EQUAL PROTECTION AS APPLIED TO TRIBAL MEMBERSHIP AND ENROLLMENT PROVISIONS

I
INTRODUCTION

The guarantee of equal protection of the laws is the most significant legal defense available to American citizens to combat the inequities often imposed by a powerful and impersonal government.[1] Yet, until passage of the Indian Civil Rights Act[2] in 1968, the reservation dweller was afforded equal protection of tribal laws only if the tribe deemed this alien value acceptable and adequately implemented it.[3] In most instances, Indians and other persons residing on the reservation were denied judicial review of alleged violations of their constitutional rights, including the right to equal protection, by their tribal governments.[4] They were also prevented from airing their grievances in the federal courts by the long-standing doctrine of "constitutional immunity,"[5] which recognized the tribes as unique cultural communities immunized, to a large degree, from the imposition of a complex, foreign body of law. In the 1960's, however, concern over the precarious status of the reservation dwellers' constitutional rights vis-à-vis tribal governments led Congress to enact an "Indian Bill of Rights,"[6] contained in the Indian Civil Rights Act. Congress modeled this legis-

1. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

2. Act of April 11, 1968, Pub. L. No. 90-284, Title II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341 (1970)).

3. Equal protection of state laws for the Indians was guaranteed. *See, e.g.*, Acosta v. San Diego County, 126 Cal. App. 2d 455, 465, 272 P.2d 92, 98 (1954).

4. 113 CONG. REC. 35,473 (1967). *See* text accompanying note 67 *infra*.

5. *See* text accompanying notes 32-38 *infra*. Note that constitutional restraints upon the nation as a whole did bind the tribes. For example, the thirteenth amendment prohibition against slavery was applicable to tribal governments. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 159 (1940); *see* In re Sah Quah, 31 F. 327, 329-31 (D.C. Alaska 1886).

6. 25 U.S.C. §§ 1301-1303 (1970). Section 1302 provides that:

> No Indian tribe in exercising powers of self-government shall
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compensation;

lation after the federal Bill of Rights.

Section 8 of the Indian Bill of Rights[7] [hereinafter section 1302(8)] requires a tribal government to provide equal protection of its laws for all persons within its jurisdiction. This Note will focus upon the actual and potential effects of section 1302(8) on the vitally important power of the tribes to determine the standards for membership in their ethnic unit.[8] Special consideration will be given to the effect of equal protection on the tribes' use of racial and other disfavored criteria. The historical development of the constitutional immunity doctrine, the history of the Indian Civil Rights Act, and the Indians' reaction to their Bill of Rights will be discussed first. The Note will then review judicial attempts to define and delineate the scope of section 1302(8) in the light of evolving equal protection theory. These issues arise in cases in which tribal governments have been accused of unfairly limiting individual involvement in reservation activities or of denying individuals benefits that flow directly from tribal membership. Finally, guidelines will be proposed for distinguishing section 1302(8) from the equal protection clause of the fourteenth amendment and for administering equal protection standards to challenged tribal membership and enrollment ordinances.

II
THE CONSTITUTIONAL STATUS OF THE RESERVATION INDIAN PRIOR TO 1968

Chief Justice John Marshall, writing for the Supreme Court in *Cherokee Nation v. Georgia*[9] and *Worcester v. Georgia*,[10] established the unique legal status of the Indian tribes when he described the Cherokee Nation as "a distinct political society . . . capable of managing its own affairs and governing itself . . . ."[11] In *Cherokee Nation*, the Chief Justice found the tribes to be

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(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

7. *Id.* § 1302(8) (1970). *See* note 6 *supra*.

8. Control over enrollment of tribal members is of vital importance for a tribe. For example, the rights to receive allotments of tribal property and assets, to vote in tribal elections, and to run for elected tribal office all are normally conditioned on membership. Note, *Enrollment: Procedures and Consequences*, 3 AM. INDIAN L. REV. 109 (1975).

9. 30 U.S. (5 Pet.) 1 (1831).

10. 31 U.S. (6 Pet.) 515 (1832).

11. 30 U.S. (5 Pet.) at 16.

neither states nor foreign nations, but "domestic dependent nations."[12] In *Worcester*, the Court held that the Cherokee tribe was not subject to the jurisdiction and laws of Georgia, but only to the Constitution and statutes of the federal government.[13] From the time of these two decisions, tribes have been regarded by the federal judiciary as autonomous bodies retaining residual powers in all spheres except foreign relations.[14] Only Congress, with its "plenary" power to legislate for the tribes, can modify tribal domestic policy by express enactments.[15] Although Congress has placed limits on the internal sovereignty of tribes[16] and both Congress and the Supreme Court have frequently disregarded the notion that tribes are truly sovereign entities,[17] the handling of most

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12. *Id.* at 17.

13. "The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." 31 U.S. (6 Pet.) at 561.

14. *See* United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 240 (D. Neb. & D.S.D. 1975). The historical doctrine of tribal sovereignty was summarized by Felix Cohen as follows:

> 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 power 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 their duly constituted organs of government.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

15. Congress has plenary control over tribal relations and property. Stephens v. Cherokee Nation, 174 U.S. 445, 478, 483 (1899). The constitutional sources of federal authority over the tribes are the provision vesting in the Executive the power to make treaties (U.S. CONST. art. II, § 2, cl. 2) and the provision granting Congress the power to regulate commerce with the Indian tribes (U.S. CONST. art. I, § 8, cl. 3). Morton v. Mancari, 411 U.S. 164, 172 n.7 (1973); McClanahan v. Arizona State Tax Comm'n, 417 U.S. 535, 551-52 (1974); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959).

16. One justification for this has been the wardship doctrine. Chief Justice Marshall first utilized the common law relationship of guardian and ward to describe the relationship of the United States with the Indian tribes. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The wardship doctrine is commonly used in international law to describe the relationship between conquering and dependent nations. A frequently cited statement of the doctrine as applied to Indians appears in United States v. Kagama, 118 U.S. 375, 383-84 (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 . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. at 383-84 (emphasis in original).

17. In 1871 Congress ended the practice of making treaties with the tribes. Indian Appropriation Act, ch. 120, § 1, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (1970)): "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."

By 1880, the Supreme Court had abandoned the view of tribes as distinct nations. Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

internal matters historically has been left to reservation leaders.[18] State interference, when not authorized by Congress, has been largely prohibited.[19]

Prior to enactment of the Indian Civil Rights Act in 1968, the courts had refused to enforce constitutional guarantees of individual privileges when disputes were purely intra-tribal,[20] and Congress had failed to enact civil rights provisions applicable to reservation dwellers. Throughout the United States' first century, congressional Indian policy was essentially one of separation,[21] although early attempts were made to persuade the Indians "to adopt the white man's civilization and way of life"[22] through promotion of agriculture, spinning and weaving, and the establishment of schools for Indian children.[23] The federal government, concerned more about impediments to settlement of coveted frontier areas than about internal tribal affairs, left the tribes "quite free to govern themselves,"[24] as long as they did so at a distance from Anglo-American communities.[25]

In 1868, the fourteenth amendment was ratified, imposing upon the states,

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18. Federal jurisdiction has traditionally been denied for controversies which are purely intra-tribal and not governed by federal statute. *See, e.g.*, United States v. Quiver, 241 U.S. 602, 605-06 (1916); *Ex parte* Crow Dog, 109 U.S. 556, 567-68 (1883); Motah v. United States, 402 F.2d 1 (10th Cir. 1968). *See also* note 44 *infra*.

Federal legislation restricting Indian domestic relations is limited in scope. Cohen, *supra* note 5, at 176-79.

19. Under *Worcester*, the states are forbidden to legislate for the tribes, except as authorized by Congress, *see* note 13 *supra*. *See also* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686-87, 690 (1965); United States v. Kagama, 118 U.S. 375, 384 (1886); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1866).

In recent years, however, the jurisdictional limitations on state law have eroded. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171-72 (1973). The Court has indicated that in the absence of a governing federal statute state law may be applied unless "the state action would infringe on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959). For analysis of recent Supreme Court decisions concerning the validity of state assumption of jurisdiction over reservations under the *Williams* infringement test, see Barsh, *The Omen*: Three Affiliated Tribe v. Moe *and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977); Johnson, *State Taxation of Indians: Impact of the 1973 Supreme Court Decisions*, 2 AM. INDIAN L. REV. 1 (1974).

20. *See* Talton v. Mayes, 163 U.S. 376 (1896) (right to an indictment by a grand jury under the fifth amendment held inapplicable to tribal governments); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (fifth and fourteenth amendments inapplicable to tribal voting procedures); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (first amendment guarantee of the right to free exercise of religion inapplicable); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959) (fifth and fourteenth amendments inapplicable to tribes' legislative actions); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958) (fifth amendment inapplicable to claim of denial of tribal membership); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963) (fifth, sixth, and fourteenth amendments inapplicable to a habeas corpus claim); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (first amendment free exercise of religion guarantee inapplicable). *But see* text accompanying notes 46-47 *infra*.

21. *See* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 618 (1976); Comment, *Red, White and* Gray: *Equal Protection and the American Indian*, 21 STAN. L. REV. 1236, 1238-39 (1969).

22. F. P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 213 (1962).

23. *Id.* at 213-24.

24. Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962).

25. Typical of federal policy during the mid-19th century was the Indian Removal Act of 1830, ch. 148, 4 Stat. 411, which authorized the President to negotiate exchanges of government land west of the Mississippi River for eastern tribal lands. Comment, *Red, White and* Gray: *Equal Protection and the American Indian*, *supra* note 21, at 1238.

among other things, the equal protection clause.[26] The equal protection clause was intended to "eliminate racial discrimination emanating from official sources in the States."[27] The specific purpose of the fourteenth amendment was to protect the rights granted by the Civil Rights Act of 1866 to newly emancipated blacks.[28] Congress, however, never intended the equal protection clause to prevent tribal authorities from utilizing blood quantum distinctions for membership practices.[29] These distinctions, based upon percentage of tribal Indian blood, are used by the tribes to differentiate among Indians and between Indians and non-Indians. Indeed, Congress and the federal courts have acknowledged the right of federal,[30] state, and tribal governments to reasonably discriminate between Indians and non-Indians on the basis of race.[31]

In 1896, in *Talton v. Mayes*,[32] the Supreme Court, for the first time, considered the applicability of a constitutional restraint upon tribal sovereignty. A Cherokee law, which allowed an indictment to be handed down by a grand jury comprised of as few as five members, was challenged as contravening the due process and grand jury provisions of the fifth amendment. The Court reinforced the distinct legal status of Indian tribes by holding that the "powers of local self-government enjoyed by the Cherokee nation"[33] were not subject to fifth amendment qualifications both because the internal sovereignty of the Cherokees existed well before the Constitution was adopted and because the Cherokee tribe was not a federal instrumentality "arising from and created by" the Constitution.[34] The *Talton* decision reflected the historical license of the "semi-independent," sovereign tribe to exist free of constitutional restraints.[35]

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26. U.S. CONST. amend. XIV, § 1 prohibits the states from denying "to any person within its jurisdiction the equal protection of the laws."

27. McLaughlin v. Florida, 379 U.S. 184, 192 (1964). *See* Loving v. Virginia, 388 U.S. 1, 10 (1967); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).

28. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, 20 (1977).

29. Regarding the equal protection clause, the Court stated that:

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).

30. *See* note 132 *infra*.

31. Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1578-81 (1969). *See also* Note, *Blacks and America's Tribal Indians: A Comparison of Civil Rights*, 2 STUD. AM. INDIAN L. 452, 512 (1971) [hereinafter cited as Note, *Blacks and America's Tribal Indians*]; Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

32. 163 U.S. 376 (1896).

33. *Id.* at 384.

34. *Id.* The Cherokee tribe had to have been considered a *federal* subdivision for the fifth amendment to have been applicable to it, because at the time the Bill of Rights guarantees had not yet been incorporated into the fourteenth amendment so as to apply to the states. *See id.* at 382. The theory that Indian tribes are not federal instrumentalities would now be strongly challenged. *See* Colliflower v. Garland, 342 F.2d 369, 378-79 (9th Cir. 1965); Martone, *supra* note 21, at 618; Comment, *Indian Tribes and Civil Rights*, 7 STAN. L. REV. 285, 289 (1955).

35. The fact that the constitutional violation alleged in *Talton* involved a procedural matter (Talton, a Cherokee, had sought a writ of habeas corpus) has led one commentator to propose that *Talton* "stands only for the proposition that a tribal government, absent any federal action, is not required to grant Indians a *remedial* right—a right concerning the form and manner in which the

Subsequent to *Talton*, it was accepted that the Constitution is binding upon tribal governments only when it is expressly applicable to the tribes, is made applicable by treaty[36] or act of Congress,[37] or when it binds the nation as a whole.[38]

After *Talton*, no significant judicial action occurred in this area for over fifty years. It was not until 1958 that a federal court explicitly held that the tribes were not states within the meaning of the fourteenth amendment,[39] thus signifying that constitutional limitations under the fourteenth amendment do not apply to legislative actions of tribes. During the interim period, however, the federal courts agreed that a tribe had complete, exclusive authority, as an autonomous political entity, to determine membership standards and benefits,[40] in the absence of a congressional directive to the contrary.[41]

A prime example of judicial deference in tribal membership matters occurred in 1957 in *Martinez v. Southern Ute Tribe*.[42] The Tenth Circuit was faced with a substantial due process claim. The plaintiff, a daughter of a full-blooded Indian, alleged that she had been capriciously denied the rights and privileges arising from tribal membership by a newly created tribal corporation which was the transferee of tribal property. The plaintiff's cause of action accrued after she had been accepted as a member of the Southern Ute tribe for many years. The merits of the case were never reached because the court of appeals affirmed the lower court's grant of the defendants' motion to dismiss for lack of subject-matter jurisdiction.[43] The Tenth Circuit simply followed the historically entrenched doctrine of blanket immunity from suit for a tribe in the

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power of government is exercised—conferred by the Constitution." Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 341 (1969).

36. *See* note 17 *supra*.

37. Twelve years prior to *Talton*, the Court stated that general acts of Congress did not apply to Indian tribes unless a clear intent to have them apply is expressed. Elk v. Wilkens, 112 U.S. 94, 100 (1884).

38. *See* note 5 *supra*.

39. Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *see* Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) (Indian tribes "have a status higher than that of states").

40. *See, e.g.*, United States v. Heyfron, 138 F. 964, 968 (C.C.D. Mont. 1905); Waldron v. United States, 143 F. 413, 419 (C.C.D.S.D. 1905); *accord, In re* Patterson v. Council of the Seneca Nation, 245 N.Y. 433, 438-40, 445, 157 N.E. 734, 736, 738 (1927). *See also* text accompanying notes 42-44 *infra*. This proposition has been adhered to by post-Indian Bill of Rights courts. *See, e.g.*, Baciarelli v. Morton, 481 F.2d 610, 612 (9th Cir. 1973).

41. Congress has plenary power to determine and regulate tribal membership. Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-07 (1902); Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899). *See* note 15 *supra*. The only express limitation imposed by Congress on the broad powers of the tribes over membership determinations is the grant to the Secretary of the Interior of final authority in matters involving the distribution of funds or property over which the Secretary exercises supervisory control. *See* 25 U.S.C. § 163 (1970).

42. 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

43. Subsequently, the plaintiff sought relief in the Colorado courts. The Colorado Supreme Court found that the plaintiff, "having sought and been denied relief in the Federal courts, will be without a remedy of any kind if the state courts also decline to hear her grievance, and the State of Colorado will have denied her the equal protection of its laws in violation of the 14th Amendment." Martinez v. Southern Ute Tribe, 150 Colo. 504, 509-10, 374 P.2d 691, 694 (1962). Thus, the court, disregarding the tribal immunity doctrine, found Martinez's claim justiciable.

absence of explicit congressional authorization to hear the dispute.[44] Thus, in the decade before passage of the Indian Civil Rights Act, it appeared that federal courts had reached a consensus that tribal leaders alone could decide whether equal protection or due process were to be accorded to reservation dwellers.[45]

A significant departure from judicial adherence to the constitutional immunity doctrine occurred in 1965 in *Colliflower v. Garland*.[46] The Ninth Circuit declared that tribal courts could be considered federal instrumentalities subject to judicial review when they were created by federal legislation, partially governed by the Bureau of Indian Affairs, and functioned as federal agencies.[47] Accordingly, a writ of habeas corpus could properly be issued by the federal district court on behalf of an Indian imprisoned pursuant to a tribal court order. Thus, a constitutional limitation superseded tribal authority in what had traditionally been viewed as an intra-tribal matter.

Although the Ninth Circuit's decision suggested that the constitutional immunity doctrine was destined for judicial abolishment, *Colliflower* did not constitute a major breakthrough. The holding was carefully limited to the facts at issue and the case was specifically distinguished from *Talton*. The court confined its decision to the particular tribal courts involved[48] and to the issue of habeas corpus.[49] Subsequently, the opinion was not extended by other federal courts[50] and was rendered inconsequential by the Indian Civil Rights Act.[51]

III
EMERGENCE OF THE INDIAN CIVIL RIGHTS ACT

Over the past century, the federal judiciary has consistently acted to preserve the tribe as a discrete and autonomous entity within American soci-

44. Tribes have long been considered to be immune from suit, absent qualification by treaty or federal statute, because of their status as dependent sovereigns. *See* United States v. United States Fiduciary & Guarantee Co., 309 U.S. 506, 512 (1940); Turner v. United States, 248 U.S. 354, 358 (1919). For analysis of the effect of the Indian Civil Rights Act on the tribes' use of the sovereign immunity doctrine as a defense against suit, *see* FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION BY THE TASK FORCE ON FEDERAL, STATE AND TRIBAL JURISDICTION 135-37 (1976) [hereinafter cited as TASK FORCE].

45. *See generally* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956).

46. 342 F.2d 369 (9th Cir. 1965).

47. *Id.* at 378-79.

48. It has been suggested that "no meaningful difference" may be found between the tribal courts involved in *Colliflower* and other tribal courts. Lazarus, *supra* note 35, at 343-44.

49. "It does not follow from our decision that the tribal court must comply with every constitutional restriction that is applicable to federal or state courts. Nor does it follow that the Fourteenth Amendment applies to tribal courts at all . . . . " 342 F.2d at 379.

50. *See, e.g.*, United States *ex rel.* Rollingson v. Blackfeet Tribal Court, 244 F. Supp. 474, 478 (D. Mont. 1965). Four years later, however, after enactment of the Indian Civil Rights Act, the Ninth Circuit followed *Colliflower* and commented on its significance in Settler v. Yakima Tribal Court, 419 F.2d 486, 488-89 (9th Cir. 1969).

51. The Ninth Circuit's decision as to habeas corpus was, in effect, enacted into law in the Indian Civil Rights Act. 25 U.S.C. § 1303 (1970) provides that "the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.". Since the Indian Bill of Rights did not extend all the

ety.[52] During that time, Congress adopted numerous and often ill-conceived Indian policy stances, without permitting Indians a meaningful voice in their decision-making process. Federal Indian policy has been alternately predicated upon separatism,[53] assimilation,[54] segregation and revitalization of tribal governments,[55] termination of the federal guardianship,[56] and finally, self-deter-

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constitutional guarantees to reservation Indians in their relationship with tribal governments, the question of the validity of the constitutional immunity doctrine remains one of significance. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1350-53 (1969) [hereinafter cited as Note, *Indian Bill of Rights*].

52. *See* Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 486 (1970) [hereinafter cited as Comment, *Indian Battle*]; W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 183 (1966).

53. *See* text accompanying notes 21-25 *supra*.

54. The General Allotment Act of 1887 (also known as the Dawes Act) authorized the President to parcel small portions of communal tribal land among individual tribal members. Act of Feb. 8, 1887, ch. 119, 24 Stat. 390 (current version at 25 U.S.C. § 331 (1970)). A patent in fee, issued to every allottee, was held in trust by the federal government for 25 years, during which time the land could not be alienated or encumbered. The Act was justified by its supporters on the theory that increased contact with non-Indians and fee ownership of land would turn Indians into educated, civilized, and self-supporting farmers and cattlemen. BROPHY & ABERLE, *supra* note 52, at 19. The underlying policy of the federal government was to "break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life, and deal with them not as nations or tribes or bands, but as individual citizens." Commissioner of Indian Affairs Report, 1890, at vi, *quoted in* Sonosky, *State Jurisdiction Over Indians in Indian Country*, 48 N.D. L. REV. 551, 553 (1972).

55. By 1934, Congress had recognized the need to revitalize tribal governments and to halt the dissipation of tribal land holdings caused by the federal government's purchase and distribution to non-Indians of allotted tribal land. Lazarus, *supra* note 35, at 346. Action was also necessary "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934). The Indian Reorganization Act of 1934 (also known as the Wheeler-Howard Act) gave a new direction to Indian policy. Act of June 18, 1934, ch. 576, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1970)). It precluded further loss of tribal lands by ending allotment procedures and restricting alienation of Indian land or of shares in the assets of tribal corporations. The Act provided funds for the repurchase of surplus land for homeless Indians. It also strengthened and stabilized tribal governments and courts by proposing new criminal justice regulations, defining the right of tribes to establish formal courts, granting new powers in the management of political and business affairs, allowing the incorporation of tribal communities for business purposes, permitting the adoption of tribal constitutions, and providing for a revolving credit fund for Indian agricultural and industrial projects. For a thorough discussion of the Act, see Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

56. In 1953, Congress reverted to assimilationist policy by officially adopting a new program of "termination," which was designed to withdraw federal responsibility for Indian affairs in favor of the states and to eliminate the special position of Indians under federal law. H.R. REP. NO. 848, 83d Cong., 1st Sess. 3, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 2409. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version at 18 U.S.C. § 1162 (1970) as to criminal jurisdiction and at 28 U.S.C. § 1360 (1970) as to civil jurisdiction) allowed six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—to assume jurisdiction over reservation Indians in civil and criminal matters over which the tribe previously had sole authority. Consent was given to all other states to assume civil and criminal jurisdiction over reservations located within their boundaries, whether or not those states had obstacles to assumption of jurisdiction embodied in their constitutions or enabling acts. Also, nine Termination Acts enacted between 1954 and 1962 eliminated federal supervision over ten tribes which had been deemed self-sufficient enough to progress without federal guidance. As a result, trust title was transferred from the fed-

mination and self-development.[57] These fluctuating policies weakened tribal structure and prevented the development of adequate programs to deal with complex social and economic problems.[58]

Furthermore, both the federal courts and Congress neglected the issue of individual rights for reservation Indians. For the most part, neither the numerous federal laws pertaining to Indians nor the treaties Congress entered into with the tribes contained language explicitly proscribing tribal infringement upon civil liberties.[59] Although Congress, in 1934, granted the tribes the power to create and adopt their own constitutions,[60] any civil rights provisions included in tribal constitutions were enforceable only in tribal courts.[61] The tribal

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eral government to the tribes, the trust relationship was ended, tribal property and assets were sold and the proceeds distributed to the tribe, Indian land lost its state tax-exempt status, and individual Indians were no longer entitled to federal government services formerly available. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 140-41 (1977). Public Law 280 and the Termination Acts, working in concert, were designed to end the federal guardianship over Indians through assimilation. S. REP. No. 501, 91st Cong., 1st Sess. 161-62 (1969); H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONG. REC. 9968 (1953).

57. On December 11, 1971, the Senate approved Concurrent Resolution 26, which announced:

> That it is the sense of Congress that—(1)(A) governmentwide commitment shall derive . . . that will be designed to give Indians the freedom and encouragement to develop their individual, family, and community potential and to determine their own future to the maximum extent possible;
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> . . .
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> (3) improving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national policy.

S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46,383 (1971).

In 1974, the Indian Financing Act was enacted to promote Indian financial self-sufficiency, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451-1543 (1974)). It created a loan and grant program for the tribes and for individual tribal members in order to assist in the establishment of Indian businesses.

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), which provides funds for the tribal takeover of programs and services originally administered by the Bureau of Indian Affairs, the Indian Health Service, and the states. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 13(a), 450)450(n), 455-458(e), 42 U.S.C. § 2024(b) and 50 U.S.C. § 456 (1975)). For criticism of the ISDEAA, *see* Barsh and Trosper, *Title I of the Indian Self-Determination and Education Assistance Act of 1975*, 3 AM. INDIAN L. REV. 361 (1975).

In March, 1977, the congressionally-created Indian Policy Review Commission, in a "tentative final report," recommended that the sovereignty once enjoyed by the tribes be restored:

> Under the recommendations of the Commission Indian tribes would hold nearly full legal jurisdiction in their own territory, including the right to tax, try people, including non-Indians, in tribal courts and control all agricultural, mineral, water, fishing and hunting rights. The Bureau of Indian Affairs in the Department of the Interior would be eliminated and an independent department or agency for Indian affairs created.

N.Y. Times, March 17, 1977, § A, at 15, col. 1.

58. *See* Comment, *Indian Battle*, *supra* note 52, at 463.

59. *See* Comment, *Indian Tribes and Civil Rights*, 7 STAN. L. REV. 285, 287 n.9 (1955).

60. Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1970); *see* note 55 *supra*.

61. *Hearings on H.R. 15,419, 15,122, S. 1843 Before the Subcomm. on Indian Affairs of the*

judiciary had little if any experience with civil rights concepts[62] and was often subservient to the opinions of the dominant tribal leaders.[63]

In August, 1961, two months after a Department of the Interior task force on Indian Affairs had recommended that the tribes be prohibited from violating the civil liberties of reservation dwellers,[64] the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, chaired by Senator Sam J. Ervin, Jr., began its initial series of hearings on the constitutional rights of American Indians.[65] The Subcommittee sought to determine whether Indians understood their constitutional rights and whether those rights were being adequately protected.[66]

After four years of gathering information, the Subcommittee members concluded that "basic constitutional rights," especially those of arrested persons, were being denied to reservation Indians.[67] In part, this was because many tribes were not organized under constitutions.[68] Even the existence of tribal

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Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 24 (1968) [hereinafter cited as *Hearings on H.R. 15,419*].

62. The Subcommittee on Constitutional Rights, in its analysis of its hearings, stated that denials of constitutional rights in tribal courts "occur . . . not from malice or ill will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system." STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., SUMMARY OF HEARINGS AND INVESTIGATIONS: CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 24 (Comm. Print 1966) [hereinafter cited as SUMMARY REPORT].

Tribal judges' unfamiliarity with constitutional notions stems from the fact that only a handful of them are licensed attorneys. Note, *The Indian Bill of Rights*, 1 STUD. AM. INDIAN L. 88, 114 (1970).

63. Under the tribal court system, judges are appointed, paid by, and responsible to the tribe. Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002, 1005 (1976). *But see* Collins, Johnson & Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808, 810-13 (1977).

64. Report to the Secretary of the Interior by the Task Force on Indian Affairs 31-32 (July 10, 1961), *cited in* Lazarus, *supra* note 35, at 344 n.30.

65. The Subcommittee conducted hearings in Washington, D.C. and field hearings as well as staff conferences in nine states having sizable Indian populations: Arizona, California, Colorado, Idaho, Nevada, New Mexico, North Carolina, North Dakota, and South Dakota. It received testimony from 79 witnesses including members of Congress, federal, state, and local law enforcement officials, representatives of the Bureau of Indian Affairs and spokesmen for 85 tribes and for several national associations which represent Indian interests. 111 CONG. REC. 1799 (1965).

The hearings are recorded in *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. pt. 1 (1961), 87th Cong., 1st Sess., pt. 2 (1962), 87th Cong., 2d Sess., pt. 3 (1962), and 88th Cong., 1st Sess., pt. 4 (1963) [hereinafter cited as 1961-63 *Subcomm. Hearings*]. For extensive discussion of the hearings, see Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557, 577-88 (1972); Note, *Indian Bill of Rights*, *supra* note 51, at 1355-60.

66. 1961-63 *Subcomm. Hearings*, pt. 2, *supra* note 65, at 285.

67. 111 CONG. REC. 1799-1801 (1965). The emphasis on criminal law reform led to the inclusion of 25 U.S.C. § 1311 in the Indian Civil Rights Act. This section directs the Secretary of the Interior to "recommend to the Congress . . . a model code to govern the administration of justice by courts of Indian offense on Indian reservations."

68. At the time of the initial Ervin Subcommittee hearings in 1961, there were 435 American tribal groups, of which 188 were not organized under constitutions. 1961-63 *Subcomm. Hearings*, pt. 1, *supra* note 65, at 166.

constitutions was insufficient to guarantee equal protection and other rights, however, for many of the constitutions that were in effect either had no civil rights provisions[69] or contained provisions that were clearly incomplete.[70] Furthermore, tribal constitutions were sometimes blatantly ignored by tribal officials.[71] Thus, the members of the Subcommittee decided that the constitutional immunity doctrine would have to be overruled by legislative mandate.[72]

Senate Bill 961, the original bill designed to ensure civil rights for reservation dwellers, was recommended by the Subcommittee in February, 1965.[73] It would have imposed upon the tribes all constitutional provisions limiting the federal government.[74] This proposed legislation was considered to be overly broad and drew vigorous opposition during subsequent hearings.[75] Although the Subcommittee had chosen what it believed to be the most expeditious alternative, its members did not recognize the inadequacies of Senate Bill 961. Many constitutional concepts regarding individual rights were highly inappropriate to Indian cultural communities that differed significantly from Anglo-American society.[76] Furthermore, the imposition of these concepts would have constituted a serious burden on the normally impoverished tribal economy.[77] The application of the full gamut of complex constitutional considerations that had developed over many centuries to the alien social context of an Indian tribe posed a serious threat to tribal autonomy.[78]

After considering the objections to Senate Bill 961 and a substitute bill submitted by the Department of the Interior,[79] the Subcommittee decided to adopt, with minor revisions, the latter proposal.[80] The new legislation selec-

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69. In 1961, there were 247 formally organized tribes, of which only 117 had constitutions providing some protection for individual civil rights. 1961-63 *Subcomm. Hearings*, pt. 1, *supra* note 65, at 121, 166. *See* Burnett, *supra* note 65, at 579.

70. 1961-63 *Subcomm. Hearings*, pt. 4, *supra* note 65, at 823.

71. *See, e.g., Hearing on H.R. 15,419, supra* note 61, at 135.

72. SUMMARY REPORT, *supra* note 62, at 24-26.

73. *Hearings on the Constitutional Rights of the American Indian, S. 961-68 and S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 5 (1965) [hereinafter cited as *Hearings on S. 961-68*].

74. It might have been unclear whether the bill would have made the equal protection requirement of the fourteenth amendment, which restricts state governments, applicable to the tribes. The fifth amendment has no equal protection clause, but it has been held to impose equal protection limitations. Bolling v. Sharpe, 347 U.S. 497 (1954).

75. Many witnesses agreed with the criticism proffered by the Solicitor of the Department of the Interior: "I . . . respectfully suggest that S. 961 is not an appropriate approach to the problem to which we are addressing our labors. It is too general. It includes limitations and restrictions which need not be included." *Hearings on S. 961-68, supra* note 73, at 17.

76. For example, the fifteenth amendment guarantee of equal voting rights would conflict with tribal blood quantum requirements for membership and voting. *Hearings on S. 961-68, supra* note 73, at 17-18. Also, the first amendment non-establishment clause would endanger the continued existence of the Pueblo theocracies. *Id.* at 65, 221.

77. Fifth amendment due process rights and sixth amendment criminal procedure rights are potentially costly to guarantee.

78. Thus, various spokesmen called for the enumeration of specific constitutional protections in an Indian Bill of Rights. *See, e.g., Hearings on S. 961-68, supra* note 73, at 17, 65, 318-19.

79. *See Hearings on S. 961-68, supra* note 73, at 317-19; Burnett, *supra* note 65, at 589-92.

80. *See* Groundhog v. Keeler, 442 F.2d 674, 681 (10th Cir. 1971).

tively incorporated portions of the Constitution, omitting those provisions that conflicted with important tribal interests.[81] The requirement of equal protection, which was not expressly contained in Senate Bill 961, was added in response to the recommended substitute bill.[82] The revised bill was passed unanimously by the Senate in December 1967 as Senate Bill 1843.[83] Thereafter, in March 1968, Senate Bill 1843 was incorporated by the Senate into the House of Representatives civil rights bill as an amendment,[84] even though the House legislation was designed primarily to lower racial barriers in housing for blacks. In April 1968, the House accepted the Indian Civil Rights amendment and the measure was enacted into law as Title II of the Civil Rights Act of 1968.[85]

The purposes of the Indian Civil Rights Act were numerous and potentially conflicting. The Act was intended to enhance the civil liberties of Indians and to protect them from invidious tribal actions by subjecting all tribes to a single constitutional authority.[86] Balanced against this goal was Congress' desire to preserve tribalism and avoid undue interference with Indian society and culture.[87] Nevertheless, in abolishing the long-standing constitutional immunity doctrine, the Indian Civil Rights Act overruled contrary tribal customs, laws, and constitutional provisions and blunted treaty rights of self-determination and sovereignty. Thus, it had an undeniably assimilative effect. At the same time, Congress also desired to strengthen tribal governments and institutions.[88] The Act represented a major shift in emphasis in Indian policy from termination towards federally-induced reformation of tribal administration of justice, although Congress attempted not to interfere with the specifics of tribal organiza-

81. Omitted from the new bill were: the "establishment of religion" clause contained in the first amendment (in view of the theocratic nature of some tribal governments), *see* note 76 *supra*; the second and third amendments; the fifth amendment right to a grand jury indictment (in consideration of the limited criminal jurisdiction of tribal courts); the seventh amendment right to a jury trial in civil cases and the sixth amendment right of a criminal defendant to have counsel appointed at government expense (in light of the informal nature of proceedings in the tribal courts); the thirteenth amendment, *but see* note 5 *supra*; and the fifteenth amendment, *see* note 76 *supra*. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 5-6 (1975).

82. Note that in the Interior Department's substitute bill, the equal protection guarantee was restricted to "members of the tribe," in order that non-Indian reservation dwellers be prevented from claiming membership benefits. Burnett, *supra* note 65, at 591. The Ervin Subcommittee later changed "members of the tribe" to all "persons" in the bill which became the Indian Civil Rights Act. Burnett, *supra* note 65, at 602 n.239.

83. 113 CONG. REC. 35, 471-73 (1967).

84. 114 CONG. REC. 5835-38 (1968).

85. 114 CONG. REC. 9552-53, 9620-21 (1968).

86. During the floor debate on Senate Bill 1843, Senator Ervin stated that the purpose of the bill was "to confer upon the American Indians the fundamental constitutional rights which belong to all Americans." 113 CONG. REC. 35, 472 (1967).

87. *See* Note, *Indian Bill of Rights*, *supra* note 51, at 1356-59; Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975).

88. For example, 25 U.S.C. §§ 1321-1322 (1970) necessitate tribal consent before further state assumptions of civil or criminal jurisdiction over reservation matters may occur. Also, Congress demonstrated its concern with the scope of federal court intervention into tribal affairs by limiting the available remedy, *see* note 217 *infra*.

tion. Yet, Congress necessarily wished to limit the sovereign powers of the tribes[89] by requiring a certain degree of uniformity of tribal action to achieve greater conformity with national standards.

Title II of the Act contained ten sections delineating constitutional rights that were not to be infringed upon by tribal governments.[90] The Senate Judiciary Committee made clear, in its report accompanying Senate Bill 1843,[91] that section 1302(8), which guaranteed equal protection to all reservation dwellers, was not intended to have the same meaning for Indians that the fourteenth amendment has for Americans in general.[92] The notion that the use of racial classifications is more acceptable in the tribal context is evidenced by the fact that the Indian Bill of Rights omits the fifteenth amendment prohibition against abridgment of voting rights on account of race.[93] Congress plainly sought to accommodate a pre-existing tribal practice, the necessary utilization of ethnic distinctions to regulate membership.[94]

The Senate Judiciary Committee failed to clarify the extent to which section 1302(8) and the fourteenth amendment are equivalent. Congress provided no specific standards for determining the scope of application to the tribes of the various constitutional rights. Clarification would arise gradually from judicial interpretation. Such judicial definition was to follow a wide-ranging Indian reaction to the formulation and enactment of the Act.

IV
THE TRIBAL RESPONSE

The tribes, in general, remained apathetic during the hearings which preceded the passage of the Indian Civil Rights Act.[95] Some laudatory support was voiced for passage of the Act, primarily by leaders of smaller tribes.[96] Various spokesmen and organizations, many of them non-Indian, also spoke in favor of the proposed legislation, citing the need to protect the civil liberties of Indians as American citizens.[97] The most widely-held Indian position was that, while

89. *See* Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973); Dodge v. Nakai, 298 F. Supp. 26, 29 (D. Ariz. 1969).

90. *See* note 6 *supra*.

91. S. REP. No. 841, 90th Cong., 1st Sess. (1967).

92. The summary of the report of the Subcommittee on Constitutional Rights, which was endorsed and adopted by the Senate Judiciary Committee, stated that "the Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the Federal and State governments with several notable exceptions, viz., . . . in some respects, the equal protection requirement of the 14th amendment." Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971).

93. *Id.* at 682.

94. Note, *Indian Bill of Rights*, *supra* note 51, at 1362-63.

95. Most of the 247 formally organized tribes did not participate in the hearings. Burnett, *supra* note 65, at 601. *See* Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. PUB. L. 311, 333 (1969).

96. *See, e.g., Hearings on S. 961-68*, *supra* note 73, at 348-50, 356; *Hearings on H.R. 15,419*, *supra* note 61, at 134-35.

97. Supporters of the Act included: the National Congress of American Indians; the Association of the Bar of the City of New York; the Department of the Interior; the Department of Justice; the

the objectives of the Act were commendable, the legislation was "premature" because the tribes were neither psychologically nor financially prepared for it.[98] Surprisingly, there was little active opposition to the Act,[99] even though the Act was premised upon the belief that the tribes had acted unjustly towards individual Indians.

The most vigorous opposition came from the traditional Pueblo communities of New Mexico,[100] which have stable and well-developed cultures.[101] Aside from attempting to gain exemption from Title II after its enactment,[102] Pueblo authorities encouraged Senator Ervin's limited and unsuccessful efforts in 1969 to restrict the applicability of Title II to Indians only.[103] Such revision would have meant that non-Indians on the reservation would not have been entitled to equal protection of tribal laws. This would have pacified Pueblo leaders, who were concerned about their potential loss of control over non-Indians residing on their territory.[104] The adverse reaction of the Pueblo communities was also based on their belief that the application of Anglo-American legal notions necessarily altered conventional methods of tribal administration and unavoidably modified those tribal customs that emphasized the protection of "group rights rather than individual rights."[105] One Pueblo official surmised

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Indian Rights Association; the Association on American Indian Affairs, Inc.; the American Civil Liberties Union; and the National Council of the Churches of Christ. S. REP. No. 721, 90th Cong., 2d Sess. 30 (1967), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1837, 1863 (additional views of Mr. Ervin).

98. Burnett, *supra* note 65, at 589, 601.

99. *See Hearings on H.R. 15,419, supra* note 61, at 136.

100. The Navajo and Hopi tribes were also outspoken in their criticism of the Act. Ziontz, *supra* note 81, at 42. Some Pueblo Indians, however, strongly supported the Act. *See Hearings on H.R. 15,419, supra* note 61, at 134-35.

101. One century ago, the Supreme Court noted that the Pueblos had attained a degree of civilization far superior to that of neighboring nomadic tribes. United States v. Joseph, 94 U.S. 614, 617 (1877).

102. New Mexico Senators Clinton Anderson and Joseph Montoya, neither of whom were members of the Senate Judiciary Committee, introduced a bill, known as Senate Bill 211, which would have exempted the nineteen Pueblos of New Mexico and their courts from the reach of the Indian Bill of Rights. *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 1-6 (1969) [hereinafter cited as *Hearings on S. 211*].

103. Senator Ervin introduced an amendatory bill, Senate Bill 2172, which would have narrowed the scope of the Indian Bill of Rights to encompass only American Indians rather than all persons. 115 CONG. REC. 12,532, 12,555 (1969). The bill died in the Senate.

104. *See* Burnett, *supra* note 65, at 614; Note, *Reapportionment: One Man, One Vote, As Applied to Tribal Government*, 2 AM. INDIAN L. REV. 137, 142 (1974) [hereinafter cited as Note, *Reapportionment*]. Concern about the impact of the equal protection clause contained in the Act led to the introduction in 1969 by Senator Ervin of Senate Bill 2173, which included a clause providing that none of the rights guaranteed under the Act shall be construed to "affect any tribal law or custom of any Indian tribe regulating the selection of the officers, bodies, or tribunals by or through which the powers of self-government of the tribe are executed." 115 CONG. REC. 12,555-56 (1969). The measure was passed by the Senate on July 11, 1969, but subsequently languished and died in the House of Representatives. Note, *Reapportionment, supra* note 104, at 142.

105. Ziontz, *supra* note 81, at 43, discussing comments of Robert Lewis, former Governor of the Zuni Pueblo, *reported in* AMERICAN INDIAN LAWYERS ASSOCIATION, THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER 49 (1974).

that radical changes forced upon Pueblo theocratic political systems, such as the one-person, one-vote principle,[106] would lead to serious "misunderstandings and confusion" among Pueblo people.[107]

Integral to the adverse reaction of Indians to the Indian Civil Rights Act was the indignity of having to submit to the judgment of non-Indians with regard to serious tribal matters.[108] Indians expressed frustration at having no decisive voice in the creation of such a significant reform measure.[109] They claimed that there were no major civil rights problems on the reservations and that Indians were not being deprived of basic liberties.[110] Critics of the Act observed that many tribes had included guarantees of individual rights in their constitutions.[111] Consequently, tribal judges had already been adhering to constitutional concepts. They further argued that many of the injustices associated with the Anglo-American judiciary system, such as prolonged pre-trial detention, were less prevalent on the reservation.[112] Lack of assertion of personal rights by Indians was due in large part to poverty, low educational levels, and anti-Indian bias off the reservation, rather than to tribal abuses. A near-sighted focus by politicians on the issue of constitutional immunity eclipsed these crucial problems.[113] Indians contended that a better alternative would be to allow the tribes to work out their problems within their own cultural framework.[114]

Section 1302(8) may well have been the most controversial provision in the Indian Bill of Rights. The due process[115] and equal protection clauses of that section have been the focus of much federal litigation in the years subsequent to the passage of the Act. Each clause posed its own peculiar problems for tribal governments, but the equal protection guarantee presented a particularly devastating command. Given that the typical reservation is small and holds familial relations and social and religious stature above egalitarian values, there normally exists what under Anglo-American standards might be regarded as

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106. *See* notes 121-23 *infra* and accompanying text.

107. *Hearings on S. 211, supra* note 102, at 7 (statement of Domingo Montoya).

108. Ziontz, *supra* note 81, at 47. *See, e.g., Hearings on H.R. 15,419, supra* note 61, at 57 (statement of Gov. Robert E. Lewis).

In December, 1973, the National Tribal Chairmen's Association adopted a resolution calling for an amendment to the Indian Civil Rights Act which would require tribal consent as a condition for application of the Act. 1 Indian Law Rep. 63-65 (1974).

109. *See, e.g., Hearings on S. 211, supra* note 102, at 46-48 (statement of Frank Olguin).

110. *See, e.g., 1961-63 Subcomm. Hearings*, pt. 2, *supra* note 65, at 424-25, 479; *Hearings on H.R. 15,419, supra* note 61, at 56 (statement of Gov. Robert E. Lewis). The Report of the Commission on the Rights, Liberties and Responsibilities of the American Indian stated that since the tribe must obtain the approval of the Secretary of the Interior in order to enact an important law, the chances of passage of a patently unconstitutional law were slight. BROPHY & ABERLE, *supra* note 52, at 43.

111. *See, e.g., Hearings on S. 211, supra* note 102, at 116 (statement of Raymond Nakai); *Hearings on S. 961-68, supra* note 73, at 325. *But see* text accompanying notes 69-71 *supra*.

112. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1836-37 (1968).

113. *See 1961-63 Subcomm. Hearings*, pt. 1, *supra* note 65, at 194-95 (article by Clarence Wesley).

114. *See, e.g., 1961-63 Subcomm. Hearings*, pt. 3, *supra* note 65, at 609.

115. For a discussion of the due process clause of § 1302(8), *see* Note, *An Interpretation of the Due Process Clause of the Indian Bill of Rights*, 51 N.D. L. REV. 191 (1974).

unwarranted prejudice and unfair dealing. Thus, the equal protection clause of section 1302(8) is an assimilative tool in the hands of a court that ignores the historic and cultural distinction between non-reservation Americans, who are under the authority of state governments, and reservation Indians, who are primarily under the aegis of tribal leaders.

Since 1968, reservation dwellers have attacked the tribes' cultural and political conditions in suits claiming a denial of equal protection.[116] Many tribes allege that these suits are being utilized to harass their governments and to settle accounts with tribal leaders.[117] They contend that members will resort prematurely to federal court proceedings before availing themselves of tribal remedies.[118]

The Pueblo communities have been sued numerous times. Each suit not only drains tribal assets but, more importantly, endangers the tribes' ability to function as unique sovereign entities.[119] For example, the Pueblos fear that the "totally alien"[120] one-person, one-vote requirement established by the Supreme Court in *Reynolds v. Sims*[121] and related cases,[122] if judicially mandated,[123] would impair their way of life by abrogating traditional methods of choosing leaders.[124] Elders would no longer be entitled automatically to positions of "influence and respect as social and religious leaders" of the Pueblo.[125] Furthermore, the notion of competitive political contests is repugnant to historical Pueblo values of group harmony and intimacy.[126] Acquiescence to such alien values may weaken the respect for government necessary to maintain the tribal unit.

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116. *See, e.g.*, Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), *rev'g* 402 F. Supp. 5 (D.N.M. 1975), *cert. granted*, 431 U.S. 913 (1977), *discussed in* text accompanying notes 265-321 *infra*.

117. *See* 6 AM. INDIAN L. NEWSLETTER 29 (1973).

118. *Id.*

119. *See* Ziontz, *supra* note 81, at 43, dicussing comments of Robert Lewis, former Governor of the Zuni Pueblo, *reported in* AMERICAN INDIAN LAWYERS ASSOCIATION, THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER 49 (1974).

120. *Hearings on S. 211*, *supra* note 102, at 7 (statement of Domingo Montoya).

121. 377 U.S. 533 (1964). The Supreme Court held that the seats in all legislative chambers must be apportioned on the basis of substantial equality of population. The decision gave constitutional effect to the one-person, one-vote principle.

122. *See* Baker v. Carr, 369 U.S. 186 (1962), in which the Court decided that cases involving legislative apportionment schemes do not involve political questions beyond the competency of the courts; Wesberry v. Sanders, 376 U.S. 1 (1964), in which the Court struck down a state legislative districting statute for contravening the one-person, one-vote principle.

123. The one-person, one-vote requirement was applied to tribal governments in a series of Eighth Circuit decisions. *See* Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973). *See generally* Comment, *Indian Law: The Application of the One-man, One-vote Standard of* Baker v. Carr *to Tribal Elections*, 58 MINN. L. REV. 668 (1974).

124. Ziontz, *supra* note 81, at 42. Neither the Federal Constitution nor the Indian Civil Rights Act requires that executive officials of the tribe be elected rather than appointed. Also, the Indian Bill of Rights does not mandate that tribes maintain a republican form of government as guaranteed in art. IV, § 4 of the United States Constitution. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971).

125. *Hearings on S. 211*, *supra* note 102, at 7 (statement of Domingo Montoya).

126. *Id.* at 8.

V
EQUAL PROTECTION CONSIDERATIONS

At first glance, the equal protection clause of section 1302(8) poses a particularly serious problem for tribal control over membership requirements and enrollment procedures. Blood distinctions symbolize the historical development of a unique social unit and are the fundamental justification for encouraging the preservation of tribes as semi-sovereign communities.[127] Percentage of Indian ancestry, alone or in combination with a residency requirement, is usually the primary criterion of eligibility for tribal membership.[128] This system conflicts with traditional notions of equal protection. For many years, the Supreme Court has deemed racial classification automatically suspect[129] and subject to the "most rigid scrutiny,"[130] imposing a "heavier burden of justification"[131] on the particular legislation involved.[132] Congress, however, clearly did not intend that distinctions based on blood quantum, which lie at the heart of traditional tribal life, be prohibited *per se*.[133] The existence of tribes as distinct ethnic units with unique cultures would be severely threatened if non-Indians or persons of low blood quantum could not be excluded. Congress sought to preserve tribalism, not to destroy it.

Racial discrimination affecting membership is not the only area of tribal concern to fall under the purview of the equal protection clause. Selection of members based on other factors than blood quantum, such as gender or legitimacy, may also be prohibited by modern constitutional theory, under which improper use of these categories is offensive.[134] Moreover, tribal sovereignty is jeopardized by the use of equal protection scrutiny to bar restrictions on the activities of non-Indians on the reservation.

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127. *See* United States v. Seneca Nation of New York Indians, 274 F. 946 (W.D.N.Y. 1921).

128. Various tribal constitutions, compiled in CHARTERS, CONSTITUTIONS AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA (Fay ed. 1967-71) indicate that descendants of original members of the tribe generally must have at least one-quarter of their tribe's blood in order to become members. According to Felix Cohen, however:

> The general trend of the tribal enactments has been away from the older notion that rights of tribal membership run with Indian blood. . . . Instead, it has recognized that membership in a tribe is often a political relation rather than a racial attribute. . . . The trend is towards making participation in tribal property correlative with the obligations that fall upon the members of the Indian community.

Cohen, *supra* note 5, at 164.

129. Loving v. Virginia, 388 U.S. 1, 11 (1967); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

130. Korematsu v. United States, 323 U.S. 214, 216 (1944).

131. McLaughlin v. Florida, 379 U.S. 184, 194 (1964). *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

132. The Court has held, however, that federal legislation favoring tribal Indians does not necessarily involve impermissible racial discrimination. "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes." Morton v. Mancari, 417 U.S. 535, 553 & n.24 (1974). It appears established that federal statutes which regulate the affairs of reservation Indians need satisfy only a non-racial, rational relationship standard. *See* United States v. Antelope, 430 U.S. 641, 646-47 (1977).

133. *See* text accompanying notes 91-94 *supra*.

134. *See* note 156 *infra*.

The absence of interpretive aids in the Indian Civil Rights Act makes it important for the courts to ascertain the equal protection standards to be used in determining the validity of tribal classifications and legislative purposes. Traditional equal protection doctrine must be considered in order to discover minimal constitutional requirements and to fully appreciate the attempts of the federal courts to develop a reservation version of equal protection which may be applied to membership disputes.[135]

The dissent of Justice Harlan in *Plessy v. Ferguson*[136] was the precursor of the modern view of the fourteenth amendment as an absolute prohibition against the use by state governments of race as a criterion for differentiating among citizens on the basis of race.[137] This notion of a "color-blind" Constitution, under which race is always irrelevant, has never been completely condoned by a majority of the Court.[138] Race, however, has been deemed a "suspect classification,"[139] the use of which triggers application of the strict scrutiny test.[140] This test occupies the upper level of the Warren Court's two-tier system for examining the validity of discriminatory laws.[141] A racial clas-

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135. *But see* Comment, *Equal Protection Under the Civil Rights Act*: Martinez v. Santa Clara Pueblo, 90 HARV. L. REV. 627, 630-32 (1977) [hereinafter cited as Comment, *Equal Protection*] wherein it is suggested that it was not Congress' intention that "Anglo-American notions of equality [be used] to evaluate Indian cultural traditions."

136. 163 U.S. 537 (1896).

137. Justice Harlan wrote, "I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. . . . Our Constitution is color-blind . . . . " *Id.* at 554-55, 559.

138. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088-90 (1969) [hereinafter cited as *Developments*].

139. *See* note 129 *supra* and accompanying text. A suspect class has been described as one "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." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) *quoting* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Classifications other than race which have been deemed suspect include national origin, *see, e.g.*, Oyama v. California, 332 U.S. 633, 646 (1948), and alienage, *see, e.g.*, Examining Bd. v. Flores de Otero, 426 U.S. 572, 602 (1976), *but see* Mathews v. Diaz, 426 U.S. 67, 80 (1976).

It has been suggested that legislative classifications based on race or lineage are prohibited because those characteristics "are congenital and unalterable traits over which an individual has no control and for which he should receive neither blame nor reward." *Developments*, *supra* note 138, at 1126-27.

140. An alternative method of invoking strict scrutiny is to show infringement upon the enjoyment of a fundamental interest. Settled examples of fundamental interests include the franchise, *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), and interstate travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

141 The highly deferential rational relation test, which before the Warren Court was the only equal protection standard utilized, occupies the lower level of the two-tier system. "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam). The traditional rational basis test is a judicial rubber-stamp which "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." McGowan v. Maryland, 366 U.S. 420, 425 (1961). The rational basis test is typically invoked when a "legislative classification entails only

sification will stand under the strict scrutiny test only if it can be shown to promote a "compelling government interest,"[142] and to represent the least discriminatory alternative available.[143]

Where the rights of a relatively powerless minority group[144] are being protected rather than imperiled by racial differentiation, as in the tribal context, strict scrutiny analysis is not appropriate.[145] Tribal ancestry requirements, which function to preserve a disadvantaged group, should be treated with deference. Indians, although they may be a substantial majority on the reservation, discriminate against ethnic outsiders in order to maintain an autonomous existence.

The Burger Court has ostensibly maintained the two-tier system of equal protection analysis,[146] although new approaches have been articulated as a result of dissatisfaction with the Warren Court's scheme.[147] The Burger Court appears to have developed an intermediate scrutiny test. This test has been described as "an invigorated rational relation test applied only when the statute at issue affects interests that, while not 'fundamental,' are still socially or constitutionally important or when it creates a scheme similar to an inherently suspect classification."[148] In *Reed v. Reed*,[149] which signalled the beginning of the end for the two-tier system, Chief Justice Burger stated that the means (classification) "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the

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economic or financial repercussions. . . ." Samuel v. Univ. of Pittsburgh, 375 F. Supp. 1119, 1132 (W.D. Pa. 1974). It now appears "unlikely that any 'economic' statute will be invalidated under the rational relation test." Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 102 n.298 (1977).

142. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

143. *See, e.g.*, American Party v. White, 415 U.S. 67, 780-81 (1974); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 267-69 (1974).

144. "The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom." President Nixon's Message to Congress on Indian Affairs (July 8, 1970), *reproduced in* RED POWER: THE AMERICAN INDIAN'S FIGHT FOR FREEDOM 225 (A. Josephy, Jr. ed. 1971).

145. *Cf.* Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966) (the court used the rationality standard to uphold a federal statute which prescribed different inheritance rights for persons with different percentages of Indian blood). For criticism of the argument that when the rights of minority group members are threatened, strict scrutiny should be more readily invoked, see *Developments*, *supra* note 138, at 1125-27.

146. "[T]he Court outwardly adheres to the two-tier model, [although] it has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-19 (1976) (Marshall, J., dissenting).

147. For recent expressions of dissatisfaction with the two-tier approach, *see, e.g.*, Beal v. Doe, 432 U.S. 438, 457-58 (1977) (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring), 212 (Stevens, J., concurring).

148. Note, *Durational Residence Requirements From* Shapiro *Through* Sosna: *The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622, 628 (1975). *See also* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

149. 404 U.S. 71 (1971).

legislation . . . ."[150]

Reed and its progeny suggest the inapplicability of the strict scrutiny standard in cases involving gender and legitimacy distinctions.[151] Assuming, however, the efficacy of the application of strict scrutiny to tribal enrollment standards based on blood quantum, it appears from established equal protection doctrine that there are four essential elements of a valid racially discriminatory ordinance. First, the racial classification involved must be reasonable,[152] and must rest upon differences material to the legislative purpose, so as not to apply inequitably to persons within a class.[153] Second, the classification must be necessary to accomplish a permissible legislative purpose.[154] Since tribes are distinct ethnic units, the difference between Indians and non-Indians is clearly a logical, vital one for membership purposes. The significance of lineal variations among Indians with varying degrees of tribal blood quantum is also best left to tribal resolution. The fraction of tribal ancestry acceptable to the tribe must unavoidably be somewhat arbitrary. Thus, tribal officials are best qualified to determine the minimum level below which a serious danger to tribal integrity is involved.

Greater difficulty in substantiating a classification occurs when distinctions are based upon gender, legitimacy, or residence combined with blood quantum. Gender and legitimacy, although only "quasi-suspect"[155] classifications, have invoked careful scrutiny by the Supreme Court in the past.[156] Residency re-

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150. *Id.* at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *Reed* is a prime example of the application of a rigorous rational basis standard which falls short of strict scrutiny. With *Reed* and subsequent decisions such as Police Dep't v. Mosley, 408 U.S. 92 (1972) and Eisenstadt v. Baird, 405 U.S. 438 (1972), "emphasis shifted from the mere rationality of the relationship between the challenged classification and a governmental objective to the sufficiency of that objective." *Sex Discrimination*, 1976 ANN. SURVEY AM. L. 81, 87. *Reed* and related opinions present a middle-tier approach under which the Court carefully examines only the actual reason for the classification.

151. *See* note 156 *infra*. For the position that strict scrutiny should not be utilized for all statutes containing a racial classification, see the dissenting opinion in Bakke v. Regents of the Univ. of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977).

152. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

153. *Id.* at 190; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

154. Loving v. Virginia, 388 U.S. 1, 11 (1967).

155. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting).

156. The primary focus of the Burger Court's middle ground equal protection position has been on laws utilizing gender-based or legitimacy-based classifications. In Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion), four justices—Brennan, Douglas, Marshall and White—suggested that gender should be regarded as a suspect classification. *Id.* at 688. This view has never gained the acceptance of a majority of the Court; rather, the Court seems to have sidestepped the matter when possible, *see, e.g.*, Stanton v. Stanton, 421 U.S. 7, 13 (1975). Furthermore, those who joined the plurality opinion in *Frontiero* apparently have "retreat[ed] . . . from their view that sex is a 'suspect' classification for purposes of equal protection analysis." Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). For analysis of Supreme Court decisions on gender-based classification up until 1975, see Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. REV. 235 (1975); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV. 617 (1974).

quirements may infringe upon the fundamental right of interstate travel.[157] The necessity of utilizing these factors in promoting tribal well-being is less manifest than the need to use racial criteria.[158]

Third, the legislative purpose must be a "legitimate, overriding" one.[159] In light of the historic acceptance by Congress and the courts of the right of tribes to determine membership through racial differentiation,[160] preservation of cultural and ethnic autonomy appears to be a valid and sufficiently substantial purpose. It certainly is not one which the fourteenth amendment was designed to eliminate, since racial supremacy is not a motive behind rigid tribal membership requirements.

Finally, the membership ordinance must be fairly applied to all persons similarly situated.[161] Inequitable administration of a *per se* valid law conflicts with the equal protection guarantee.[162] This requirement has vast implications for the tribes, for it may oblige them to enroll all Indians of sufficient tribal blood quantum, regardless of the extent of such persons' connections with the tribe.

VI
THE CASES POST-1968

A. Dodge v. Nakai:[163]
A Harbinger of Interventionism

The initial judicial interpretation of the Indian Bill of Rights occurred in *Dodge v. Nakai*, a case concerning a tribe's control over the activities of a non-member residing and working on the reservation. The suit resulted from a

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Recently, in Craig v. Boren, 429 U.S. at 190, "the majority articulated a special—though less than 'strict'—standard of review" for gender classifications. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 114 (9th ed. 1977 Supp.). Justice Brennan's opinion stated that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197.

The Court's position on the appropriateness of utilizing legitimacy classifications has fluctuated during the past decade and is somewhat contradictory and unclear. Although the Court has rejected the assertion that legitimacy classifications are suspect, Mathews v. Lucas, 427 U.S. 495, 504 (1976), it has maintained that the relevant standard of scrutiny is not a "toothless" one, Trimble v. Gordon, 430 U.S. 762, 767 (1977), *quoting* 427 U.S. at 510. For an analysis of recent cases on legitimacy classifications, see *Family Law*, 1977 ANN. SURVEY AM. L. 239; Alito, *Equal Protection and Classifications Based on Family Membership*, 80 DICK. L. REV. 410 (1975-76).

157. *See* note 245 *infra*.

158. The Department of the Interior, in an administrative opinion, observed that a membership classification based solely upon legitimacy (and, by analogy, gender) is "not based upon an essential requirement of an Indian tribe, serves no rational purpose and abrogates other fundamental rights." 76 Interior Dec. 353, 356 (1969).

159. Loving v. Virginia, 388 U.S. 1, 11 (1967).

160. *See* text accompanying notes 40-41, 92-94 *supra*.

161. *See, e.g.*, Daly v. United States, 483 F.2d 700, 706 (8th Cir. 1973); Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327, 1334-35 (D.S.D. 1975).

162. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967); McLaughlin v. Florida, 379 U.S. 184, 191 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

163. 298 F. Supp. 26 (D. Ariz. 1969).

challenge to the expulsion from the Navajo Reservation of the Director of Dinebeiina Nahiilna Be Agaditahe, Inc. (DNA), a nonprofit legal services program organized under Arizona law to provide legal aid for indigent Navajo Indians. The Director, a non-Indian named Theodore Mitchell who was the person primarily responsible for the creation of DNA,[164] and Navajo tribal leaders had a history of hostile relations stemming in part from Mitchell's insistence that DNA be totally independent of Navajo government.[165] Tribal councilmen believed that non-Indian lawyers working under government auspices, who had developed strong ties with young Navajo tribal members,[166] were a threat to their authority.[167] The Navajo leaders attempted to have Mitchell discharged from his position by the Board of Directors of DNA,[168] but were unsuccessful.

The ill will between Mitchell and members of the Navajo Tribal Council culminated at a meeting between the Advisory Committee of the Navajo Tribal Council and representatives of the Department of the Interior, who had come to the reservation to explain the recently enacted Indian Civil Rights Act, in August, 1968.[169] During this meeting, Mitchell erupted into boisterous laughter when a female member of the Committee inquired whether the Act would prevent the tribe from evicting a person from the reservation, and then denied that she had a particular individual in mind.[170] The following day, during another public conference, this woman, apparently greatly humiliated by Mitchell's behavior, hit him several times. Mitchell was excluded from the Navajo Reservation two days later, after a hearing during which he was given an opportunity to show cause why he should not be expelled.[171]

Suit was subsequently brought by Mitchell, DNA, and members of the Navajo Tribe challenging the expulsion order under the due process clause of section 1302(8). The defendants were three leading figures in Navajo government. In December, 1968, the District Court of Arizona denied defendants' motion to dismiss.[172] Jurisdiction was assumed upon a determination that the Indian Bill of Rights was intended to protect non-Indians residing on the reservation as well as resident Indians.[173]

Substantial conflicting interests were involved. On one side, Mitchell contended that his exclusion was not based on a specific ground enumerated in the tribal code.[174] Thus, the fear was raised that other non-Indians would be sub-

164. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 L. AND THE SOC. ORD. 161, 175-76.

165. *See* note 175 *infra*. For background information on the power struggle that was waged between DNA and tribal leaders, see Price, *supra* note 164, at 176-79.

166. Price, *supra* note 164, at 179 n.36.

167. 298 F. Supp. at 29-31.

168. *Id.* at 29-30.

169. *Id.* at 30.

170. *Id.* at 30-31.

171. *Id.* at 31.

172. 298 F. Supp. 17 (D. Ariz. 1968).

173. *Id.* at 24-25. The defendants had asserted that "it was the intent of Congress in enacting Title II to protect only the rights of Indians in their relationships with tribal governments" and that Mitchell, therefore had no standing to invoke the Indian Bill of Rights. *Id.* at 24.

174. 298 F. Supp. at 32.

ject to arbitrary tribal actions. The status of non-Indian residents of the Navajo Reservation, the largest reservation in the United States, would be jeopardized unless they could be assured that their homes and jobs would be secure if they fell into disfavor with the ruling segment of the tribe. Another consideration raised by the plaintiffs was the need for DNA to be a truly independent agency if it was to be able to effectively assist Navajos in combating injustice arising from tribal as well as outside sources.[175]

On the other hand, the plaintiffs' position threatened the tribe's ability to exercise control over non-Indians on the reservation, a power essential to the tribe's continued existence as an autonomous social unit. The ability to exclude outsiders from the confines of the reservation has historically been every tribe's primary self-defense mechanism.[176] Moreover, the Navajo Tribe had been granted, by century-old treaty,[177] the right to exclude all non-Navajos except those authorized to be on the reservation by federal law or executive order.[178] Limiting the traditional tribal power by applying the Indian Bill of Rights in support of a non-Indian who had affronted tribal officials would be a substantial intrusion upon tribal sovereignty.[179]

The trial court held that Title II modified the tribe's sovereign powers and proceeded to enjoin enforcement of the expulsion order.[180] The critical factor causing the court to favor the plaintiffs' position appeared to be the court's view that the tribe's action was an irresponsible overreaction to insignificant conduct. Although the validity of the tribal interest in maintaining its integrity was not questioned, the means used to promote the tribal goal were seen as unreasonable.[181] Furthermore, the court deemed the tribe's use of its "drastic power of exclusion"[182] to have been a bill of attainder,[183] a violation of due

175. Tribal officials and DNA attorneys differed over the issue whether the legal services program "should include the representation of indigent Navajo Indians before agencies of the tribal government itself." *Id.*

176. The right of a tribe to expel persons who violate prescribed rules of conduct on the reservation is clear. *See* United States v. Joseph, 94 U.S. 614, 619 (1876); New York *ex rel.* Cutler v. Dibble, 62 U.S. (21 How.) 366 (1858); Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). *See generally* Note, *Land Use: Exclusion of Non-Indians from Tribal Lands—An Established Right*, 4 AM. INDIAN L. REV. 135 (1976).

177. Treaty of June 1, 1868, 15 Stat. 667.

178. At the time of the suit, DNA was financed by the federal Office of Economic Opportunity. However, Mitchell was not deemed to be an officer or employee of the United States. 298 F. Supp. at 20.

179. Implicit in the Treaty of 1868 "was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." Williams v. Lee, 358 U.S. 217, 221-22 (1959).

180. 298 F. Supp. at 26.

181. *Id.* at 31-32.

182. *Id.* at 32.

183. The district court found that the Advisory Committee, which is vested with judicial powers with respect to enforcement of the power of exclusion, acted in a legislative capacity, and, thus, outside its proper role in issuing the order barring Mitchell from the reservation. The expulsion order was, therefore, deemed a bill of attainder, in violation of 25 U.S.C. § 1302(9). *Id.* at 33-34.

process,[184] and an abridgment of free speech.[185]

The *Dodge* opinion was short-sighted, because the district court failed to fully examine the situation in its proper context. The better approach would have been to measure Mitchell's aggressive and spiteful conduct by Navajo standards. If this had been done, the trial judge might not have classified the expulsion order as "wholly unreasonable."[186] As one commentator noted: "Given the sensitivity of Indians to the idea that when they are on their reservation, they are on their land, . . . the conduct of Mr. Mitchell constituted a deep and unforgiveable [*sic*] offense."[187]

In this significant case of first impression, it was unfortunate that an unenlightened federal court failed to act with greater respect for the important tribal concerns affected. Although equal protection was not an issue in *Dodge*, the vigor with which the court applied other provisions of the Indian Bill of Rights afforded a dangerous precedent, for it suggested that the scope of the equal protection clause of section 1302(8) might be liberally interpreted in the future to extend the rights of tribal members to non-Indians. The court's undiscerning approach was taken by the Southwest tribes as a forerunner of further undesirable judicial interferences[188] which, however, did not occur.

B. Slattery v. Arapahoe Tribal Council:[189] *The Issues Avoided*

Slattery was the first decision rendered subsequent to the enactment of the Indian Civil Rights Act which involved a tribal blood quantum ordinance. Sarah Slattery, a member of the Arapahoe Tribe, commenced suit on behalf of herself and her two minor sons, alleging that the Tribal Council had unfairly and arbi-

184. The court found the remedy of banishment to be "wholly unreasonable." One reason for the finding was that the Navajo Tribal Code contained no express ground for exclusion which covered the Mitchell situation. Also, the court believed the expulsion to be based solely on the Advisory Committee members' "personal dislike for the conduct of Mitchell." *Id.* at 32.

185. In view of the fact that Mitchell's laughter was not alleged to have been disruptive of the decorum of the Advisory Committee meeting, the court held that Mitchell had been denied his "right to express views as to the wisdom and propriety of the policies and programs adopted by tribal governmental agencies." *Id.*

Note that "[a]lthough free speech is an unquestioned right under the U.S. Constitution, it has not been so in Indian culture. Historically, tribes have been homogeneous communities which have traditionally suppressed open internal conflict or partisanship, thus full protection for free speech could undermine cultural value." TASK FORCE, *supra* note 44, at 138.

186. 298 F. Supp. at 32.

187. Ziontz, *supra* note 81, at 51.

188. Several Indian spokesmen, while testifying before the Ervin Subcommittee in 1969 during the hearings on the question whether to exempt the New Mexico Pueblos from the reach of Title II, *see* note 102 *supra*, specifically protested the *Dodge* decision. Raymond Nakai, Chairman of the Navajo Tribe and one of the defendants in *Dodge*, stated that "the language of the legislation has been perverted by the Court [*sic*] to give a result not intended . . . and the decision rendered has opened a Pandora's box that could lead directly to the termination of the reservation life of the American Indian, and the eventual loss of his identity and his autonomy." *Hearings on S. 211*, *supra* note 102, at 115.

189. 453 F.2d 278 (10th Cir. 1971). Two factually similar cases were decided together. Each involved claims by a mother and her children against the tribal council of the tribe of which the mother was an enrolled member.

trarily refused to enroll her two sons as tribal members, in violation of section 1302(8). She sought a writ of mandamus, directing the Tribal Council to admit her sons into membership. The Tenth Circuit affirmed the Wyoming District Court's grant of defendant Tribal Council's motion to dismiss for lack of jurisdiction.

The enrollment ordinance of the Arapahoe Tribe, which had been approved by the Secretary of the Interior,[190] required that a potential member possess at least one-quarter degree Indian blood. Ms. Slattery's sons were each of one-eighth Indian blood. Plaintiffs did not challenge the validity of the ordinance *per se*. Rather, they claimed that it had been arbitrarily applied, thus violating the statutory guarantee of equal protection. The lower court found that it did not have jurisdiction to hear a controversy pertaining to a denial of section 1302(8) rights, because Title II does not expressly confer such jurisdiction.[191] The appellate court, however, recognized that federal courts could hear intra-tribal disputes involving claims of Indian Bill of Rights violations.[192] The Tenth Circuit suggested that its earlier decision in *Martinez v. Southern Ute Tribe*,[193] which held that tribal membership standards were solely an internal matter in the absence of express congressional legislation to the contrary, was no longer good law.[194]

The court avoided discussion of the merits of the case, however, by concluding that the plaintiffs had failed to adequately demonstrate a denial of either equal protection or due process. The lower court's order was affirmed because the plaintiffs' "singularly inconclusive" affidavits failed to disclose sufficient facts to demonstrate an arbitrary application of the ordinance.[195] The court reasoned that, since the plaintiffs had not attacked the blood quantum requirement itself as being unconstitutional, section 1302(8) was not brought into play.[196] Thus, no subject-matter jurisdiction was conferred. The court displayed a desire to defer to tribal membership guidelines, in the absence of clear evidence of discrimination.

Given the desirability of granting great respect to tribal judgments concerning membership, the point at which judicial interference is justified by equal protection considerations would seem to be reached only when persons with strong cultural, familial, and/or economic ties with the tribe are excluded.[197] In such instances, it becomes doubtful whether the racial discrimination being employed is necessary to serve substantial tribal interests. A general blood quan-

190. On this basis, Secretary of the Interior Walter J. Hickel was named as a co-defendant in the case. *Id.* at 279.

191. Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157, 1160 (D. Wyo. 1970). *See* note 220 *infra*.

192. 453 F.2d at 281.

193. 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958). *See* notes 42-44 *supra* and accompanying text.

194. 453 F.2d at 281.

195. *Id.* at 281-82.

196. *Id.*

197. *See* Note, *Indian Bill of Rights*, *supra* note 51, at 1362. *See also* text accompanying note 338 *infra*.

tum standard for membership that lumps together persons who play significantly different roles in the community defies the requirement of reasonable classification, despite legitimate ethnic considerations. In *Slattery*, assuming proper subject matter jurisdiction, key factors which should have been considered were whether the two sons were living on the reservation, attending school with reservation children, and participating in social and religious activities.[198] If Sarah Slattery, who was only one-quarter Indian and who had married a non-Indian, and her sons intended to move from the reservation and sought membership only in order to receive a proportionate share of tribal income and other membership benefits without assuming the corresponding responsibilities and burdens, then denial of membership based on lack of requisite blood quantum would have been quite acceptable. Failure to meet the blood quantum requirement, however, would have been by itself an incomplete justification for exclusion. Conversely, if the Slattery boys were vitally involved in Arapahoe society, their degree of Indian blood would have been a less justifiable excuse for denial of enrollment. Thus, traditional equal protection doctrine should be understood to dictate that the blood quantum requirement be complemented by an additional or alternative requirement of evidence of a somewhat objectively demonstrable, minimal level of involvement in tribal affairs.

C. Daly v. United States:[199] *Tribal Sovereignty Affirmed*

It was not until 1973 that a court of appeals reached the merits of a case involving the blood quantum issue. In *Daly v. United States*, the plaintiffs, three Crow Creek Sioux tribal members, alleged that the apportionment of the Crow Creek Sioux Tribal Council violated the Supreme Court's one-person, one-vote doctrine,[200] and was, therefore, a denial of equal protection under section 1302(8).[201] The South Dakota District Court assumed jurisdiction and upheld the plaintiffs' claim, granting the Tribal Council six months in which to draft a reasonable apportionment plan which guaranteed equal representation.[202] The Tribal Council submitted a revised apportionment plan which the district court again invalidated.[203] The court implemented its own plan, under which the blood quantum requirement for membership on the Tribal Council was eliminated. That requirement had been included in the tribe's constitution in order to ensure that at least one of the two councilmen from each district were not only of satisfactory Indian ancestry to qualify for enrollment, but were also of one-half or more Indian blood.

The Eighth Circuit, on appeal, held on the authority of an earlier deci-

198. Note, *Blacks and America's Tribal Indians*, *supra* note 31, at 520-21.

199. 483 F.2d 700 (8th Cir. 1973).

200. *See* notes 121-22 *supra* and accompanying text.

201. The plaintiffs based their claim on the fact that each of the tribe's three electoral districts varied significantly in size of population, with the largest district being over seven times as populous as the smallest one. 483 F.2d at 702-03.

202. *Id.* at 703-04.

203. *Id.* at 704.

sion[204] that sections 1302(8)[205] and 28 U.S.C. § 1343(4)[206] gave it jurisdiction.[207] The court, on the merits, found that section 1302(8) mandates that the one-person, one-vote principle be effected where a tribe has "adopted election procedures analogous to those found in Anglo-American culture."[208] The court disapproved of the election plan ordered by the lower court, on the ground that it violated the guidelines for equitable electoral apportionment laid down by the Supreme Court.[209] Reapportionment was ordered based on total tribal population rather than on the number of eligible voters.[210]

Reaching the ancestry issue, the Eighth Circuit concluded that the tribe "has a sufficient cultural interest in setting a higher blood quantum requirement to hold office."[211] The court further stated that, in general, tribal election practices should not be interfered with by federal court judges if they are uniformly administered.[212] In reaching its decision, however, the court failed to adequately consider the interests involved in the issue of blood quantum requirements for office-holding. The tribe imposed the higher ancestry requirement to prevent the neglect of traditional values and customs. A judicial determination that section 1302(8) yields in cases in which a tribe has a genuine interest in deterring acculturation would have been both significant and desirable. The Eighth Circuit's short, unenlightening treatment of this vital issue is regrettable, especially since this court was the first to render a decision under section 1302(8) in a manner different than would have been possible if only the fourteenth amendment had been involved.

Undoubtedly, the Eighth Circuit's decision on the blood quantum issue represents a triumph for those concerned about tribal sovereignty. The tribe's desire to ensure the election of councilmen familiar with local customs and traditions and capable of commanding the respect of tribal members was implicitly recognized as a valid legislative objective. Moreover, the decision indicated that ancestry classifications were beyond the purview of section 1302(8).

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204. White Eagle v. One Feather, 478 F.2d 1311 (1973).

205. *See* note 220 *infra*.

206. *See* notes 221, 223 *infra*.

207. 483 F.2d at 704-05.

208. *Id.* at 704. There is nothing in the Indian Civil Rights Act or in its legislative history which reflects a congressional intent to require that a tribe select its leaders by elections. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971).

209. 483 F.2d at 706. The Eighth Circuit found that the lower court's plan "allowed for too much variation between the number of eligible voters per councilmen in the districts," so as to be violative of the Supreme Court's directive in Mahan v. Howell, 410 U.S. 315 (1973), even though in that case the Court held that a federal court may allow variation from the equal population principle when the legislature has taken into consideration certain factors of local incidence, *id.* at 321-25.

210. 483 F.2d at 706. Reapportionment on the basis of either population or qualified voters is permitted, in light of the Supreme Court decision in Burns v. Richardson, 384 U.S. 73 (1966), where the tribal constitution specifies the basis for apportionment. Brown v. United States, 486 F.2d 658, 662 (8th Cir. 1973). "[I]n *Daly*, the constitution was silent on the basis for apportionment, and the court applied population as the preferable standard." TASK FORCE, *supra* note 44, at 141.

211. 483 F.2d at 705.

212. *Id.* at 706.

Nevertheless, the court failed to explain satisfactorily why the tribe's needs were "sufficient" enough to override traditional equal protection considerations, relying only on an analogy to the constitutional requirement that the nation's President be a natural-born United States citizen.[213] It simply declared that "in our view, this is one of those 'respects [in which] the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights.' "[214] Thus, the Eighth Circuit, by finding the matter of racial discrimination in tribal apportionment plans to be an area which Congress intended not to be disturbed by equal protection concerns, avoided the need for specifically defining the scope of section 1302(8) and failed to enunciate a viable standard for interpretation.

D. Laramie v. Nicholson:[215] *Jurisdictional Barriers Broken*

Laramie v. Nicholson, a Ninth Circuit decision handed down shortly after *Daly*, is important largely because it, along with previous Eighth Circuit decisions,[216] firmly established the jurisdictional basis for equal protection claims against the tribes.[217] Although their mother was a tribal member, the plaintiffs

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213. *Id.* at 706 n.4.

214. *Id.* at 705, *quoting* Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971), in which the Tenth Circuit expounded on the congressional intent behind the enactment of § 1302(8) and concluded that the equal protection clause of § 1302(8) is not coextensive with the equal protection clause of the fourteenth amendment. The proposition that Congress did not intend to subject the tribes to identical compulsions as those which are exacted under the fourteenth amendment has been widely accepted. *See, e.g.*, Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975); McCurdy v. Steele, 506 F.2d 653, 655 (10th Cir. 1974); Lohnes v. Cloud, 366 F. Supp. 619, 622-23 (D.N.D. 1973).

The Tenth Circuit in *Groundhog* failed to indicate that the quoted language that it had referred to was taken from the summary report of the Ervin Subcommittee. In that summary report, *see* note 62 *supra*, the Subcommittee stated that the Interior Department's proposed bill differed from the fourteenth amendment equal protection clause "in some respects." At the time the summary report was written, the draft legislation made the equal protection guarantee applicable only to "members of the tribe." Later, however, the Senate rejected this limitation on the scope of the equal protection guarantee and substituted "persons" in what now is § 1302(8), *see* note 82 *supra*.

215. 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871 (1974) (Douglas, J., would grant certiorari).

216. Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972).

217. Jurisdictional questions arose because Congress failed to specifically designate a particular court to serve as a forum for actions brought in response to deprivation of rights enumerated in the Indian Bill of Rights. Enforcement of civil rights was provided "only to the extent of habeas corpus actions [25 U.S.C. § 1303 (1970)]; express civil remedies were apparently viewed as incompatible with the self-determination of Indian nations, or at least not crucial to the protection of civil rights." Note, *Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 MICH. L. REV. 210, 211 n.6 (1976) [hereinafter cited as Note, *Civil Remedies*]. However, "[c]ourts quickly rejected the limited role of habeas corpus set forth in the statute for them and established a trend to take jurisdiction of all claims under the act . . . ." TASK FORCE, *supra* note 44, at 133.

If one accepts the premise that the sovereign immunity of the tribes cannot be waived by implication, *see* note 44 *supra* and accompanying text, it is difficult to justify assumption of jurisdiction by the federal judiciary in § 1302 cases. For an argument that the implication of federal civil remedies against tribal governments is improper and unnecessary, see Note, *Civil Remedies*, *supra*.

in *Laramie* were refused membership in the Colville Confederated Tribe because they had previously been enrolled with another tribe. The plaintiffs claimed that other persons who had enjoyed membership in other tribes had been later enrolled in the Colville Confederated Tribe and thus that the membership ordinance had been applied in a discriminatory manner.

The district court dismissed the action for lack of jurisdiction.[218] The court of appeals reversed and remanded, holding, on the basis of an earlier decision,[219] that the lower court did have jurisdiction under sections 1302(8)[220] and 28 U.S.C. § 1343(4).[221] Section 1302(8) provides subject matter jurisdiction in civil actions involving a tribal enrollment dispute and, as suggested in *Dodge*,[222] 28 U.S.C. § 1343(4) furnishes the jurisdictional base for a trial court to provide the necessary relief.[223] The Ninth Circuit observed that the *Southern Ute* immunity principle[224] had been overruled in light of the Indian Civil Rights Act.[225]

Had there been a ruling on the validity of the enrollment ordinance of the Colville Confederated Tribe, it might have proven difficult to justify. The ordinance allowed no leeway for mitigating circumstances such as substantial in-

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218. *See* 487 F.2d at 315.

219. Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 202 (9th Cir. 1973).

220. Various federal district courts had refused to assume jurisdiction on the basis of § 1302(8). *See, e.g.*, Lohnes v. Cloud, 366 F. Supp. 619, 621 (D.N.D. 1973); Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157, 1160 (D. Wyo. 1970), *aff'd sub nom.* Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

221. 487 F.2d at 316. 28 U.S.C. § 1343 (1970) provides, in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Note that § 1343 does not expressly sanction a cause of action to protect civil rights, leading one commentator to the conclusion that the use of § 1343(4) as a jurisdictional predicate involves a "bootstrap" approach. Note, *Civil Remedies, supra* note 217, at 214 n.25.

222. 298 F. Supp. at 25.

223. The use of § 1343(4) as a jurisdictional source in Indian Bill of Rights causes of action has been widely accepted. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 236 (9th Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933-34 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974); White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973) (per curiam).

Section 1343(4) provides jurisdiction only when an Indian claims against the tribe and the officers of the tribe in their capacity as officers, but not when the claim is against officers as private individuals. Dry Creek Lodge, Inc. v. United States, 515 F.2d at 934-35; Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 89 (D. Mont. 1969). For an argument that 42 U.S.C. § 1983 is a more desirable jurisdictional basis for litigants than § 1343(4), see Note, *Remedies: Tribal Deprivation of Civil Rights: Should Indians Have a Cause of Action Under 42 U.S.C. § 1983?*, 3 AM. INDIAN L. REV. 183 (1975). 28 U.S.C. § 1331(a), which "confers original jurisdiction on the district courts for actions arising under the Constitution, laws or treaties of the United States where the matter in controversy exceeds in value the sum of $10,000" has also been used as a jurisdictional basis. *See* Loncassion v. Leekity, 334 F. Supp. 370, 372 (D.N.M. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 90 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 17, 21 (D. Ariz. 1968).

224. *See* text accompanying notes 42-45 *supra*.

225. 487 F.2d at 316.

volvement in tribal life or a willingness to abandon all ties with the other tribe. Unfortunately, as was the case in *Slattery*, the plaintiffs alleged only unequal application and did not challenge the tribal enrollment practice itself.[226]

E. Yellow Bird v. Oglala Sioux Tribe:[227] *Further Analytical Inadequacy*

In *Yellow Bird v. Oglala Sioux Tribe*, a tribal membership provision was squarely attacked, for the first time, as violative *per se* of the equal protection clause of section 1302(8). Plaintiffs requested the court to declare invalid and to enjoin the enforcement of a section of the Oglala Sioux Constitution which delineated membership standards for elective office. The plaintiffs claimed that they had been classified as "non-enrolled" members of the tribe because the challenged provision allowed only children born to a member of the tribe who had been a resident of the reservation at the time of the birth of the child to be considered for enrollment.[228] Each plaintiff had at least one Oglala Sioux parent, but both plaintiffs had been born off the reservation.[229] As a result, the plaintiffs were denied the right to run for office.[230] They argued that the provision was "arbitrary and capricious" with "no reasonable relation to any legitimate purpose of the Oglala Sioux Tribe" and that it contravened both the equal protection and due process guarantees.[231]

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226. The tribal ordinance could have been challenged on first amendment freedom of association grounds. As Justice Harlan stated in his opinion for the Court in NAACP v. Alabama, 357 U.S. 449 (1958):

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .

Id. at 460.

227. 380 F. Supp. 438 (D.S.D. 1974).

228. *Id.* at 439. Article II of the Oglala Sioux Tribal Constitution, pertaining to membership, provided:

> Section I. The membership of the Oglala Sioux Tribe shall consist as follows:
>
> . . . .
>
> b. All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

Id. at 438.

229. Brief for Defendant at 5.

230. Apart from the well-established fundamental right to vote, *see* note 296 *infra*, a number of courts have recognized a fundamental right to be a candidate for public office. *See* Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973) ("candidacy is both a protected First Amendment right and a fundamental interest"); Thompson v. Mellon, 9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973); Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971); Cowan v. City of Aspen, 181 Colo. 343, 348, 509 P.2d 1269, 1272 (1973). *But see* Bullock v. Carter, 405 U.S. 134, 142-44 (1972), in which the Supreme Court declined to attach fundamental status to candidacy.

231. 380 F. Supp. at 439. The court noted that the plaintiffs apparently had not directly applied to the Oglala Sioux Tribal Council to be enrolled as full members. *Id.* at 439, 440. The court, however, did not use the plaintiffs' failure to exhaust tribal remedies, *see* note 331 *infra*, as a basis for deciding the case.

The denial of equal protection claim appeared to be a substantial one on its face. Yet, the South Dakota District Court granted the tribe's motion to dismiss for lack of subject matter jurisdiction, thereby refusing to reach the merits of the case. The trial court found that the Eighth Circuit's opinion in *Luxon v. Rosebud Sioux Tribe*[232] limited the availability of a section 1302(8) cause of action to "proper case[s]."[233] Then, the court rejected the propriety of the action before it by holding that the question presented paralleled the blood quantum issue in *Daly*[234] and concluding, by analogy, that the equal protection clause of section 1302(8) did not provide subject matter jurisdiction in such situations absent an allegation of unequal application of tribal laws.[235] The court closed its opinion by distinguishing *Laramie* on the ground that *Laramie* involved the discriminatory application of an ordinance, which the plaintiffs in *Yellow Bird* had not alleged.[236]

The district court's failure to reach the merits is difficult to support. *Luxon* was construed too narrowly, because the Eighth Circuit there had based its determination on the Supreme Court decision in *Bell v. Hood*,[237] in which the Court held that when a plaintiff in a federal court action requests recovery directly under the Constitution or federal law, the court must not dismiss the action on jurisdictional grounds unless either the averments in the complaint are so insubstantial as to be frivolous or the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction.[238] Also, although the decision in *Yellow Bird* may be regarded as an affirmation of tribal sovereignty, the circumstances of that case presented no major threat to the tribe. Both plaintiffs were full-blooded Sioux Indians: three of their four parents were Oglala Sioux and the fourth was Cheyenne River Sioux.[239] The plaintiffs merely sought to represent Oglala Sioux members in the Tribal Council. Their parents' failure to reside on the reservation when plaintiffs were born is by itself not significant.

The problem with the membership provision contained in the Oglala Sioux Constitution stemmed not from the tribal goal, which was an important and valid one, but from the overly restrictive means employed to advance the goal. The purpose of the residence requirement is related to the fact that large numbers of tribal members have resided for some time off the reservation. Reservation Oglalas do not want off-reservation Indians dominating the tribal government.[240] The reservation Oglalas especially fear that if off-reservation tribal members gain control, they might choose to trade the reservation for money.[241]

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232. 455 F.2d 698 (8th Cir. 1972).
233. 380 F. Supp. at 439.
234. 483 F.2d at 705-06; *see* text accompanying notes 211-12 *supra*.
235. 380 F. Supp. at 440.
236. *Id.* at 441.
237. 327 U.S. 678 (1946).
238. *Id.* at 682; *see* Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 8-9 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *cert. granted*, 431 U.S. 913 (1977).
239. Brief for Defendant at 5.
240. Letter from S. Bobo Dean, Professor of Federal Indian Law at New York University School of Law (Nov. 7, 1977).
241. *Id.*

Although the use of a residency requirement is desirable,[242] the one employed was unreasonable. The location of the parents' residences at the time of a non-enrolled member's birth may have no relation to his subsequent contacts with and stake in the tribe. In *Yellow Bird*, plaintiffs' interests in the tribe were likely to have been serious because they were active members of the tribe, although "non-enrolled," and had gathered at least the minimum amount of support necessary to have their names placed on the ballot. In view of the political turmoil on the Oglala Sioux Reservation[243] and the staunch anti-American Indian Movement stance of defendant Richard Wilson, President of the Oglala Sioux, and of other defendant-members of the Tribal Election Board,[244] the residency requirement may have been used as a pretext to disqualify plaintiffs.

Certainly, the district court's automatic application of the *Daly* holding was unwarranted. In *Daly*, the cultural interests which prompted the requirement of a higher degree of blood quantum for councilmen were readily cognizable. In *Yellow Bird*, however, the residency requirement for full membership on its face did not appear to be necessary to any legitimate tribal purpose. Thus, the ordinance was open to attack, for the plaintiffs' cause of action arguably involved infringement of their fundamental right of interstate travel,[245] which would have called for the strictest form of scrutiny.

Moreover, as previously noted, the Eighth Circuit in *Daly* never explained why the tribe's cultural interest was "sufficient" to preclude application of section 1302(8).[246] Thus, the South Dakota District Court adopted a wholly conclusory statement to justify its own judgment that the membership provision was not subject to equal protection limitations. Because of fear of undue intrusion into tribal affairs, the courts in *Daly* and *Yellow Bird* both vaulted from a

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242. "Residency requirements for candidates serve the important purpose of preventing persons disinterested in tribal affairs who live away from the reservation, and who are not involved in or informed of daily tribal events . . . from returning at election time and gaining control of the tribe." Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327, 1337 (D.S.D. 1975), *vacated*, 534 F.2d 101 (8th Cir. 1976).

243. *See* Means v. Wilson, 383 F. Supp. 378 (D.S.D. 1974), *modified*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976), decided shortly after *Yellow Bird*.

244. V. DELORIA, JR., BEHIND THE TRIAL OF BROKEN TREATIES 70-72 (1974).

245. "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966). In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court struck down a one-year residency requirement for welfare applicants, holding that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible," in light of the right to interstate mobility. *Id.* at 629. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (per curiam) (in which the Court stressed the distinction between durational residency requirements and continuing residency requirements); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (in which the Court noted that the critical factor in triggering strict scrutiny was the existence of a "penalty" and that the right to "migrate with intent to settle and abide," not the broader right to travel, had been central to *Shapiro*). *But see* Chimento v. Stark, 353 F. Supp. 1211, 1218 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) (holding that the right to travel is fundamental in its relation to voting, but not in its relation to candidacy).

246. *See* text accompanying notes 211-14 *supra*.

finding that Congress did not intend to fully equate section 1302(8) with the fourteenth amendment to a decision that equal protection review was improper under the circumstances of the case. Neither court examined whether or not the application of equal protection standards would have subverted major tribal interests. Thus, more than six years after the enactment of the Indian Bill of Rights, the scope of equal protection in the reservation context remained uncharted beyond the broad principle that it is not as encompassing as the scope of equal protection provided by the fourteenth amendment.

F. Howlett v. Salish & Kootenai Tribes:[247] *A Jurisdictional Approach Formulated*

In *Howlett v. Salish & Kootenai Tribes*, a case involving membership in a tribal council, a federal court finally attempted to enunciate the "respects" in which Congress intended that "the equal protection requirement of the fourteenth amendment should not be embraced in the Indian Bill of Rights."[248] Plaintiffs, two members of the Salish and Kootenai Tribes of the Flathead Reservation in Montana, sought to run for tribal council office but were declared ineligible by the Tribal Election Committee because they failed to satisfy the one-year residency requirement mandated by the tribal constitution. The plaintiffs alleged that they had been deprived of their rights to travel[249] and to run for office[250] and asked that the residency requirement be declared invalid.[251] The Montana District Court denied the requested relief on the merits,[252] and the Ninth Circuit affirmed.

At the outset, the court of appeals delineated a balancing approach for the application of section 1302(8), which was designed to accommodate the conflicting interests in "both the maintenance of cultural tribal identity and the preservation of fundamental constitutional rights for the individual Indian."[253] Under this approach, the intratribal immunity principle should control and section 1302(8) should not provide a basis for subject matter jurisdiction in cases in which the application of equal protection is likely to substantially modify tribal practices or customs "firmly embedded in Indian culture" and the individual right allegedly infringed upon is "relatively slight."[254] On the other hand, when the tribe's election and voting procedures (and, by analogy, other intratribal processes) are "parallel to those commonly employed in Anglo-American society," there is no danger of undue interference with tribal sovereignty, and jurisdiction may be assumed regardless of the seriousness of

247. 529 F.2d 233 (9th Cir. 1976).

248. *See* note 214 *supra* and accompanying text.

249. *See* note 245 *supra*.

250. *See* note 230 *supra*.

251. 529 F.2d at 235. A similar residency requirement was upheld in Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327 (D.S.D. 1975), *vacated on other grounds*, 534 F.2d 101 (8th Cir. 1976).

252. Unpublished Opinion and Order of January 7, 1975 (C.T. 202), *cited in* 529 F.2d at 235.

253. 529 F.2d at 236. This type of approach was recommended in Comment, *Equal Protection*, *supra* note 135, at 633.

254. 529 F.2d at 238.

the individual right affected.[255] In this latter situation, the court should only be concerned with the issue of unequal application, for if the tribe's law is faithfully patterned after a state law valid under the fourteenth amendment, it will *a fortiori* satisfy the equal protection standard of section 1302(8).

In examining the substantive issues, the court assumed the accuracy of the plaintiffs' claim that their "fundamental" constitutional rights to travel and to run for office were protected under section 1302(8),[256] and proceeded to apply a "compelling tribal interest" test to ascertain whether the objective behind the one-year physical presence requirement justified contravening constitutional rights.[257] The defendants argued persuasively that in order to carry out their duties and responsibilities, they must have a knowledge of and intimacy with the tribes that can arise only from making the reservation one's constant home.[258] Maintenance of tribal cultural integrity can be ensured only through the enduring familiarity of tribal leaders with often complex religious and social customs. The court added that, given the "extremely localized problems of the Tribes,"[259] and the interest which the tribes as political units had in providing for an informed voter choice, it was vital that a high degree of interpersonal communication between voters and candidates be achieved in the months before an election.[260] This last justification is based on a possibly unwarranted assumption that the Salish and Kootenai Indians desire an informed democracy in accordance with Anglo-American ideals. Whatever the intended functions of the residency requirement, the court deemed it constitutionally sufficient. This is a surprising outcome analytically, for the court appeared to be applying a strict scrutiny standard. The Ninth Circuit did note that if the residency requirement were read literally to preclude candidacy for "inconsequential absences," the ordinance might then be struck down for insufficiently promoting the tribes' interests.[261]

The decision rendered by the court of appeals seems to be equitable, given the significant need for councilmen familiar with the tribes and their mores. Nevertheless, the circumstances of the case suggest an inconsistency in the court's jurisdictional scheme. The court understood the case before it to

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255. *Id.*

256. First amendment rights of freedom of speech and freedom of association were possibly infringed upon as well. *See* Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973); Headlee v. Franklin County Bd. of Elections, 368 F. Supp. 999, 1003 (S.D. Ohio 1973) (three-judge court). *But see* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973); Lawrence v. Issaquah, 84 Wash. 2d 146, 524 P.2d 1347 (1947).

257. 529 F.2d at 242-43. The Ninth Circuit followed Dunn v. Blumstein, 405 U.S. 330 (1972), and other federal courts which have applied a compelling interest test in evaluating a durational residence requirement.

258. 529 F.2d at 243.

259. *Id.* at 244. The court explained that "[i]nformation which under other circumstances might be communicated by more formal means [*i.e.*, through widespread availability and use of radio, television, and newspapers] necessarily is communicated informally by personal acquaintance and observation, by word of mouth from neighbor to neighbor." *Id. quoting* Hadnott v. Amos, 320 F. Supp. 107, 121 (M.D. Ala. 1970), *aff'd*, 401 U.S. 968 (1971).

260. 529 F.2d at 244.

261. *Id.*

exemplify the situation in which a tribal practice was so closely associated with established Anglo-American procedures as to render it amenable to full equal protection analysis. This conclusion assumes that no strong cultural interests that would have required a more limited application of section 1302(8) were involved. Yet, the two categories set out by the court may not be mutually exclusive in all situations, as when a compromise between traditional Indian mores and Anglo-American practice has been reached. The Salish and Kootenai membership ordinance may have represented "a solution to a newly arisen problem with the solution drawn from, based upon or directed toward preserving cultural traditions and values . . . ."[262] Consider the situation that would arise if the residency requirement were alleged to have been based upon long-standing tribal tradition which mandated that candidates for leadership positions be physically present on the reservation for a certain time period before selection. Although constitutions and formal elections are twentieth century innovations for the tribes, the origin of the residency requirement may not be clear to a court with little knowledge of tribal custom.[263] The court would then be faced with two arguably appropriate classifications, the choice of which would determine whether subject matter jurisdiction would be asserted and the merits of the case heard.[264]

Denial of jurisdiction in *Howlett* as a result of ambiguous factual distinctions would have been unfortunate because the court could not have upheld the residency requirement and bolstered tribal sovereignty. Although the contrast between tribal and Anglo-American tradition will normally be substantial and apparent, borderline cases will inevitably occur. To deny the plaintiff a day in court because of an arbitrary categorization is unjustifiable. Therefore, the test that the *Howlett* court enunciated should be taken as a broad guideline at best, with a presumption in favor of granting subject matter jurisdiction in borderline situations.

G. Martinez v. Santa Clara Pueblo:[265] *The Scope of Section 1302(8) Defined*

Santa Clara Pueblo v. Martinez, involving a direct clash between Anglo-American and Pueblo values, is the most significant case in the field of Indian civil rights in this century. For the first time, a federal appellate court rejected a tribal practice as incongruous with basic constitutional principles. The case concerned a section 1302(8) challenge to an enrollment ordinance of the Santa

262. Comment, Martinez v. Santa Clara Pueblo: *The Scope of Indian Equal Protection*, 1976 UTAH L. REV. 547, 554 [hereinafter cited as Comment, Martinez]. In this situation, a court is dealing with a "secondary cultural involvement." *Id.*

263. "[M]ost ancient traditions have only come to be put into writing in recent years either as a result of divisions over assimilation or the 1934 Reorganization Act." Comment, *Equal Protection*, *supra* note 135, at 630 n.30.

264. It has been suggested that a court which finds itself confronted with this dilemma should require proof "of the consistency of the classification with the values of the tribe as indicated by its current manner of life." *Id.* at 634.

265. 540 F.2d 1039 (10th Cir. 1976), *rev'g* 402 F. Supp. 5 (D.N.M. 1975), *cert. granted*, 431 U.S. 913 (1977).

Clara Pueblo which discriminated on the basis of gender by denying membership to the children of female members who marry non-members while enrolling children of male members who marry outsiders.[266] The plaintiffs were Julia Martinez, a full-blooded member of the Pueblo and her eldest daughter, Audrey. Julia had resided on the Pueblo continuously since 1941 with her husband, Myles Martinez, a full-blooded Navajo. Myles, the father of Audrey, was not a member of the Pueblo. Julia and Myles raised ten children at the Pueblo, eight of whom were still alive at the time of trial. All their children spoke Tewa, the traditional language of the Pueblo and all participated freely in the Pueblo's religious activities. The trial court acknowledged that all the Martinez family members were "culturally, for all practical purposes, Santa Clara Indians."[267]

Julia began attempting to enroll her children in the Pueblo in 1946, shortly after Audrey was born. From 1963 until the trial, Julia's efforts were "vigorous and constant."[268] She followed proper complaint procedures under the Pueblo by-laws, without success. The Martinez family made efforts to secure the assistance of the Tribal Council, various Bureau of Indian Affairs officials, their state representative, and even Senator Ervin. Also, in an attempt to circumvent the ordinance, they endeavored to have Myles naturalized as a member of the tribe. However, their struggles were in vain. In 1971, they obtained assistance from DNA, the federally funded legal services program for the Navajo Reservation. After the Martinez' counsel failed to gain headway in securing membership status for Audrey, suit was filed in New Mexico District Court in September, 1972.

Plaintiffs instituted a class action suit claiming that the tribal enrollment ordinance violated both the due process and equal protection clauses of section 1302(8), and seeking injunctive and declaratory relief. Their complaint alleged that denial of membership status for reservation children whose fathers are not

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266. The enrollment ordinance reads as follows:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
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> 1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
> 2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
> 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

402 F. Supp. at 11-12. Plaintiffs challenged the validity of subparagraphs 2 and 3 of the ordinance. *Id.* at 12.

See also letter of the Assistant Secretary of the Interior to the Shoshone Business Council (Feb. 25, 1971) (the Assistant Secretary disapproved of a proposed resolution of the Council which contained an enrollment provision similar to the one in *Santa Clara Pueblo* as violative of equal protection), *cited in* TASK FORCE, *supra* note 44, at 143.

267. 402 F. Supp. at 18.

268. *Id.* at 11.

enrolled in the Pueblo unjustly deprives those children of numerous rights.[269]

Defendants, the Santa Clara Pueblo and its Governor, explained that the enrollment ordinance was enacted in 1939 out of concern for the rise in mixed marriages. Pueblo leaders had feared not that cultural dilution would occur but that the population increase ensuing from intermarriages would lead to an overwhelming demand for apportionment of land and other resources.[270] This overpopulation rationale appears unsound, however, because it is traditionally the Santa Claran male who brings his spouse to live on the Pueblo.[271] Thus, it would seem that intratribal marriages involving male members should be disfavored more than mixed marriages involving female members.

The defendants attempted to show that the policy of tracing membership solely through the father in cases of mixed marriage was necessary in light of the patrilineal nature of Santa Claran society. In the male-dominated Santa Claran household,[272] the father plays the prime role in the cultural and ideological training of the children.[273] Therefore, argued the defendants, when the father of a family residing on the reservation is a Santa Claran, he is presumably familiar with the customs of the Pueblo and there is greater assurance that the tribe's cultural identity will be promoted than in cases in which only the mother is a Santa Claran.[274]

The Pueblo's patrilineal character and the threat of a drain on its resources, however, fail to adequately justify gender discrimination. This becomes clear upon viewing other enrollment practices of the Pueblo. For example, children of unmarried female members are automatically taken in and made members of the Pueblo, even if their fathers were or could have been outsiders, or even non-Indians.[275] Also, children raised away from the Pueblo "who cannot speak the language, who have not participated in the life of the Pueblo, and who know nothing of its values, customs and traditions," are automatically made members if their fathers are members.[276] These enrollment practices cannot be explained by the economic and cultural justifications for excluding Audrey Martinez, and suggest the existence of an underlying policy of invidious gender discrimination on the part of the Santa Clara Council.

Although the tribal interest in maintaining the double standard appeared

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269. The complaint did not include an allegation that the tribal ordinance had been inequitably applied. In April, 1969, however, two female members of the Pueblo testified before the Ervin Subcommittee as to instances of unequal treatment in enrollment of members. *Hearings on S. 211, supra* note 102, at 68-69.

270. 402 F. Supp. at 15-16.

271. "It appears that Santa Clara was traditionally . . . patrilocal." *Id.* at 16.

272. 7 AM. INDIAN L. NEWSLETTER (no. 3) 48 (1974).

273. *Id.*

274. Plaintiffs argue that the presumption that "children raised in a family with a non-Santa Clara father will not follow the language, religion or culture of Santa Clara" is an irrebuttable one and, thus, violates due process. Brief for Respondents at 31 (Supreme Court).

275. *Hearings on S. 211, supra* note 102, at 68 (statement of Mrs. Virginia Ebelacker and Mrs. Mela M. Youngblood). The district court referred to this practice in its opinion, in order to indicate the significance of parents' membership status together with marital status as a factor in membership determinations at the Santa Clara Pueblo. 402 F. Supp. at 16.

276. 402 F. Supp. at 18.

subject to sharp attack, the privileges and benefits to be gained through enrollment were clear and substantial. Political rights ensuing from membership included the fundamental rights to vote[277] and to hold office,[278] as well as the right to present grievances before the Pueblo Council. Members enjoyed the rights to use Pueblo land,[279] to receive land use rights from their parents,[280] to hunt and fish on Pueblo land, to use irrigation water, and to share in the apportionment of funds paid out by the Pueblo. Membership allowed one to reside on the reservation free from the threat of expulsion. After Julia's death, her immediate surviving kin would not have an absolute right to remain at the Pueblo, unless member relatives took them in.[281] Also, in light of the difficulty experienced by the Martinez children in obtaining federal benefits and the possibility that entitlement to such benefits may in the future be conditioned on membership, the plaintiffs feared cessation of essential government services if they remained non-members.[282] Finally, in addition to the tangible benefits of membership, the Martinez children, having been born and raised on the Pueblo, were emotionally tied to the tribe and desired recognition as Santa Clarans.[283]

At trial, after finding that the court had subject matter jurisdiction,[284] the judge ruled in favor of the Pueblo, holding that the ordinance did not contravene section 1302(8).[285] The court uncovered several justifications for the tribe's discriminatory enrollment policy. Membership standards represented a method of "social, and to an extent psychological and cultural, self-definition."[286] A court-imposed change in the definition of a "Santa Claran" would inescapably lead to modification of Santa Claran culture and ethnic character. The court also cited the interrelationship between economic and cultural survival, maintaining that the ability of the Pueblo community to control its limited resources through a restrictive enrollment practice enhanced its ability to preserve its unique heritage.[287] Given the "cultural expectations" arising from the

277. *See* note 296 *infra*.

278. *See* note 230 *supra*.

279. The principle that individual Indians cannot own reservation land by fee simple, because tribal land is possessed communally with ultimate title resting with the federal government, dates back to Justice Marshall's decision in Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588, 592 (1823). Although individual Indians may only hold occupancy and use rights to reservation land, it has been suggested that 25 U.S.C. § 1302(5) (1970), which prohibits a tribal government from "taking private property for a public use without just compensation," may be the basis of a cause of action in a membership dispute involving property rights. M. PRICE, LAW AND THE AMERICAN INDIAN 761 (1973).

280. 402 F. Supp. at 14. The immediate cause of the *Martinez* suit was a "beneficiary clause" in a tribal application form for housing built with funds provided by the Department of Housing and Urban Development. The clause provided that a member could not leave her property to nonmember children. 7 AM. INDIAN L. NEWSLETTER (no. 3) 48 (1974).

281. 402 F. Supp. at 14.

282. Brief for Appellants at 3-4 (court of appeals).

283. 402 F. Supp. at 15. As Deputy Solicitor of the Department of the Interior Raymond C. Coulter stated, "[t]ribal membership is as fundamental to Indians as American citizenship is to Americans generally." 76 Interior Dec. 353, 355 (1969).

284. 402 F. Supp. at 6-11.

285. *Id.* at 18.

286. *Id.* at 15.

287. *Id.* at 16.

patrilineal tradition of the Santa Clarans,[288] the use of sexual and marital criteria, in lieu of blood quantum requirements, in making enrollment determinations was justifiable.

The district judge recognized that the *Groundhog-Daly* principle restricting the scope of section 1302(8) did not provide an answer to the issue of the applicability of equal protection, but merely laid the foundation for analysis.[289] Yet, the court's own reasons for upholding the ordinance were imprecise and failed to focus on the heart of the issue: the contrast between section 1302(8) and the fourteenth amendment. The court emphasized the need for deference to traditional Pueblo values and the danger of impinging upon aspects of tribal sovereignty. While practically conceding the illogical and counterproductive nature of the enrollment ordinance,[290] the court insisted that examination of the legislative history and judicial interpretation of the Indian Bill of Rights required the conclusion that section 1302(8) not be used to circumscribe tribal authority in the area of membership qualifications whenever "the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions."[291] Thus, the lower court implied that any discriminatory tribal custom pertaining to membership determinations, no matter how invidious or irrational, would survive judicial scrutiny.

The district court's opinion is reminiscent of *Yellow Bird* in its failure to identify any concrete legal standards. The court neglected to discuss whether the tribal ordinance could withstand an appropriate level of equal protection scrutiny; rather, it alluded to the holding of *Daly* that blood quantum requirements are valid in spite of the Supreme Court's long-standing disapproval of racial distinctions.[292] The court's analysis is weak, for ancestry classification based on degree of Indian blood, being essential to the continued existence of the tribes and never disapproved of by Congress or the Supreme Court,[293] is far more readily justifiable under equal protection analysis than ancestry discrimination emanating from gender.

The precise equal protection standard that should have been applied in *Santa Clara Pueblo* is unclear. In light of the *Howlett* court's use of a "compelling tribal interest" test[294] in a case in which less vital interests had been affected and the challenged ordinance more reasonable on its face, a strict scrutiny standard might have appeared appropriate. Strict scrutiny, however, was inapt because gender is not a suspect classification.[295] One could argue that strict scrutiny was triggered by the fundamental interests involved, such as the right to vote.[296] Yet, the only privilege explicitly denied the plaintiffs was

288. *Id.*
289. *Id.* at 17.
290. *Id.* at 18.
291. *Id.*
292. *Id.* at 17; *see* text accompanying notes 211-12 *supra*.
293. *See* note 132 *supra* and text accompanying note 94 *supra*.
294. *See* note 257 *supra* and accompanying text.
295. *See* note 156 *supra*.
296. The fundamental status of the right to vote is well-established. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 626-28 (1969).

enrollment as a member, a right which most persons are not entitled to and which may be legitimately circumscribed by the tribe. The most appropriate standard, one which the defendants accept as proper,[297] was formulated by the Supreme Court in *Craig v. Boren*.[298] Under this invigorated rationality approach, the gender classification contained in the Santa Clara enrollment ordinance must be seen as serving "important governmental objectives and must be substantially related to achievement of those objectives."[299] The challenged ordinance fails to meet this standard.

The rationale advanced for the ordinance was misleading and the district court's emphasis on "cultural expectations" was misplaced. There was evidence indicating that the Pueblo's patrilineal tradition was similar to that found in Anglo-American society, characterized by little more than the assumption by children of their fathers' surname and domicile.[300] The primary purpose behind the enactment of the enrollment ordinance was not cultural, but economic: the preservation of the Pueblo's limited land and monetary resources.[301]

With this in mind, it becomes evident that the means decided upon to promote the tribe's goals were arbitrary and ill-suited for that purpose. The Pueblo's patrilineal tradition, which had "lost much of [its] force,"[302] could not sustain the denial of important benefits incident to membership to persons who had both been fully accepted into Santa Claran society and been allowed to develop substantial ties with the Pueblo. Before enactment of the 1939 ordinance, there was no "hard and fast rule concerning membership; rather, the [Tribal] Council considered each case separately."[303] Membership was predicated on residence within the community and on participation in Pueblo activities. Under traditional tribal standards, the Martinez children would have been of sufficient cultural and ethnic status to have been enrolled. The 1939 ordinance, which was designed to implement the Bureau of Indian Affairs' concept of formal, lifetime membership, reflects a totally non-traditional view of membership.[304]

Traditionally, all mixed marriages were disapproved of by Santa Claran leaders.[305] Refusal to enroll all children of such marriages would, therefore, appear to be a more equitable and logical alternative to gender discrimination. Also, the use of certain other discriminatory methods, such as lower per capita payments to all families with a non-member parent, would have been a more efficient way of conserving the Pueblo's wealth. In any event, because the

297. Brief for Petitioners at 27 (Supreme Court).

298. 429 U.S. 190 (1976).

299. *Id.* at 197. *See* note 156 *supra*.

One commentator has suggested that the proper analysis to be used in all § 1302(8) equal protection cases is a hybrid of rational relation and middle ground standards under which a court would "examine the actual reasons for a discriminatory classification, using a rational basis standard of review." Comment, Martinez, *supra* note 262, at 556.

300. Brief for Respondents at 36-37 (Supreme Court).

301. 402 F. Supp. at 15.

302. *Id.* at 16.

303. *Id.*

304. Brief for Respondents at 43 (Supreme Court).

305. *Id.* at 37.

means employed under the enrollment policy failed to encompass factors such as the commitment of the non-member parent and his children to the Santa Claran community, the classification failed to meet the standard of scrutiny required of gender classifications by the fourteenth amendment. Similarly, the ordinance violated section 1302(8), for it appears established that when a tribe adopts an Anglo-American practice, the procedure will be judged by fourteenth amendment standards.[306]

In light of the above considerations, the Tenth Circuit on appeal defied the trend of extreme deference to tribal membership policies and reversed the district court's decision. Initially, the court of appeals found that the legislative history of the Indian Civil Rights Act did not "provide a conclusive answer to the ultimate question presented in the case,"[307] namely, whether the ordinance was valid under section 1302(8). The court then determined that the Pueblo's interest was not "compelling,"[308] for the ordinance represented "an arbitrary and expedient solution" to economic problems of recent origin.[309] The defendants failed to prove that the use of the gender-based distinction "foster[ed] and promote[d] cultural survival."[310] The court found that economic stability and patrilineal values could have been preserved through non-discriminatory methods.[311] "[I]f the equal protection clause of the ICRA [Indian Civil Rights Act] is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case."[312]

The Tenth Circuit opinion is valuable for it provides a clear standard for ascertaining where the more significant interests lie in any equal protection dispute that arises in the tribal context. Rather than concern itself solely with the sufficiency of the tribal interests, as all previous courts except the Ninth Circuit in *Howlett* had done, the court weighed tribal and individual interests.[313] *Santa Clara Pueblo* tells us that, given a tribal ordinance violative of equal protection doctrine, a federal court must determine whether, under the circumstances, "the Tribe [is] justified in deviating from the Fourteenth Amendment standard on the basis that tribal, cultural and ethnic survival would suffer from full-scale enforcement" of section 1302(8).[314] This test for balancing tribal

306. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976); Daly v. United States, 483 F.2d 700, 704-05 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311, 1314 (8th Cir. 1973).

307. 540 F.2d at 1045.

308. *Id.* at 1047. Although the Tenth Circuit used language indicating application of the strict scrutiny standard, it appeared to waver between strict scrutiny and rationality analysis.

309. *Id.* at 1048.

310. *Id.* at 1047.

311. *Id.* One commentator has suggested that "[t]he question, however, should not be whether a nondiscriminatory solution is possible, but whether the chosen solution is based upon tribal cultural values." Comment, Martinez, *supra* note 262, at 554.

312. 540 F.2d at 1048.

313. For the view that the Tenth Circuit failed to accord the Pueblo's interests sufficient weight, thus "in effect, rejecting tribal views of equity and justice . . . while imposing the full scope of federal notions of equality as embodied in the fourteenth amendment," see Comment, *Equal Protection, supra* note 135, at 629.

314. 540 F.2d at 1047.

interests against the "individual right to fair treatment"[315] focuses upon the paramount issue and necessitates consideration of the important civil rights allegedly denied, yet is flexible enough to allow a court great discretion in upholding tribal laws.[316] The standard, by its wording, implicitly favors the tribe's judgment and, thus, is in line with the "long-standing rule that 'legislation affecting the Indians is to be construed in their interest.' "[317]

The Tenth Circuit decision need not have unfavorable consequences for the Santa Clara Pueblo and for other tribes. The outcome was prompted by a fact pattern strongly supportive of the Martinez' claims and may be distinguished from similar claims brought by cultural outsiders. The key to nonintervention by a federal court is a carefully worded ordinance which points precisely to the interests being promoted and discriminates solely on the basis of one's ties with the tribal society and potential to become a worthy member. Elimination of unreasonable, arbitrarily chosen means should immunize tribal legislation from invalidation. For example, to avoid the deterioration of traditional practices and values, a tribe might condition membership for persons of limited tribal blood quantum on demonstrated involvement with the tribal community. Consideration of a mixture of objective and semi-objective factors, such as length of time in residence on the reservation, employment on the reservation, knowledge of the traditional spoken language, number and closeness of relatives enrolled in the tribe, acceptance of customary Pueblo ways, and degree of participation in social and religious activities, would probably foreclose any claim that an enrollment determination was arbitrary.

Santa Clara Pueblo may have enormous repercussions for the phenomenon of sex discrimination in the Indian context.[318] Freedom to differentiate among the sexes is no longer an unrestricted by-product of tribal sovereignty. In one sense, *Santa Clara Pueblo* represents the imposition of a foreign value, equality of the sexes, that has only recently taken hold in the larger society. It is questionable whether it is proper for a technologically advanced, dominant society, which "has had a long and unfortunate history of sex discrimination,"[319] to impose its notions of sexual equality upon an ancient, well-developed culture. The propriety of prohibiting tribes from differentiating among persons on the basis of sex in making essential enrollment decisions is further put in doubt by the observation that Congress is permitted to discriminate on the basis of gender (and legitimacy) in determining which aliens may immigrate to the United States.[320] Finally, it is unclear whether *Santa Clara*

315. *Id.* at 1045.

316. For criticism of the Tenth Circuit's use of a balancing test in a tribal equal protection case, see Comment, Martinez, *supra* note 262, at 552-55.

317. Oliphant v. Schlie, 544 F.2d 1007, 1010 (9th Cir. 1976), *cert. denied sub nom.* Oliphant v. Squamish Indian Tribe, 431 U.S. 964 (1977).

318. For example, various tribes deprive women of the right to vote, Note, *Reapportionment: One Man, One Vote as Applied to Tribal Government*, 2 AM. INDIAN L. REV. 137, 141 (1974); and the right to hold office, *see, e.g.*, Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974).

319. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

320. *See* Fiallo v. Bell, 430 U.S. 787 (1977), in which the Court upheld a provision of the

Pueblo can be harmonized with the current congressional desire to "give Indians the freedom and encouragement to . . . determine their own future to the maximum extent possible."[321] As matters now stand, the tribes should be able to comply with federal judicial and legislative demands made upon them while successfully resisting acculturation.

VII
CONCLUSION

Section 1302(8) must be applied by the courts with intelligence and foresight, for its misuse may lead to grave consequences. Perhaps the greatest danger is that equality will eventually result in uniformity. To mandate a total surrender to the dictates of Anglo-American society would obviously be a self-defeating policy. Indeed, it may be that injustice will always have to be suffered by the Indian in order to remain distinct.

Ultimately, whether section 1302(8) is a bane or boon for reservation Indians and for the tribes rests on the wisdom of Congress' policy decision in enacting the Indian Civil Rights Act. While our government is committed to enabling Indians to determine their own future to the maximum extent possible,[322] it has granted non-Indian judges supreme power to cure inequities within the tribal community. This may be "unconscious ethnocentrism,"[323] the "subtlety of [which] is possibly more dangerous to the survival of Indian life than the outright threat of termination."[324] The courts must be cognizant of the threat to the integrity of Indian mores and values posed by a constitutional requirement that may gradually lead to the elimination of even the most subtle religious and social distinctions.

Given Congress' desire to ensure the enjoyment of civil liberties on the reservation,[325] section 1302(8), as it is currently interpreted, is more beneficial than harmful to Indian interests and should not, as has been recommended,[326]

Immigration and Nationality Act which accorded special preference immigration status to illegitimate children or their natural parents based upon whether the child's relationship was with the father or with the mother. The Court emphasized that: "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.' " *Id.* at 792, *quoting* Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953). The plaintiffs distinguish *Fiallo* from *Santa Clara Pueblo*, both of which arguably involve the exercise by a sovereign of its right to exclude unwanted persons, on essentially two grounds: that the ultimate issue involved in *Santa Clara Pueblo* is wholly one of statutory interpretation and does not deal with a separation of powers question, and that the broad discretion granted Congress in its exercise of the immigration power would still not allow it to expel or deny rights to native insiders, born in the United States and subject to federal authority, in contravention of the fourteenth amendment. Brief for Respondents at 44-45 (Supreme Court).

321. S. Con. Res. 37 (preamble) *reprinted in* 120 CONG. REC. 16,591 (1974).

322. *See* note 57 *supra*.

323. Ziontz, *supra* note 81, at 47.

324. Note, *Indian Tribal Sovereignty*, 2 STUD. AM. INDIAN L. 1, 29 (1971).

325. *See* note 86 *supra* and accompanying text.

326. *See* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 644 (1968).

be repealed. Tribal governments cannot be relied upon to guarantee equal treatment because of the social structure of the typical tribe, the unfamiliarity of Indians with constitutional notions, and the dependent status of many tribal judges.[327] The federal courts, in general, have paid great deference to Indian culture, and there has been minimal impingement on tribal sovereignty and the right of the tribes to enforce racial and cultural segregation.[328]

For section 1302(8) to continue to redress oppression of reservation dwellers without being abused by either outsiders or embittered tribal members, a sensitive delineation of the scope of equal protection of tribal laws, based upon the standard supplied by *Santa Clara Pueblo*, must evolve and become widely accepted. A Supreme Court standard may soon be forthcoming.[329] With or without an express doctrine to abide by, however, a federal court should consider three factors in deciding a case in which modification of an enrollment or membership practice is recommended.

First, the rights and benefits denied the plaintiff(s) should be significant, because the invalidation of any tribal membership ordinance, no matter how illogical or invidious that ordinance appears to be, will cause serious repercussions for the tribe. Section 1302(8) restricts a small, interrelated ethnic community somewhat resembling an extended family, rather than a vast, impersonal society. Membership ordinances are the most significant regulations enacted by a tribe, for they both define and justify the tribe as a unique entity. "Absent the ability to determine who shall participate in their affairs, Indian tribes would soon be indistinguishable from state and local governments."[330]

Second, under the judicial doctrine of exhaustion of tribal remedies,[331] the tribe should initially be allowed a fair chance to settle its internal problems.

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327. *See* note 63 *supra* and accompanying text.

328. *See, e.g.*, Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

329. On November 15, 1976, petition for certiorari in the *Santa Clara Pueblo* case was filed. The questions presented were:

> (1) Does the Indian Civil Rights Act . . . vest federal courts with jurisdiction to determine questions of tribal membership? (2) Does Act waive sovereign immunity of Indian tribes to suit in federal courts? (3) Does Act sub silentio terminate quasi-sovereign status of Indian nations as it has been known heretofore? (4) If Act vests federal courts with jurisdiction to resolve Indian tribal membership questions, what legal standard of equal protection should be applied?

45 U.S.L.W. 3403 (1976). On May 16, 1977, the Court granted certiorari. 431 U.S. 913 (1977).

330. Note, *Blacks and America's Tribal Indians*, *supra* note 31, at 516.

331. Federal courts have generally required that parties in litigation which is essentially tribal in nature first attempt to exhaust all available tribal remedies. "The purpose of this exhaustion requirement is to foster tribal self-government and cultural identity; the federal courts should infringe as little as possible upon the authority of an Indian tribe to govern itself." Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 100 (8th Cir. 1976). For a thorough examination of the exhaustion doctrine, see Note, *Jurisdiction: Exhaustion of Remedies and the Status of Tribal Courts*, 4 AM. INDIAN L. REV. 295 (1976); Note, *Remedies: Indian Civil Rights Act—Exhaustion of Tribal Remedies Prior to Removal to Federal Court*, 3 AM. INDIAN L. REV. 169 (1975) [hereinafter cited as Note, *Exhaustion*].

The Indian Civil Rights Act was "not meant to substitute a federal forum for tribal court."[332] Strict interpretation and application of this doctrine preserves the effectiveness of and respect for tribal courts and government, which is vital because "[e]nforcement of the Act must come at the tribal level . . . [b]y reviewing tribal action rather than hearing each case *de novo*, the court could perform more efficiently and guarantee more effectively the enforcement of the Indian Civil Rights Act."[333] To the extent that tribal courts efficiently provide meaningful remedies for infringement of civil rights, the degree of federal court intervention into tribal affairs will be minimized. Only in situations in which full compliance with tribal procedures would be a futile, oppressive, or undesirable requirement, given the existence of meager tribal remedies,[334] inadequate appellate procedures,[335] a potential for great delay,[336] or other difficulties, would immediate access to federal courts be appropriate.[337]

Finally, a clear distinction must be maintained between cultural outsiders and persons who have "been defined as being within the cultural group or . . . been allowed to develop a substantial stake in it."[338] Insiders who have been encouraged to become socially, financially, and emotionally involved with the life of the community should have a greater chance of obtaining membership. For such persons, the tribal government may be as great an impersonal force as state government is for persons off the reservation. While outsiders can often avoid tribal persecution through flight from the reservation, cultural insiders may have little choice but to suffer unjust and inequitable treatment.

Thus, when a cultural insider with a sufficient degree of tribal blood quantum challenges a membership practice, the level of equal protection scrutiny should be heightened. As suggested in the discussion of *Santa Clara Pueblo*, utilization of a middle ground equal protection standard seems to be a fair method of accommodating the conflicting goals of maintaining tribal sovereignty and culture and protecting constitutional rights.[339] On the other hand, when non-Indians or those reasonably defined as cultural outsiders seek enrollment or membership benefits through federal court decree, a significant threat to the integrity of the tribe is presented. The outsider may be seeking personal gain at the expense of the tribe or may simply not understand the motives behind the tribe's denial of his request. In this situation, a strong presumption in favor of validity of the challenged ordinance, perhaps in the form of the non-invigorated, rational relation test, should be applied. This would

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332. Lohnes v. Cloud, 366 F. Supp. 619, 621 (D.N.D. 1973).

333. Note, *Exhaustion*, *supra* note 331, at 178.

334. In Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973), for example, the court found no tribal remedies to be exhausted.

335. Olney Runs After v. Cheyenne River Sioux Tribe, 437 F. Supp. 1035, 1037 (D.S.D. 1977).

336. *Id.* at 1037.

337. Exhaustion of tribal remedies would obviously not be necessary when all parties acquiesce to federal court jurisdiction. Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 101 (8th Cir. 1976).

338. Note, *Indian Bill of Rights*, *supra* note 51, at 1363.

deter costly litigation and preserve the right that every tribe necessarily possesses to protect its community character and to reject cultural pluralism.

JEFFREY INGBER*

Editor's Note: On May 16, 1978, the United States Supreme Court decided the case of Santa Clara Pueblo v. Martinez, 46 U.S.L.W. 4413, reversing the Tenth Circuit by a seven to one majority, without reaching the merits of the case. The Court held that the Indian Civil Rights Act neither expressly nor impliedly extends federal court jurisdiction over tribes and their officers in civil actions for declaratory or injunctive relief.

339. *See* text accompanying notes 297-99 *supra*.

* Winner of the Leonard M. Henkin Prize, awarded annually at New York University School of Law for the article of distinction on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.