

Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not hinder the Government's right to award contracts and to administer their provisions.

44 Fed. Reg. 62,515 (1979) (to be codified in 41 C.F.R. § 14-7.5003(c)).

91. Memorandum from Thomas W. Fredericks, Office of the Area Director, Portland Area Office, Bureau of Indian Affairs, U.S. Department of the Interior, to Superintendent, Colville Agency (Aug. 4, 1978) (regarding approval of Colville Employment Rights Ordinance Res. No. 1978-557 (July 31, 1978)). [hereinafter cited as Fredericks].

92. 25 U.S.C. § 476 (1976). See notes 31-33 *supra* and accompanying text.

93. 18 U.S.C. §§ 1161, 1165 (1976). See also *United States v. Mazurie*, 419 U.S. 544 (1975).

courts were not fully guaranteed in tribal courts. "[T]his interest is weakened since the due process requirements in civil enforcement proceedings are far more limited than those in criminal cases."<sup>94</sup>

## 2. Powers Derived from Tribal Ownership of Land

While not as important to the Indian tribes as powers derived from their inherent sovereignty, nor as expansive,<sup>95</sup> there is some basis for finding that tribes have the authority to impose employment preference requirements on reservation employers. This arises from the tribe's power to exclude or remove persons from their territory and to impose conditions before granting permission to enter upon tribal lands.<sup>96</sup>

This authority was recognized in 1821 by Attorney General Wirt: So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent . . . . Although the Indian title continues only during their possession, yet that possession has always been held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. We treat with them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince.<sup>97</sup>

Some courts upholding tribal power over non-Indians also based their findings on the tribal authority to remove or expel non-members,<sup>98</sup>

94. McCoy, *supra* note 79, at 421. In a footnote, McCoy states:

The criminal trial guarantees of the sixth amendment have been held inapplicable to civil enforcement proceedings. . . . The double jeopardy clause has also generally been held inapplicable to civil penalty proceedings. . . . Furthermore, the procedural due process rights in civil penalty proceedings seldom include more than the opportunity to be heard. . . . When a civil enforcement proceeding is dependent on a conviction in a criminal case or could give rise to a later criminal prosecution for the same incident, the Court has exhibited greater concern for the defendant's rights. . . . This line of cases has no effect on the due process requirements in tribal civil enforcement proceedings because *Oliphant* precludes a subsequent tribal criminal proceeding against a non-Indian.

*Id.* at 421 n.285 (citations omitted). See also *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975).

95. See note 101 *infra*.

96. See 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 156-58; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 142-45, 332; Collins, *supra* note 58, at 513, 528 nn.294-97; *Balancing the Interests*, *supra* note 78, at 1466.

97. 1 OP. ATT'Y GEN. 465, 466-67 (1829).

98. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905),

while others do not.<sup>99</sup> This explanation of tribal authority, however, inadequately covers all the situations in which regulatory authority has been, and needs to be, exercised.<sup>100</sup>

### 3. Others

There are other possible legal premises upon which tribal authority can be based. One is an express grant of power by statute. In *United States v. Mazurie*,<sup>101</sup> the Supreme Court rejected the argument that Congress could not delegate power to Indian tribes since they were only "private, voluntary organizations." The Court stated that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.'"<sup>102</sup> There are presently no federal statutes delegating authority to Indian tribes to impose Indian employment preference standards.

Another basis for tribal authority arises from powers expressly reserved by tribes in treaties. Some treaties exist which have, by their terms, been recognized as reserving the right to determine the conditions upon which non-Indians can reside or use land on the reservation.<sup>103</sup>

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*appeal dismissed without opinion*, 203 U.S. 599 (1906); *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr. 1900), *aff'd without opinion* 105 F. 1003 (8th Cir. 1900). See also 23 OP. ATT'Y GEN. 214 (1900).

99. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

100. See 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977):

Yet repeatedly, the Solicitor's Office encountered situations requiring some identifiable regulatory authority, either Federal, State, or tribal, to regulate the conduct of non-Indians or nonmembers within Indian country that could only be accounted for by finding some power inherent in Indian tribes that arose from some source other than the simple power to expel or remove. Thus it was held that the tribes might seize stray cattle of a non-Indian which trespassed upon tribal property and sell the same at a public auction in order to cover the expenses of the tribe, that the tribes might confiscate unlicensed dogs of non-Indians in furtherance of tribal police powers, that tribes might seize and forfeit the fishing equipment of a non-Indian fishing within the reservation in violation of tribal laws, and that a tribal court could enter a decree of divorce in a marriage between an Indian and a non-Indian.

Clearly, the conception that the power of a tribe was limited to its power of removal from the reservation was not adequate to the law enforcement or regulatory needs of government in Indian country.

*Id.* at 158 (footnotes omitted).

101. 419 U.S. 544 (1975).

102. *Id.* at 557 (tribal jurisdiction to control the sale of liquor on privately held lands within the reservation boundaries).

103. See Treaty with the Navajo Indians, June 1, 1868, United States-Navajo Indians, art. 2, 15 Stat. 667, 668. The Treaty provided that the reservation was set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do,

One final basis of power upon which tribal employment preference ordinances might be based is the tribe's contractual power. Substantial economic activity on reservations often leads to commercial contracts between the tribe and third parties. These include contracts to rent land or buildings from the tribe, to lease tribal minerals or resources, or to construct projects requiring tribal money. Before entering into such agreements, the tribe may require the other party to comply with all tribal ordinances, including those involving employment preference.<sup>104</sup> As noted above, such agreements do not violate Title VII of the Civil Rights Act of 1964.<sup>105</sup>

## B. *Limitations*

There can be little doubt that tribes have retained some civil regulatory powers, even over non-Indians. But problems arise in determining the extent of such powers, especially those concerning enforcement of tribal civil regulatory jurisdiction over non-Indians. This section will address these problems.

### 1. General Limitations Upon Inherent Sovereign Powers

The power to regulate business on the reservation has not been withdrawn by treaty<sup>106</sup> or statute. For the most part, this power is not inconsistent with Indian tribes' status as dependent nations.<sup>107</sup> There may, however, be certain tribal ordinances which exceed the thin and uncertain line between what may be regarded as consistent with this status, and what may be regarded as inconsistent.<sup>108</sup>

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and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174-75 (1973). See also *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969). Virtually identical language is found in many Indian treaties. *E.g.*, Treaty with the Crows, May 7, 1868, United States-Crow Indians, art. 2, 15 Stat. 649; Treaty with the Sioux, April 29, 1868, United States-Sioux Indians, art. 2, 15 Stat. 635; Treaty with the Ute, March 2, 1868, United States-Ute Indians, art. 2, 15 Stat. 619; Treaty with the Cheyenne and Arapaho, October 28, 1867, United States-Cheyenne and Arapaho Indians, art. 2, 15 Stat. 593; Treaty of Point Elliott, January 22, 1855, United States-Dwamish, Suquamish and other allied and subordinated Indian tribes in the Washington Territory, art. 2, 12 Stat. 927. See also *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904).

104. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1340 (D.S.D. 1975); D. Press, *supra* note 28, at 46-47. See also *Collins*, *supra* note 58, at 515.

105. 42 U.S.C. §§ 2000(b), 2000e-2(i) (1976).

106. This comment is made in a general way and does not express an absolute conclusion that no treaty exists which may be interpreted as precluding such an ordinance.

107. See notes 22-37 *supra*.

108. See notes 174-97 *infra* and accompanying text.

## 2. The Indian Civil Rights Act of 1968<sup>109</sup>

The Indian Civil Rights Act (ICRA) was enacted by Congress to protect both Indians and non-Indians<sup>110</sup> from arbitrary tribal action. The Act was also designed to maintain tribal culture and to strengthen tribal governments.<sup>111</sup> The ICRA purports to affect "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial."<sup>112</sup> Provisions in Title I of that Act<sup>113</sup> are known as the "Indian Bill of Rights" since, with some notable exceptions, they were derived from the Bill of Rights of the United States Constitution.<sup>114</sup>

In *Santa Clara Pueblo v. Martinez*,<sup>115</sup> the Supreme Court held that the ICRA does not implicitly authorize private causes of action in federal courts.<sup>116</sup> Federal jurisdiction under the ICRA was found to be limited to writs of habeas corpus.<sup>117</sup> The Court realized that, in the civil context, this would mean that tribal forums<sup>118</sup> would have exclu-

109. 25 U.S.C. §§ 1301-1341 (1976).

110. *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933-34 (10th Cir. 1975); *Dodge v. Nakai*, 298 F. Supp. 26, 31-32 (D. Ariz. 1969); *Dodge v. Nakai*, 298 F. Supp. 17, 24-25 (D. Ariz. 1968).

111. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144 (8th Cir. 1973). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. at 62; *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1237 (4th Cir. 1974) (overruled by *Martinez*, *Crowe v. Eastern Band of Cherokee Indians*, 584 F.2d 45, 46 (4th Cir. 1978)).

112. 25 U.S.C. § 1301(2) (1976).

113. 25 U.S.C. §§ 1301-1303 (1976).

114. Some of the differences are: There are no provisions in the ICRA equivalent to the second, third or seventh amendments. The equal protection clause of the ICRA, § 1302(8), differs from the fourteenth amendment in that § 1302(8) guarantees the equal protection of the tribe's laws, not of "the laws." The due process clause of § 1302(8) does not include "life" as a protected interest as do the fifth and fourteenth amendments. Section 1302(7), which prohibits excessive bail or fines and cruel and unusual punishments, sets an absolute limit on punishment by the tribe of six months imprisonment and a \$500 fine. There is no requirement that tribal criminal prosecutions be initiated by grand jury indictment. The establishment clause of the first amendment is not present in the ICRA, permitting establishment of religion. The ICRA also provides that a criminal defendant has a right to assistance of counsel at his own expense, § 1302(6), contrary to the requirements of the sixth amendment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 n.14 (1978); *Johnson and Crystal*, *supra* note 42, at 618 n.176.

115. 436 U.S. 49 (1978).

116. *Id.* at 59-72.

117. *Id.* at 66-72; 25 U.S.C. § 1303 (1976).

118. 436 U.S. at 65-66, 71-72. The Court noted, in the following language, that tribal forums included nonjudicial tribal institutions.

Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and [25 U.S.C.] § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Nonjudicial tribal institutions have also been recognized as

sive jurisdiction. The Court, however, went on to note that:

Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [the ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.<sup>119</sup>

Some courts have distinguished *Martinez* on the ground that the controversy there concerned an intra-tribal dispute, and its holding should not, therefore, apply to disputes between Indians and non-Indians.<sup>120</sup> Such arguments are based on a distinction not made in *Martinez*. To the contrary, the Court stated that “[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of *both Indians and non-Indians*.”<sup>121</sup> The Supreme Court may have left open one possible avenue for relief in a forum other than those of the tribe. In a footnote, Mr. Justice Marshall, writing for the majority, noted that under many Indian Reorganization Act constitutions,<sup>122</sup> though not the Santa Clara Pueblo, Department of the Interior approval of tribal ordinances is required before they may go into effect. Justice Marshall stated that “[i]n these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek

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competent law-applying bodies. . . . Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief.

*Id.* at 65-66. Along these lines, the Court noted that the Santa Clara Pueblo had, in its constitution approved by the Secretary of the Interior, vested judicial authority in its tribal council. *Id.* at 66 n.22. See Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U. CAL. D. L. REV. 1 (1979).

119. 436 U.S. at 72, speaking specifically of § 1302 of the ICRA. See Ziontz, *supra* note 118, at 25-33.

120. *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, No. C-77-882M (W.D. Washington, July 27, 1978), 5 Ind. L. Rep. F-153, *appeal pending*.

121. 436 U.S. at 65 (footnote and citations omitted) (emphasis added); *Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366, 368-69 (D.N.D. 1978).

122. Pursuant to the IRA, Indian tribes, at their option, 25 U.S.C. § 478 (1976), could adopt a constitution and by-laws by which to govern their reservations. 25 U.S.C. §§ 476-477 (1976). In 1947 it was reported that 181 tribes had accepted the Act, 77 had declined it and 14 came under it because they had not voted. Within 12 years after the IRA was enacted, 161 constitutions and 131 corporate charters had been adopted. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972).

relief from the Department of the Interior."<sup>123</sup> To date, no federal court has granted jurisdiction on this basis.<sup>124</sup>

a. The Equal Protection Clause of the Indian Civil Rights Act:  
What Standard of Review?<sup>125</sup>

In *Martinez*, the Supreme Court did not reach the merits of the case<sup>126</sup> and, therefore, never directly addressed the problem of applicable standards under the ICRA equal protection clause. The Court did note, however, that the application of the ICRA equal protection clause by the federal courts in civil cases "may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."<sup>127</sup> The Court said, in recognizing a tribe's right to determine its own membership, that because of "the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters."<sup>128</sup> The Court's statement expressed its concern for striking a balance among individual rights and tribal cultural and governmental identity as was intended by Congress.<sup>129</sup>

123. 436 U.S. at 66 n.22 (*dictum*). See also *United States v. Mazurie*, 419 U.S. at 558 n.12 (1975) (Court noted with favor that the Secretary must approve any tribal ordinance limiting sale of liquor on the reservation before violation of the ordinance becomes a federal offense); Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 L. & CONTEMP. PROB. 166, 173-75 (1976).

124. Telephone conversation with Francis Ayer, Solicitor's Office, Dept. of the Interior, Washington, D.C. (Nov. 26, 1979). See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (plaintiffs sued the Secretary of the Interior on the basis that in approving the tribe's tax ordinance he violated the Administrative Procedures Act but abandoned this claim at trial).

A distinction should be made between suits against Interior officials for decisions for which they are responsible, involving such things as grant disbursement, and suits against Interior officials for approving a tribal ordinance which violates some federal law or constitutional provision.

125. As a result of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), challenges to tribal laws may only be brought in tribal forums unless upon a writ of habeas corpus. This discussion of an applicable standard for reviewing cases under the ICRA is based largely upon federal court decisions predating *Martinez*. The analysis may or may not be applied by tribal forums upon review under the ICRA. See note 138 *infra*.

126. *Martinez* involved an ordinance of the Santa Clara Pueblo which denied tribal membership to the children of female members who had married non-members of the Pueblo, while permitting enrollment of children of male members who had married non-members of the Pueblo. The district court held the ordinance did not violate the ICRA equal protection requirement because it was based upon Pueblo tradition. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975). The circuit court of appeals reversed finding that the interest of the individual member outweighed the tribal interest involved. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1975).

127. 436 U.S. at 72 (footnote omitted).

128. *Id.* at 72 n.32.

129. *Id.* at 62-66 (citing relevant legislative history); *O'Neal v. Cheyenne River Sioux Tribe*,



While the Supreme Court has not addressed the question of striking this balance, some lower federal courts have. These decisions were rendered prior to *Martinez* and discussed the issue only after basing jurisdiction upon grounds now rejected by *Martinez*.<sup>130</sup> The general approach seems to involve a balancing of the individual rights granted by the ICRA against the historical, governmental, and cultural interests of the tribe, with deference given to tribal customs and traditions.<sup>131</sup> In one of the first appellate court decisions involving the ICRA, the Eighth Circuit noted: "[I]t is clear to us that Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments."<sup>132</sup>

The conventional approach to equal protection claims under the

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482 F.2d 1140, 1144-45 (8th Cir. 1973); S. REP. NO. 721, 90th Cong., 2d Sess. 26, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1837, 1863-67. See Johnson and Crystal, *supra* note 42, at 619-25.

130. Relying on *Martinez*, several cases have been dismissed for lack of federal jurisdiction. *E.g.*, *Mousseaux v. Rosebud Sioux Tribe*, 582 F.2d 1287 (8th Cir. 1978); *Crowe v. Eastern Band of Cherokee Indians*, 584 F.2d 45 (4th Cir. 1978); *Sturdevant v. Wilber*, 456 F. Supp. 428 (E.D. Wis. 1978); *Salt River Project Agri. Improvement & Power Dist. v. Navajo Tribe of Indians*, No. 78-352 Phx.WPC (D. Ariz. 1978) 5 Ind. L. Rep. F-116, *appeal pending*; *Boe v. Fort Belknap Indian Community*, 455 F. Supp. 462 (D. Mont. 1978); *Wardle v. Ute Indian Tribe*, No. C74-330 (D. Utah 1978) 5 Ind. L. Rep. L-20; *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975). See *Ziontz*, *supra* note 118, at 9 n.53, where the author notes:

Absent any jurisdiction, and given the retroactivity of *Martinez*, prior federal decisions would appear to be a nullity. . . .

One question of importance to tribal government is the weight to be given prior substantive rulings under the ICRA. While those decisions may no longer stand as conclusive and binding interpretations of the ICRA, they cannot safely be ignored.

*Id.*

131. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1045-46 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978); *Tom v. Sutton*, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1097 (8th Cir. 1975); *Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-45 (8th Cir. 1973); *Janis v. Wilson*, 385 F. Supp. 1143, 1150-51 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975).

132. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144 (8th Cir. 1973) (footnote omitted). The court further stated:

In addition, Congress was sensitive to the possibility of disrupting the Indian governments when it passed the Indian Bill of Rights: "Discussion of the Indian Bill of Rights showed no intent to use the statute as an instrument for modifying tribal cultural attitudes in order to facilitate assimilation of Indians into the non-Indian community. In fact, the committee showed a positive intent to avoid requirements injurious to the tribe's capacity to function as autonomous governmental units."

*Id.* at 1145. Johnson and Crystal, in their recent look at equal protection, note:

In the absence of a conclusive answer, [from the Supreme Court] the lower federal court decisions have varied considerably. However, they have generally accorded considerable weight to Indian cultural autonomy and traditional values and have given considerable deference to the judgment of tribal governments.

Johnson and Crystal, *supra* note 42, at 620.

federal constitution involves three levels of scrutiny.<sup>133</sup> Where action by a government<sup>134</sup> is based on a "suspect" classification, such as racial classification, or impinges upon a "fundamental right," review of that action will be based on a standard of "strict scrutiny," requiring the action to be struck down absent a compelling state interest. Without a suspect classification or infringement upon a fundamental right, review will proceed under a "rational basis" standard. Certain classifications, although not "suspect," have been reviewed under a mid-level of scrutiny lying somewhere between the above extremes. This intermediate test requires that state action serve "important governmental objectives" and "be substantially related to achievement of those objectives."<sup>135</sup>

While it is clear that the ICRA equal protection clause does not apply to tribal governments in the same manner that federal constitutional provisions apply to federal and state governments,<sup>136</sup> some federal courts have found that the equal protection analysis developed under the federal constitution serves as a persuasive guide in reviewing actions arising under ICRA provisions.<sup>137</sup>

With regard to tribal ordinances requiring Indian employment preference, there is a strong argument that strict scrutiny is an inappropriate standard of review. This conclusion is persuasive in light of modern equal protection analysis and principles.<sup>138</sup> If the congres-

133. See note 42 *supra*.

134. The ICRA applies to the executive, legislative, and judicial branches of tribal governments. See note 120 *supra*.

135. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

136. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1045, 1047 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978); *Tom v. Sutton*, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975); *McCurdy v. Steele*, 506 F.2d 653, 655 (10th Cir. 1974); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973); *Groundhog v. Keeler*, 442 F.2d 674, 678, 681-82 (10th Cir. 1971); *Janis v. Wilson*, 385 F. Supp. 1143, 1150-51 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 440 (D.S.D. 1974); *Lohnes v. Cloud*, 366 F. Supp. 619, 621-22 (D.N.D. 1973). *Cf. White Eagle v. One Feather*, 478 F.2d 1311, 1313-14 (8th Cir. 1973) (consideration different where voting procedures adopted by the Tribe are identical to anglo procedures).

137. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978). See *Johnson and Crystal*, *supra* note 42, where the authors state:

Cases involving the ICRA equal protection clause have used standard constitutional equal protection language for determining the validity of tribal action challenged under that act. The difference between these cases and cases involving the equal protection clause of the constitution lies in the *application* of the guarantee: the courts give special deference to long established tribal customs and tradition in the ICRA cases.

*Id.* at 628 (emphasis supplied). See also note 130 *supra*.

138. See notes 41-43 *supra* and accompanying text.

sional policy favoring a strengthening of tribal governments<sup>139</sup> is added to the conventional factors considered in the equal protection analysis under the ICRA,<sup>140</sup> the conclusion that strict scrutiny is inappropriate is even more compelling.

One reason for this conclusion is that the distinction between Indians and non-Indians is a political distinction, not a racial one. Thus, analysis must proceed under the rational basis test.<sup>141</sup> That test must be used where "the preference is reasonably and directly related to a legitimate, nonracially based goal."<sup>142</sup> Increased economic development on Indian reservations has increased the number of non-Indians living on or near reservations.<sup>143</sup> This has caused a political and cultural strain on many reservations which might be alleviated by reducing the incentives for non-Indian labor on or near reservations, and by training and hiring more Indian labor.<sup>144</sup> Thus, employment preference supports a tribal goal which, stated in its most basic terms, involves the maintenance of tribal identity, integrity, custom, and, in some circumstances, its very existence. Tribal preference ordinances also correct much of the discrimination which has kept reservation Indians from getting jobs or job training.<sup>145</sup> Additionally, tribes have an interest in creating and maintaining a job market on the reservation to encourage Indian labor to remain. Consideration of these factors makes it likely that differing treatment for Indians and non-Indians will be upheld under this test.<sup>146</sup>

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139. See 25 U.S.C. § 450a (1976); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-45 (8th Cir. 1973); *Lohnes v. Cloud*, 366 F. Supp. 619, 621-22 (D.N.D. 1973).

140. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-45 (8th Cir. 1973).

141. See notes 41-43 *supra* and accompanying text.

142. *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

143. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 338-39, 342-43 (1977).

144. *Id.* at 342-43.

145. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (upholding, under Title VII, an affirmative action plan designed to eliminate conspicuous racial imbalances).

146. It should be noted that the Supreme Court's emphasis in *Mancari* upon Congress' "unique obligation" towards Indians was important in determining what constituted "a legitimate, nonracially based goal" under the rational basis standard employed in that case. Once the goal sought to be achieved has been identified—"to further Indian self-government" in *Mancari*—the means employed need merely be "reasonably and directly related" to it. 417 U.S. at 554-55. Thus, absence of such a "unique obligation" towards Indians by either state or tribal governments does not foreclose the existence of other "legitimate nonracially based" goals which may be dealt with in statutes by making a distinction between Indians and non-Indians. The Supreme Court's statement that "a blanket exemption for Indians from all civil service examinations" presents an "obviously more difficult question," *id.* at 554, does not detract from this view of the test. Such an exemption would be "more difficult" to justify as being "reasonably related" to furthering the goal of "Indian self-government" involved in that case.

Even if the distinction between Indians and non-Indians is considered a "racial" classification, it is not necessarily subject to strict scrutiny. For that standard to apply, the classification must be suspect or the right impaired must be fundamental. Employment preference statutes, however, protect no fundamental right,<sup>147</sup> nor are non-Indian classifications suspect. These classifications simply do not bear the "traditional indicia of suspectness."<sup>148</sup> Moreover, this is not an instance in which racial classifications are "irrelevant and therefore prohibited."<sup>149</sup> No stigma attaches to those discriminated against,<sup>150</sup> and no presumptively invidious discrimination is involved.<sup>151</sup> Congress, for example, when enacting Title VII of the Civil Rights Act of 1964,<sup>152</sup> recognized that "an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed" by Title VII.<sup>153</sup> The Tenth Circuit reached a similar result, holding that a state Indian employment preference policy does not involve any "racial, stigmatized discrimination against the white majority."<sup>154</sup> These considerations simply illustrate that under tribal employment preference ordinances, there will be no absolute bar to employment of non-Indians and no non-Indians will lose his or her job to make space for an Indian.<sup>155</sup>

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147. See note 42 *supra*.

148. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See note 42 *supra*. It should be noted that with regard to tribal governmental action, unlike action by state governments, it can be said that the non-Indian class is in a "position of political powerlessness." Only members of the tribe may be involved in the "political process" on most reservations and non-Indians may not become members. See, e.g., *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). This concern is negated somewhat by the fact that the non-Indian class can be said to have a majoritarian control over Congress which, in turn, has been said to have plenary authority over the powers of government which the tribes otherwise possess. E.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

149. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part, dissenting in part). See note 43 *supra* and accompanying text.

150. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-58 (1978).

151. This is unlike the situation in *Martinez*, where the circuit court found invidious sex discrimination in a tribal ordinance under which the children of a mixed marriage would be members of the tribe only if the father were a member. The circuit court distinguished blood quantum requirements for tribal membership and office holding from those involved in that case, based on sex. The former requirements were said to have "some semblance of basis for the classification" unlike that of sex. 540 F.2d at 1046.

152. 42 U.S.C. §§ 2000e to 2000e-6, 2000e-8 to 2000e-9, 2000e-13 to 2000e-14, 2000e-16 to 2000e-17 (1976).

153. 417 U.S. at 548. It should be pointed out that 42 U.S.C. § 2000e-2(i) permits not only federal Indian employment preference, but also preference within the private sector as well, where no unique relationship exists between employer and Indian employee.

154. *Livingston v. Ewing*, 601 F.2d 1110, 1115 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979).

155. See notes 46, 52 *supra* and accompanying text.

Two arguments exist for upholding Indian employment preference ordinances in face of an equal protection challenge. It can be argued that the preference statute is benign or remedial and that it should be reviewed under a lesser standard than strict scrutiny, but under a standard more exacting than the rational basis standard.<sup>156</sup> In the alternative, it can be argued that despite the applicability of strict scrutiny, there are "compelling government interests" which permit preference ordinances.<sup>157</sup>

#### b. The Due Process Clause of the Indian Civil Rights Act

The due process clause contained in the ICRA is the only other provision which could be used to limit the sovereign powers of a tribe.<sup>158</sup> There has, however, been little litigation involving that provision. Its meaning and parameters will probably prove to be similar to those of the United States Constitution's due process provisions, taking into consideration the unique historical, governmental, and cultural attributes of Indian tribes.<sup>159</sup>

Procedural due process under the ICRA requires that minimal protections, such as notice and opportunity to be heard, be afforded to those individuals affected by acts of the sovereign which impinge upon

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156. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978). Justice Brennan stated that "a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359.

157. See generally *Livingston v. Ewing*, 601 F.2d at 1115-16 (finding a compelling state interest); *Doores v. McNamara*, 476 F. Supp. 987, 994-95 (W.D. Mo. 1979) (finding that the Kansas City Board of Police Commissioners' affirmative action program satisfied compelling governmental interests). It should also be noted that in addition to the aspects of the ICRA equal protection clause discussed in the text, the clause requires that tribes apply law in an equal manner and not arbitrarily, treating all who are similarly situated alike. *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975); *Crowe v. Eastern Band of Cherokee Indians, Inc.* 506 F.2d 1231, 1237 (4th Cir. 1974); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973); *Two Hawk v. Rosebud Sioux Tribe*, 404 F. Supp. 1327, 1334-35 (D.S.D. 1975).

158. 25 U.S.C. § 1302(8) (1976).

159. *Tom v. Sutton*, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976); *McCurdy v. Steele*, 506 F.2d 653, 655 (10th Cir. 1974); *Janis v. Wilson*, 385 F. Supp. 1143, 1150-51, 1153-55 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975) (ICRA claims must not be measured by the Bill of Rights). *But see Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1977) ("Although due regard for the historical, governmental, and cultural values of the Indian tribes has resulted in some variance in the protections accorded under the Bill of Rights and the Indian Civil Rights Act . . . our court has written that the due process clauses of both documents have the same meaning." *Id.* at 364 (citation omitted)). See also *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 202-03 n.4 (9th Cir. 1973); *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360, 364 (D. Mont. 1977); *Loucas v. Leeky*, 334 F. Supp. 370, 374 (D.N.M. 1971).

constitutionally or statutorily<sup>160</sup> protected rights of liberty or property.<sup>161</sup> This means that tribal employment preference ordinances will most likely provide for notice of noncompliance and a hearing prior to the commencement of enforcement proceedings.<sup>162</sup>

During the early part of the twentieth century, the Supreme Court held that the due process clause of the Constitution imposed limits on government action, above and beyond ordinary procedural requirements.<sup>163</sup> This holding reflected strong underpinnings of natural law and economic theory prevalent in that era.<sup>164</sup> The Court has, however, retreated from these substantive due process requirements in the sphere of economic regulation,<sup>165</sup> and has reduced the number of rights considered fundamental under due process analysis.<sup>166</sup> At a minimum, “[d]ue process requires governmental entities to utilize reasonable means in seeking to achieve legitimate ends.”<sup>167</sup> Due process also demands that a tribal government obey the mandates of its tribal constitution and ordinances.<sup>168</sup> As was noted in *Solomon v. LaRose*:<sup>169</sup> “Due process is more than requiring that a government’s decision be based upon a rational evidentiary basis and that certain concomitants

160. The term “constitutionally” refers to tribal constitutions since the federal constitution does not apply to tribal governments. *E.g.*, *Talton v. Mayes*, 163 U.S. 376 (1896); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959). The term “statutorily” refers to tribal statutes and ordinances as well as the ICRA and applicable federal statutes.

161. *See generally* *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). For cases involving the ICRA see *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360 (D. Mont. 1977); *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934 (D. Wyo. 1976); *Indian Political Action Comm. v. Tribal Executive Comm. of the Minnesota Chippewa Tribe*, 416 F. Supp. 655 (D. Minn. 1976); *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975); *Janis v. Wilson*, 385 F. Supp. 1143 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975). *See* note 114 *supra* noting that the due process clause of the ICRA does not include life as a protected interest as do the fifth and fourteenth amendments to the federal constitution. This seems to result from the fact that 25 U.S.C. § 1302(7) (1976), which prohibits excessive bail or fines, and cruel and unusual punishments, sets an absolute limit on punishment by tribal governments of six months’ imprisonment and a \$500 fine.

162. *See* D. Press, *supra* note 28, app. A, at 4-11.

163. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

164. *See* *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

165. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

166. *See* note 42 *supra*.

167. *Dodge v. Nakai*, 298 F. Supp. 26, 31 (D. Ariz. 1969). *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 248-49 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

168. *Olney Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1038 (D.S.D. 1977); *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1199 (D.S.D. 1975); *Solomon v. LaRose*, 335 F. Supp. 715, 723 (D. Neb. 1971).

169. 335 F. Supp. 715 (D. Neb. 1971).

of procedural safeguards be observed, but entail the overriding notion that government must operate within the bounds of the instrument which created it."<sup>170</sup>

### 3. Express Congressional Limitations

As noted above, Congress has expressly exempted Indian employment preference from the prohibitions against racial discrimination in Title VII of the Civil Rights Act of 1964.<sup>171</sup> Thus, Title VII does not limit inherent tribal sovereignty,<sup>172</sup> but indicates an opposite congressional intent.<sup>173</sup>

## C. *Extent of Tribal Authority*

### 1. Entities and Persons Subject to Tribal Authority

Clearly, both Indian and non-Indian employers are subject to tribal civil regulatory jurisdiction<sup>174</sup> and tribal employment preference ordinances asserting such jurisdiction.<sup>175</sup> The fact that such an Indian or non-Indian employer owns property in fee will not affect this power as long as the land is within the boundaries of the reservation.<sup>176</sup> This

170. *Id.* at 723.

171. See notes 24-26, 36-37, 152-53 *supra* and accompanying text.

172. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (Univ. N.M. ed. 1971).

173. See notes 36-37, 152-53 *supra* and accompanying text.

174. See notes 58-94 *supra* and accompanying text. This conclusion will apply even in a state in which Congress has permitted some judicial authority over Indians to be exercised by the state pursuant to the civil jurisdiction provisions 28 U.S.C. § 1360 (1976), *superseded in part by* 25 U.S.C. §§ 1322-1326 (1976). These provisions have been limited to private civil actions and deemed not applicable to civil regulatory jurisdiction on reservations. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *United States v. New Mexico*, 590 F.2d 323 (10th Cir. 1978); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir.), *cert. denied*, 429 U.S. 1038 (1975).

175. Having the jurisdiction to regulate the conduct of both Indians and non-Indians does not mean that a tribe must exercise it. Thus, a tribe can exclude application of its ordinances as to certain groups if it so desires, subject to the limitations of the ICRA. See notes 109-70 *supra* and accompanying text.

176. As a guide to the extent of a tribal territorial jurisdiction, 18 U.S.C. § 1151 (1976) is helpful. Section 1151 provides:

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

*Id.* While expressly applicable to federal criminal jurisdiction, the Supreme Court has said that § 1151 "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-78 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 (1973);

was the conclusion reached in *Buster v. Wright*,<sup>177</sup> when the Eighth Circuit stated:

Neither the United States, nor a State, nor any other sovereign loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership or occupancy of the land within its territorial jurisdiction by citizens or foreigners.<sup>178</sup>

Some tribes have passed ordinances which purport to regulate federal and state businesses operating on the reservation.<sup>179</sup> Others expressly exempt government agencies from regulation but still require agency contractors and subcontractors to comply,<sup>180</sup> perhaps recogniz-

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*Kennerly v. District Court*, 400 U.S. 423, 424 n.1 (1971); *Williams v. Lee*, 358 U.S. 217, 220-23 nn.5, 6, & 10 (1959); *Collins*, *supra* note 58, at 528 nn.292-97. The term "Indian country" as used in § 1151 has been regarded as expansive in its scope, *United States v. John*, 437 U.S. 634, 649 n.18 (1978); *Clinton*, *Criminal Jurisdiction over Indian lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507-13 (1976), and applicable to tribal as well as federal jurisdiction. *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n.1 (1975); *United States v. Mazurie*, 419 U.S. 544 (1975); *Collins*, *supra* note 58, at 528.

Under the definition in § 1151, "Indian country" includes all land within the exterior boundary of an Indian reservation "notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). This is true whether or not the patent was issued to non-Indians. *E.g.*, *United States v. Mazurie*, 419 U.S. 544, 547 (1975); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-59 (1962); *Beardslee v. United States*, 541 F.2d 705, 707 (8th Cir. 1976). Only Congress can remove land from a reservation, *e.g.*, *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *United States v. Celestine*, 215 U.S. 278, 285 (1909), and even then the congressional intent to disestablish the reservation must be specific and will not be easily construed by the courts. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962). The opening of Indian reservations to white settlement under the General Allotment Act, ch. 119, § 6, 24 Stat. 390 (1887) (current version at 25 U.S.C. § 349 (1976)), is not sufficient. *E.g.*, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976).

It should be noted that tribal jurisdiction extends beyond the boundaries of the reservation where allotments held by individual members of the tribe are involved. 18 U.S.C. § 1151(c) (1976); *DeCoteau v. District County Court*, 420 U.S. 425, 429 n.3 (1975).

177. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

178. 135 F. at 952; *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-59 (1962); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). *Cf.*, *United States v. Mazurie*, 419 U.S. 455 (1975) (involving a congressionally delegated power). *See McCoy*, *supra* note 79, at 418 nn.269-72. *See also* note 81 *supra* and accompanying text.

179. Crow Tribal Employment Rights Office, Ordinance No. 79-27 (Apr. 14, 1979): "2. All employers, including but not limited to State, Federal, Crow Tribal, and private businesses, operating within the exterior boundaries of the Crow Reservation are hereby required to give preference to the greatest extent feasible to members of the Crow Tribe, first, and to Indians in general, second." *Id.* While the Crow Ordinance imposes an "employment rights fee" on "covered employers" with 20 or more employees or gross sales in excess of \$100,000, *id.* at ¶ 7, it expressly excludes "educational, health, governmental, or non-profit employers." *Id.* at ¶ 7(b).

180. Colville Employment Rights Ordinance Res. No. 1978-557 (July 31, 1978) § 2.6:

*Employer.* The term "employer" shall mean any person, company, contractor, subcontractor, or other entity located or engaged in work on the Reservation, employing five or more persons. The term "employer" excludes Federal, State, and County Govern-



ing that an Indian tribe would not be able to require the federal government to comply with the tribe's preference ordinance. In most instances, the power to exert such authority over the federal government and its employees is expressly taken from the tribes by treaty.<sup>181</sup> Even when the tribe has not relinquished this power by treaty, the purported tribal power over the operations of the federal government probably will be deemed as one of "those powers 'inconsistent with their status.'"<sup>182</sup>

The problems of mandating preference requirements in state governmental activities on Indian reservations are more difficult. There has been no express withdrawal of this tribal power except in instances where state governments are found to be agents of the federal government.<sup>183</sup> The implicit limits of tribal authority outlined in *Oliphant*<sup>184</sup> and *Wheeler*<sup>185</sup> are inapplicable because they involve only conflicts between the federal government and a tribe.<sup>186</sup> In spite of such doctrinal limits, at least one commentator has noted that such a provision "would be inconsistent with the dependent status of the tribe."<sup>187</sup> This

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ment agencies but includes Tribal and other agencies, contractors, and subcontractors of all other agencies.

*Id.*

181. See note 103 *supra*. In reserving the tribe's right to exclude persons from their territory and to condition their entry, the treaties generally except "such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President. . . ." Treaty with the Navajo Indians, June 1, 1868, United States-Navajo Indians, art. 2, 15 Stat. 667, 668 (1869).

182. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). See also note 71 *supra*. This seems to be a situation within the presently undetermined scope of this limitation on tribal powers. See notes 72-73, 108 *supra* and accompanying text. See also *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980).

[T]he formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained. . . . The critical factor in the cases is whether important interests of the United States, other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority.

*Id.* at 542. See also *Salt River Project Agri. Improvement & Power Dist. v. Navajo Tribe of Indians*, No. Civ. 78-352 Phx WPC (D. Ariz. September 7, 1978) reported in 6 Indian L. Rep. F-4. The court held that the Navajo Tribe, like states, could not impose certain taxes the legal incidence of which falls on the federal government. "The rationale for preventing states from taxing the federal government in *M'Culloch v. Maryland* 17 U.S. (4 Wheat). 316 (1819), applies equally well to taxation by Indian tribes." *Id.* at \_\_\_

183. See note 181 *supra* and accompanying text. This result seems unlikely since it is doubtful that the Indians could be found to have understood that state governments were to be considered as "agents" of the federal government. Such a finding would be necessary under the well established principles of treaty interpretation. *E.g.*, *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

184. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

185. *United States v. Wheeler*, 435 U.S. 313 (1978).

186. See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) quoted in notes 71, 182 *supra*.

187. *Fredericks*, *supra* note 91, at 4.

reasoning, however, is not persuasive.<sup>188</sup> If a state agency, or any contractor or subcontractor of an agency, was engaged in business on the

188. *Id.* Fredericks reasoned:

Under Section 2.6 the [Colville Employment Rights] ordinance also purports to regulate state and county governmental agencies. As the United States Supreme Court made clear in *Morris* [v. Hitchcock, 194 U.S. 384 (1904)] the power of an Indian tribe to regulate the activity of non-Indians derives from the tribe's power to exclude non-Indians from the reservation. Under the Enabling Act permitting Washington to become a state, however, Washington has the right to exercise its civil and criminal jurisdiction over non-Indians on the reservation in regard to activities not directly affecting Indians or their property. *Draper v. United States*, 164 U.S. 240 (1896); *Utah & N. Ry. v. Fisher*, 116 U.S. 28, 31 (1885). Under the Fourteenth Amendment of the United States Constitution the state also has an obligation to provide governmental services on an equitable basis to all citizens of the state—including those living on the Colville Reservation. Tribal authority to place conditions on the presence of state employees on the reservation while they are performing traditional governmental functions would be inconsistent with the dependent status of the tribe.

*Id.* at 3-4. This analysis is inadequate for several reasons. First, as made clear above, the power to exclude non-Indians is not the *only* source of tribal power to regulate the activities of non-Indians on the reservation. See notes 58-94 *supra* and accompanying text. It is not the broadest either. See note 100 *supra*. And even under the power to exclude it is not clear that the restriction imposed by this requirement is outside the scope of tribal power. See 1 OP. ATT'Y GEN. 465 (1829) quoted from 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, 156 (1977).

The statement that the State of "Washington has the right to exercise its civil and criminal jurisdiction over non-Indians on the reservation. . ." is not supported to the extent represented by the cases cited. *Draper* dealt solely with *federal criminal* jurisdiction in a limited situation and did not purport "to deny the federal government the ability to exercise whatever jurisdiction may be necessary to effectuate its obligations to Indians. . ." D. GETCHES, D. ROSENFELT, & C. WILKINSON, *Cases and Materials on Federal Indian Law* 369 (1979) (emphasis added). While tribal criminal jurisdiction over non-Indians has been drastically limited, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this does not mean there is also a lack of tribal civil jurisdiction over non-Indians. See notes 76-94 *supra* and accompanying text.

*Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885), was cited by the Supreme Court in *Williams v. Lee*, 358 U.S. 218 (1959), where the Court established the "infringement test" as the test governing conflicts between tribes and states over jurisdictional issues. In this regard the Court stated that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220 (citation omitted). Later cases emphasized the existence of "governing Acts of Congress." *E.g.*, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). These cases developed the notion of federal "preemption" of state law in Indian affairs first espoused by Chief Justice John Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There are limits to what state actions the Court will consider "preempted" by federal law. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). See generally D. GETCHES, D. ROSENFELT, & C. WILKINSON, *Cases and Materials on Federal Indian Law* 295-99 (1979). The Court is currently considering the issue of whether tribal action, as opposed to federal action, is sufficient to preempt state jurisdiction. *Confederated Tribes v. Washington*, 48 U.S.L.W. 4668 (1980). The district court held that a tribal tax on cigarette sales to non-Indians on the reservation preempted the state's tax. 446 F. Supp. 1339 (E.D. Wash. 1978). Therefore, the questions of whether employment rights ordinances preempt state jurisdiction, and whether refusal by state agencies to comply "infringes" upon tribal self-government, requires more than looking to see whether or not the activities directly affect Indians or their property, as suggested by Fredericks. *Draper* and *Fisher* are also inapposite to the tribal rights ordinance situation because there was absolutely no impact on Indians or their property in both of those cases as there would be here. *Draper* involved a crime by a non-Indian against a non-Indian which, although occurring on a reservation, violated no tribal law and injured no tribal property. *Fisher* involved state

reservation, such an agency would have to comply with valid tribal regulations in the same manner as any other business.<sup>189</sup> Only if the state agency was providing traditional government services on the reservation, where no similar services were performed by the tribal government,<sup>190</sup> would the employment preference be inapplicable.

Another area of potential conflict arises when tribes require contractors and subcontractors<sup>191</sup> to give preference to enrolled tribal *members*, and not to Indians in general.<sup>192</sup> The trouble stems from federal regulations<sup>193</sup> which require that Indian laws "shall not . . . discriminate among Indians on the basis of . . . tribal affiliation."<sup>194</sup> On the one hand, if a tribe limits preference to its members, federal contractors may not be able to comply, since federal regulations prohibit employment discrimination among Indians on the basis of tribal affiliation.<sup>195</sup>

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taxation of a non-Indian railway which, although passing over the reservation, was not taxed or in any other manner regulated by tribal law.

While the fourteenth amendment does impose the obligation upon the states to provide governmental services, this is not an absolute right. *White v. Califano*, 581 F.2d 697 (8th Cir. 1978) (state had no duty to provide mental health care for indigent Indians living on a reservation, such care is the responsibility of the United States); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1980) (a claim by residents of the Oneida reservation against the state, county, and city governments for withdrawing police and fire protection from the Oneida Indian Reservation under 42 U.S.C. § 1983 (1976) could not proceed against the state because it was not a "person" within the meaning of 42 U.S.C. §§ 1983, 1985(3), 1986 (1976)).

As noted above, the implicit limitation upon tribal authority developed in *Oliphant* involves only conflicts between the federal government and tribes. *See* note 186 *supra* and accompanying text. *National League of Cities v. Usery*, 426 U.S. 833 (1976), is totally inapposite to the relationship between tribe and state because it dealt with the relationship between the state and federal governments. As the Supreme Court has recently reiterated, Indian tribes do not derive their power from the federal government. *United States v. Wheeler*, 435 U.S. 313 (1978). Indian tribes are not federal instrumentalities. *E.g.*, *United States v. Wheeler*, 435 U.S. 313 (1978); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

189. *E.g.*, *Bank of Kentucky v. Wister*, 27 U.S. (2 Pet.) 123 (1829): When a state "becomes a partner in a trading company, it divests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Id.* at 124 (quoting 22 U.S. (9 Wheat.) 904, 907). *See Salt River Project Agri. Improvement & Power Dist. v. Navajo Tribe of Indians*, No. Civ. 78-352 Phx. WPC (D. Ariz. September 7, 1978) reported in 7 Ind. L. Rep. F-4.

190. If the tribe were offering adequate governmental service to residents of the reservation any attempt by the state to do so would infringe upon the tribe's self-government. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

191. *See* notes 179-80 *supra*.

192. *See* Crow Tribal Employment Rights Office, Ordinance No. 79-27 (April 14, 1979).

193. 41 C.F.R. § 60-1.5(a)(6) (1979); 44 Fed. Reg. 62,510 (Oct. 31, 1979) (to be codified in 41 C.F.R. §§ 14-1.354, -7.5002 to .5003).

194. 41 C.F.R. § 60-1.5(a)(6) (1979). *See also* 44 Fed. Reg. 62,510, 62,514 (Oct. 31, 1979) (to be codified in 41 C.F.R. § 14-7.5002(a)): "The Contractor agrees to give preference to Indians . . . regardless of . . . tribal affiliation for training and employment opportunities under this contract. . . ." 44 Fed. Reg. 62,510, 62,514 (1979).

195. *See* note 194 *supra*.

Conversely, if a tribal ordinance demands that preference be given to Indians in general, that classification would have to be defended against equal protection and due process challenges.<sup>196</sup> The tribal interests addressed above,<sup>197</sup> may be sufficient to withstand such challenges, especially on a reservation with large populations of members from other tribes.

## 2. The Problem of Timing

There would be no problem in applying a tribal preference ordinance to existing as well as future employers, provided existing employers were adequately notified of the new requirements.<sup>198</sup> Most ordinances only require compliance in the hiring of new employees, so that existing employees would not lose jobs.<sup>199</sup> The tribe could selectively enforce its ordinance at first, permitting the administering agency to phase in the requirements of the ordinance.<sup>200</sup> The substantive determination of which employers are subject to the ordinance must have a rational basis and be equitably applied.<sup>201</sup>

## 3. Geographical Limitations in Applicability

As mentioned previously, tribal authority extends over all reservation lands, even if owned in fee by a non-Indian.<sup>202</sup> A problem may arise when the tribe requires employers<sup>203</sup> to give employment preference to Indians not only at facilities located on the reservation, but also at tribal facilities located near the reservation.<sup>204</sup> Although a tribe

196. See notes 106-70 *supra* and accompanying text.

197. See notes 131-32, 143-46, 157 *supra* and accompanying text.

198. The requirement of notice is mandated by the ICRA due process clause. 25 U.S.C. § 1302(8) (1976). See notes 161-62 *supra* and accompanying text.

199. Colo. River Indian Tribal Employment Rights Ordinance No. 32 Draft Guidelines ¶ 3 (a) (Sept. 8, 1979); Spokane Tribal Employment Rights Ordinance, Res. No. 1979-218 § 10 (July 31, 1979). See notes 46, 52, 155 *supra* and accompanying text.

200. *E.g.*, Seminole Tribal Employment Rights Ordinances No. C-109-80, ¶ 4(h) (Jan. 11, 1980):

In implementing these components, the [Tribal Employment Rights Office] shall have the discretion to begin by implementing certain of these components or by applying all of the components to limited kinds of employers (*e.g.*, construction, mining). Whichever approach to phasing in the program the TERO decides to use, it shall develop at a gradual pace in order to insure a stable and effective program.

*Id.*

201. See notes 138-42, 147-51, 157, 167-70 *supra* and accompanying text.

202. See notes 176-78 *supra* and accompanying text.

203. All employers on a reservation are not necessarily covered by the employment rights ordinances.

204. *E.g.*, Colo. River Indian Tribal Employment Rights Ordinance No. 32 Draft Guidelines ¶ 1 (Sept. 8, 1979): "If an employer is engaged in work on the Reservation, these Guidelines shall

could not enforce such a provision against a non-complying employer's off-reservation facilities, it would be able to impose available sanctions against that employer's reservation facilities.<sup>205</sup> Another consideration involves the possibility that a tribe and the employer could enter into a contract which requires the employment preference. The employer, for example, might need certain rights of way or leases from the tribe.<sup>206</sup> Whether such a provision could be enforced though, would depend on the defenses available under contract law.

#### 4. Enforcement

In *Oliphant v. Suquamish Indian Tribe*,<sup>207</sup> the United States Supreme Court drastically limited the power of Indian tribes to maintain law and order on their reservations by holding that tribes may not

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also apply to any other facilities of the employer that are located within a reasonable commuting distance from the reservation." *Id.* The definition of "near" comes from federal regulations. See 44 Fed. Reg. 62,510, 62,513, 62, 515 (to be codified in 41 C.F.R. §§ 14-1.354(c)(6), 14-7.5003(b)(3)).

205. This is not an extension of tribal sovereignty off the reservation. The tribe is exercising no power as a sovereign outside the boundaries of the reservation (not including off-reservation lands over which tribal authority is recognized). See 18 U.S.C. § 1151(c) (1976). See also note 189 *supra*.

Tribal action against an on-reservation facility for violation of tribal ordinances off-reservation must have a sufficient basis to pass review under the ICRA. In this regard it should be noted that the Indian employment rights situation is unique. Congress has given its blessing to Indian preference to the extent sought to be enforced, 42 U.S.C. § 2000e-2(i), and no state may proscribe such a preference without violating Title VII. 42 U.S.C. § 2000e(a), 2000e(b) (1976). See also note 49 *supra*. But see Fredericks, *supra* note 91, at 3, stating, with regard to a similar provision in the Colville Employment Rights Ordinance, Resolution No. 1977-842, that the ordinance

purports to authorize the Colville Employment Rights Commission to forbid a covered employer from hiring an employee to work at an off-reservation site within commuting distance of the reservation in violation of order of the Commission even though the employee has no contact with the reservation and the employment complies in all respects with applicable state and federal law. Action by the tribe to deprive an employer and employee of the right to enter into a contract of employment that is legal in the jurisdiction where it is made and carried out would violate the due process rights under the Indian Civil Rights Act of both the employer and the employee. The right to do business within the borders of the reservation may not be conditioned on abstention from entering into such contracts. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Miller Brothers Co. v. Maryland*, 347 U.S. 349 (1953).

Fredericks, *supra* note 91, at 3. The reasoning in Fredericks is not persuasive. First, the fact that the off-reservation employee has no contact with the reservation is not relevant. As noted above the sanctions will be imposed upon the employer. Second, tribal action does not "deprive" an employer and employee of the right to enter into a contract. The tribe seeks to dissuade non-compliance with its ordinance. What the tribe does is "deprive" an on-reservation employer who fails to comply at off-reservation facilities the advantages of locating his/her business on the reservation. Finally, it should be noted that *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), was based upon a notion of substantive due process previously repudiated by the Supreme Court. See note 133 *supra*. *Miller Bros. v. Maryland*, 347 U.S. 349 (1953), dealt with state taxation of interstate commerce and has no relevance to the situation here.

206. See note 104 *supra* and accompanying text.

207. 435 U.S. 191 (1978).

exercise criminal jurisdiction over non-Indians.<sup>208</sup> But the *Oliphant* holding is inapplicable to the tribal exercise of civil regulatory jurisdiction.<sup>209</sup> The presumption against the validity of tribal criminal jurisdiction over non-Indians is absent where civil jurisdiction is involved.<sup>210</sup> In this connection, the enforcement of tribal regulatory ordinances against non-Indians has been upheld since *Oliphant*.<sup>211</sup>

Although tribal employment preference ordinances do not assert criminal jurisdiction over non-Indians for violation of their provisions, they do impose sanctions for noncompliance.<sup>212</sup> Typically, these ordinances provide that violators may be fined or denied the privilege of doing business upon the reservation.<sup>213</sup> Perhaps the most severe sanction is the immediate removal from the reservation of those employees hired in violation of the ordinance.<sup>214</sup> The removal is said to be "sum-

208. See notes 60-75 *supra* and accompanying text. *Oliphant* discussed the issue in terms of "non-Indians", not "nonmembers". 435 U.S. at 195. In *United States v. Wheeler*, 435 U.S. 313 (1978), the Court stated the *Oliphant* holding in terms of "nonmembers". 435 U.S. at 326. Collins, *supra* note 58, states that "[b]ecause of this discrepancy between contemporaneous opinions, and because the *Oliphant* defendants were in fact whites, the question of tribal criminal jurisdiction over Indians who belong to other tribes was not determined by *Oliphant*. Prior authority indirectly supports jurisdiction over nonmember Indians." *Id.* at 479 n.5. See *United States v. Montana*, 604 F.2d 1162, 1171 n.14 (9th Cir. 1979) (expressly avoiding the issue).

209. See notes 76-94 *supra* and accompanying text; Collins, *supra* note 58, at 508-16; McCoy, *supra* note 79, at 418-22. McCoy compares the tribal and federal interests which the Court analyzed in *Oliphant* relating to criminal jurisdiction with those interests in the civil enforcement context and finds *Oliphant* to be distinguishable. He concludes:

In civil enforcement proceedings, the federal interest in protecting a defendant's rights is weak in comparison to the tribal interest in enforcing civil regulatory laws on a reservation. The relative strength of these interests suggests that tribal courts should have jurisdiction. Moreover, when a civil enforcement proceeding does present some conflict with the defendant's rights, the Supreme Court has upheld proceedings which are primarily designed to compel obedience to laws and to punish further violations. When tribal civil enforcement proceedings promote this interest, the courts should not hold that the protectorate relation inherently deprives tribes of power to bring such proceedings against non-members and their property interests.

*Id.* at 422 (footnote omitted).

210. See notes 76-94 *supra* and accompanying text.

211. *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979). See *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976); Collins, *supra* note 58.

212. *E.g.*, Seminole Tribal Employment Rights Ordinance No. C-109-80, § 3 (Jan. 11, 1980).

213. *Id.*:

Any employer who fails to comply with the laws, rules, regulations, or guidelines on employment rights of the Seminole Tribe or who fails to obtain the necessary agreements from its signatory unions shall be subject to sanctions which shall include but are not limited to: denial of the right to commence business on Seminole reservations, fines, suspension of the employer's operation, termination of the employer's operation, denial of the right to conduct any further business on Seminole reservations, payment of back pay or other relief to correct any harm done to aggrieved Indians, and the summary removal of employees hired in violation of the Seminole Tribe's employment rights policies.

*Id.*

214. Removal is a permissible sanction where there is a justifiable basis for such action in

mary," but no employee will be removed until the noncomplying employer is given notice of noncompliance as well as an opportunity to present evidence to disprove noncompliance.<sup>215</sup> An employer usually has the right to appeal any decision made by the enforcing agency.<sup>216</sup> There are, of course, limits imposed by the ICRA on what action an Indian tribe may take.<sup>217</sup>

#### IV. CONCLUSION

The federal policy regarding American Indians reflects a history of vacillating Congressional moods.<sup>218</sup> Once again, it appears that after a brief period favoring the expansion of Indian rights,<sup>219</sup> the mood of Congress is changing.<sup>220</sup>

This development should concern the tribal governments. The issues raised underscore only a few areas of potential conflict between Indians and non-Indians, and will take on increasing importance. The burden of resolving these issues is on the tribal courts.<sup>221</sup> Congress will undoubtedly question the capacity of tribal courts to resolve such disputes when the decision is made whether to expand access to the federal courts inhibited by *Martinez*.<sup>222</sup>

The power of Indian tribes to exert civil regulatory jurisdiction over Indians and non-Indians on reservation territory is a necessary power. Effective and efficient government demands that there be authority to license and zone. The Supreme Court's revised formulation of the limitations upon tribal sovereignty<sup>223</sup> must apply only to crimi-

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terms of ICRA due process limitations. See notes 167-70 *supra*. Cf. *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969).

215. *E.g.*, Seminole Tribal Employment Rights Ordinance No. C-109-80, § 3 (Jan. 11, 1980): Sanctions shall be imposed by the TERO Director, after allowing the employer an opportunity to present evidence showing why it did not violate the requirements or why it should not be sanctioned. *Id.*

216. *Id.*: An employer shall have the right to appeal to the Tribal Council any decision by the TERO Director that imposes sanctions on him. *Id.* With regard to the issue of whether the Tribal Council or the Tribal Courts should be the final arbiters see D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 332-34 (1979).

217. *United States v. Montana*, 604 F.2d 1162, 1171 (9th Cir. 1979), *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

218. See generally D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW, 29-119; S. TYLER, A HISTORY OF INDIAN POLICY (1973).

219. D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 106-18 (1979).

220. *Id.* at 118-19 referring to what has been called the "backlash" against Indian rights.

221. See notes 115-21 *supra* and accompanying text.

222. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Indeed, the Supreme Court expressly put the burden on Congress to determine whether the tribes properly apply the ICRA.

223. Compare F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123, quoted in note 58, *supra*,

nal jurisdiction. The federal courts have appeared to follow this approach.<sup>224</sup> Indian tribes will encounter many problems and much resistance in enacting Indian employment preference ordinances, but the need for such legislation is great. Many problems on the reservation, resulting from the increasing influx of non-Indians, can be alleviated.<sup>225</sup> Such legislation may be the only means available to independently improve the quality of life on reservations rather than through federally imposed paternalistic legislation. Certainly, from a historical perspective, governmental actions have substantially infringed on the lifestyle and resources of the American Indian. At this juncture, there is an opportunity for government to develop, or at the least not thwart, the potential which exists for the development of the tribes' greatest asset—the human resource.

*Kevin N. Anderson*

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*with* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), quoted in the text at note 71, *supra*, and *United States v. Wheeler*, 435 U.S. 313, 323 (1978), quoted in the text at note 59, *supra*.

224. *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980); *Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366 (D.N.D. 1978); *see* note 83 *supra*. *But see* *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, No. C-77-882M (W.D. Wash. July 27, 1978), 5 Ind. L. Rep. F-153, *appeal pending*.

225. *See generally* I AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 342-43 (1977).