Washington Law Review

Volume 54
Number 3 *Symposium on Indian Law*

6-1-1979

Indians and Equal Protection

Ralph W. Johnson
University of Washington School of Law

E. Susan Crystal

INDIANS AND EQUAL PROTECTION

Ralph W. Johnson* and E. Susan Crystal**

I. INTRODUCTION

Equal protection challenges to federal, state, and tribal laws and administrative actions have become increasingly popular in recent years. Since 1974 the Supreme Court has decided five equal protection cases concerning Indians, covering challenges to federal Indian hiring preferences,[1] a criminal conviction of an Indian in federal court,[2] the distribution of an Indian claims award,[3] the preemption of state jurisdiction in an Indian adoption proceeding,[4] and a state criminal and civil jurisdiction scheme on reservation land.[5] All of these equal protection challenges were rejected.

Additional challenges have been made in the lower federal and state courts resulting in decisions that have not reached the Supreme Court. These include a challenge to a New Mexico policy allowing only enrolled Indians to sell crafts on the veranda of a state museum,[6] a state law exempting the Leech Lake Band of Indians from a fishing license fee in Minnesota,[7] and a federal court treaty interpretation awarding a specific percentage of salmon to treaty Indian tribes in Washington.[8] The first two of these equal protection challenges were rejected. The third, concerning the allocation of salmon fishing rights,

* Professor of Law, University of Washington; B.S. in Law, 1947, LL.B., 1949, University of Oregon.

** Staff Counsel, Senate Appropriations Committee, Washington, D.C.; B.A., 1974, Washington University; J.D., 1978, University of Washington.

This article was supported by a grant from the National Oceanographic and Atmospheric Administration under Sea Grant No. 04-7-158-44021.

1. Morton v. Mancari, 417 U.S. 535 (1974). *See* Part V-*A infra*.

2. United States v. Antelope, 430 U.S. 641 (1977). *See* Part V-*B-3 infra*.

3. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977). *See* Part V-*B-2 infra*.

4. Fisher v. District Court, 424 U.S. 382 (1976) (per curiam). *See* Part V-*B-1 infra*.

5. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 99 S. Ct. 740 (1979). *See* notes 124 & 125 and accompanying text *infra*.

6. Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978).

7. State v. Forge, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978).

8. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *cert. granted*, 99 S. Ct. 277 (1978).

was sustained by the Washington Supreme Court but on highly tenuous grounds.

Under the Indian Civil Rights Act of 1968[9] numerous equal protection challenges to tribal government laws and actions have been heard in federal courts, including challenges to enrollment requirements,[10] voting procedures,[11] residency requirements for tribal office,[12] conduct of tribal government business,[13] and procedures for terminating a lease of a tribal member.[14] The only equal protection challenge to succeed was subsequently reversed by the Supreme Court on different grounds.[15]

Two important observations emerge from an analysis of these cases: (1) equal protection analysis in Indian-related cases, whether brought under the United States Constitution or the Indian Civil Rights Act, differs from the analysis in other equal protection cases, and (2) at least the federal courts have been hesitant to impose equal protection limitations on laws affecting Indians.

This article analyzes the recent Indian equal protection cases in an attempt to formulate the equal protection doctrine as applied to Indians, to examine the theoretical foundation for that doctrine, and to indicate how that doctrine will likely be applied in situations not yet addressed by the courts.

II. THE FEDERAL GOVERNMENT'S TRUST RELATIONSHIP WITH INDIAN TRIBES

The uniqueness of the equal protection doctrine as applied to Indians is attributable, in large part, to the fiduciary relationship existing between the federal government and Indian tribes.[16] This relationship was first articulated by the United States Supreme Court in *Cherokee*

9. 25 U.S.C. §§ 1301-1303 (1976).

10. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

11. McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

12. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976).

13. Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

14. Johnson v. Lower Elwah Tribal Community, 484 F.2d 200 (9th Cir. 1973).

15. Santa Clara Pueblo v. Martinez, 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978) (reversed on grounds that the federal courts lacked jurisdiction over the subject matter).

16. The relationship is between the tribes as political entities and not between individuals and the United States. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974); *In re* Heff, 197 U.S. 488 (1905). This proves to be significant in equal protection analysis. *See* notes 57 & 75-77 and accompanying text *infra*.

Nation v. Georgia,[17] and is founded on both the special status accorded Indians in the United States Constitution[18] and the Indian tribes' subordinating their inherent sovereignty to that of the United States in exchange for the protection and supervision of the government.[19]

Thus, a federal trusteeship of Indians exists accompanied by a need for the federal government to enact laws concerning trust property and tribal government powers.[20] Because these laws treat an identifiable class of citizens (tribal Indians) differently than the rest of society, three potential equal protection problems arise: (1) a non-Indian

17. 30 U.S. (5 Pet.) 1 (1831). The case involved the question of whether the Supreme Court had original jurisdiction to enjoin Georgia from enforcing its laws on the Cherokee reservation. The Indians argued that this was a controversy between a "state" and a "foreign state" and thus fell under article III, section 2 of the Constitution granting jurisdiction to the Supreme Court. The Court rejected the argument that Indian tribes were sovereign nations. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For a study of the Cherokee cases, see Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 STAN. L. REV. 500 (1969).

18. "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. 4, § 8, cl. 3. *See also id.* art. 1, § 8, cls. 1 & 10; art. II, § 2; art. III, § 3, cl. 2.

19. United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). It is interesting to speculate on the difference in legal relationships between the federal government and Blacks and Indians. In addition to the judicial articulation of the guardian-ward relationship between the government and Indian tribes, Congress and the executive branch have created a special department, the Bureau of Indian Affairs, to administer federal programs for Indians, and developed volumes of laws and dozens of programs designed to benefit Indians and Indian tribes. This special relationship was developed because the United States had conquered the Indian tribes, taken away most of their land, destroyed their cultural and religious heritage, and caused fundamental changes in life style so that Indians were dependent for survival on the federal government. Many of the same factors apply to Blacks. They were taken away from their lands in Africa, their cultural and religious heritage was destroyed, and their life style was fundamentally changed. They were not, however, conquered by the U.S. government as such, but were captured individually or in small groups by private entrepreneurs, brought to the United States, and made slaves. They were dependent for survival on their owners rather than the United States. Although Blacks were legally freed by the Civil War and the fourteenth amendment, they were in fact subjected to continued racial discrimination and denied equal educational and employment opportunities well past the middle of the 20th century. But no guardian-ward relationship was ever evolved between the federal government and Blacks similar to that between the federal government and Indians. One is reminded of the moral of the play *The Mouse That Roared, i.e.,* the best way to get "aid" from the United States is to fight a war with the United States and lose.

20. Congress' power to enact laws affecting Indians has been said to be "plenary." Morton v. Mancari, 417 U.S. 535, 551–52 (1974); United States v. Kagama, 118 U.S. 375 (1886). Whatever plenary may mean in this context, it does not mean absolute. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977). *See* Part V–*B-2 infra.* Federal treaties must be separately considered and are examined at Part VII *infra.*

may either claim the same benefits accorded Indians or claim to be prejudiced by the special Indian benefits;[21] (2) an individual Indian or a particular tribe may complain that a law that benefits Indians in general prejudices that individual or tribe in particular;[22] and (3) Indians may claim that a law passed ostensibly for their benefit in fact prejudices them.[23] The outcome may vary in each case, depending upon whether federal, state, or tribal action is involved.[24]

Before a cognizable Indian equal protection can be formulated, it is first necessary to outline briefly the doctrine of equal protection applied in cases that do not involve Indians.

III. TRADITIONAL EQUAL PROTECTION ANALYSIS

The principal tenet of the equal protection doctrine is that persons similarly situated should be treated alike under the law.[25] The central inquiry in equal protection cases is whether there is an appropriate governmental interest suitably furthered by the differential treatment.[26] In traditional equal protection analysis, the validity of the relationship between the means (the classification) and the ends (the government interest) is analyzed by applying a two-tier level of scrutiny.[27] On the first tier, courts will subject most statutory classifications to only a minimal scrutiny.[28] This standard, sometimes termed "the rational relationship test," permits governments broad discretion in enacting laws which affect some groups of citizens differently than

21. *See* Morton v. Mancari, 417 U.S. 535 (1974); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *cert. granted*, 99 S. Ct. 277 (1978).

22. United States v. Antelope 430 U.S. 641 (1977); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).

23. This would arguably breach Congress' fiduciary duty toward Indians and thus be actionable without the necessity of an equal protection analysis. To date such a theory has never succeeded. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977). In general, the courts avoid invalidating federal legislation by applying a rule of construction that all doubts are to be construed in favor of Indians. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

24. *See* Part IX *infra*.

25. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

26. Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972).

27. Gunther, *The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

28. *Id.* at 19.

others.[29] Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. The constitutional safeguard is offended only if the classification is wholly irrelevant to the achievement of any valid governmental objective. Statutory classifications will not be set aside if facts can be found that reasonably justify the unequal treatment.[30]

Strict scrutiny, the second tier, is applied when a statute either infringes on a fundamental right[31] or is based on a "suspect classification."[32] Under this often fatal test,[33] the classification must be *necessary* to achieve a *compelling* state interest.[34]

In recent years the two-tiered analysis has been augmented with a middle-level analysis in which courts scrutinize the relationship between the means and the ends more rigorously than under the minimal level scrutiny, and require the legislation to satisfy an important rather than a compelling government interest.[35] This standard has been applied most notably to classifications based on gender[36] and illegitimacy.[37] This "middle-tier" scrutiny examines the means

29. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

30. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

31. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting).

32. The Court has defined a suspect class as one "saddled with such disabilities, . . . 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." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). To date suspect classifications have been limited to those based on race, Korematsu v. United States, 323 U.S. 214, 216 (1944); alienage, Sugarman v. Dougall, 413 U.S. 634 (1973); and national origin, Hernandez v. Texas, 347 U.S. 475 (1954).

This reflects the view of Justice Stone that there is an important judicial function in protecting certain "discrete and insular minorities" who, because of prejudice, are denied access to the "political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Legislation which tends to affect such minorities should be "subjected to more exacting judicial scrutiny under the general prohibition of the 14th Amendment than are most other types of legislation." *Id.*

33. Strict scrutiny has been called "strict in theory and fatal in fact." Gunther, *supra* note 27, at 8. *But see In re* Griffiths, 413 U.S. 717, 722 (1973) (permissible and substantial interest in determining the fitness of a candidate for admission to the bar); Roe v. Wade, 410 U.S. 113, 162–64 (1973) (compelling state interest in regulating abortions during some stages of pregnancy); Korematsu v. United States, 323 U.S. 214 (1944) (national security during wartime justified incarceration of Japanese-Americans during World War II).

34. Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972).

35. Trimble v. Gordon, 430 U.S. 762 (1977); Craig v. Boren, 429 U.S. 190 (1976).

36. Reed v. Reed, 404 U.S. 71 (1971).

37. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

and the ends in some detail, closing "the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry."[38]

IV. EARLY EQUAL PROTECTION CASES AND INDIANS

Most federal Indian law developed prior to the modern activist doctrine of equal protection.[39] The leading Indian equal protection cases, however, have all occurred since 1954, when modern equal protection doctrine received its impetus with the decision in *Brown v. Board of Education.*[40] Consequently, many early laws and administrative practices concerning Indians would be unconstitutional if challenged under modern equal protection principles. Felix Cohen, in his 1942 treatise, *Handbook of Federal Indian Law,* documented numerous state laws and state constitutions that deprived Indians of their right to vote, serve on a jury, testify in a lawsuit, or attend public schools with whites.[41] Federal laws, in turn, sometimes prohibited Indians from riding on railroads, "hampered freedom of speech, em-

38. Gunther, *supra* note 27, at 24.

39. The modern activist stance of the Supreme Court in equal protection cases dates essentially from the 1954 decision in Brown v. Board of Education, 347 U.S. 483 (1954), in which the Court rejected the separate but equal philosophy that had prevailed since its 1896 decision in Plessy v. Ferguson, 163 U.S. 537 (1896), and ruled that racial segregation constituted an impermissible means of accomplishing even legitimate governmental goals. *Brown* heralded a new judicial approach to equal protection. Since the early 1960's, the Court has consistently invalidated explicit governmental discrimination against minorities.

On the same day the Court decided *Brown,* it decided Bolling v. Sharpe, 347 U.S. 497 (1954), ruling that the equal protection concept of the fourteenth amendment, which constrains state government actions, is part of what is meant by due process in the fifth amendment, which constrains federal government actions. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). In *Bolling* the Court articulated the relationship of the equal protection analysis under the fourteenth amendment to the fifth amendment. It stated:

> [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Id. at 499. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW ch. 16 (1978).

40. 347 U.S. 483 (1954). *See* note 39 *supra.*

41. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 174 (University N.M. ed. 1971).

powered the Commissioner of Indian Affairs to remove from an Indian reservation 'detrimental' persons, and sanctioned various measures of military control within the boundaries of the reservations."[42] Federal administrative action often infringed on the civil liberties of the Indians, primarily through the near-despotic power held by the superintendent of the reservation, who could act as judge, jury, prosecuting attorney, police officer, and jailer in arresting, trying, and imprisoning Indians.[43] Administrative actions also denied Indians religious freedom.[44]

There are few cases challenging these early laws and administrative practices.[45] Among the early cases that did reach the courts were those challenging legislation prohibiting the sale of liquor to Indians.[46] In *Perrin v. United States,*[47] the United States Supreme Court held that it "does not admit of any doubt" that Congress can prohibit the sale of liquor to "tribal" Indians, wherever they might be, under the commerce clause and the guardian-ward relationship.[48] In *In re*

42. *Id.*

43. *Id.* at 175.

44. One purpose of the oppressive administrative practices was to make life on the reservation so intolerable for the Indians that they would choose to leave the reservation and assimilate into the non-Indian society. The more intolerable the oppression, the more Indians left the reservations, and the more successful was the Bureau of Indian Affairs in achieving its objective of assimilation. F. COHEN, *supra* note 41, at 174–75.

45. *See* cases cited in F. COHEN, *supra* note 41, at 177–79. The one remedy that was available to an Indian was to leave the reservation, renounce his political connection with the tribe, and assimilate into the non-Indian culture. By thus changing his status he was relieved of the burdens of discriminatory legislation and administrative practices. Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891); F. COHEN, *supra* note 41, at 177.

46. An 1834 act prohibited the sale of liquor to Indians in Indian country. Laws enacted in 1862 and 1897 broadened this prohibition to include all Indians under federal trust, even outside Indian country. Act of June 30, 1834, ch. 161, § 20, 4 Stat. 729 (1834), *as amended by* Act of Feb. 13, 1862, ch. 24, 12 Stat. 338 (1862) & Act of Jan. 30, 1897, ch. 109, 29 Stat. 405 (1897). In Perrin v. United States, 232 U.S. 478, 486–87 (1914), the Court said these restrictions might be of questionable constitutionality if not repealed at some future date. All these prohibitions on sale of liquor on ceded lands were repealed in 1934. Act of June 27, 1934, Ch. 846, Pub. L. 73–478, 48 Stat. 1245 (1934). The sale of liquor to Indians is still prohibited in limited circumstances. 18 U.S.C. § 1154 (1976).

47. 232 U.S. 478 (1914). The Court held that Congress could prohibit the sale of liquor to anyone, Indian or non-Indian on all ceded land for a period of years after the reservation was created. *Id.* at 482–83.

48. *Id.* at 482. The Court in *Perrin* cites United States v. Kagama, 118 U.S. 375 (1886), for the guardian-ward relationship. *Id.* This same language was used in United States v. Mazurie, 419 U.S. 544 (1975). "This Court has repeatedly held that [the commerce] clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated . . . ." *Id.* at 554. *But see* Craig v. Boren,

Heff,[49] the Court held that an 1897 act[50] applied only to Indians who were neither citizens nor emancipated. Once citizenship was granted, an Indian was no longer *personally* the ward of the government, even though she still might hold equitable title to property held in trust by the United States. As a citizen living off the reservation, she was subject to state and federal laws in the same manner as other citizens.

These early cases provided the foundation for the principle that legislation concerning Indians was constitutional provided it was based not on race, but rather on the political or ancestral affiliation of the individual to a tribe.[51] If that affiliation were severed, the individual would no longer be considered an Indian within the meaning of the legislation.

V. EQUAL PROTECTION CASES INVOLVING FEDERAL LAW

Although most statutes prohibiting the sale of liquor to Indians have been repealed,[52] there is still an entire title of the United States Code[53] devoted to Indians, as well as a substantial body of law consisting of treaties[54] and administrative regulations.[55] If the modern doctrine of strict scrutiny were to be applied to all classifications based on "Indian-ness," the entire structure of Indian law would crumble.[56] This result has been avoided, first, by characterizing clas-

429 U.S. 190, 208 n.22 (1976) (Indian liquor laws would now be of "questionable constitutionality").

49. 197 U.S. 488 (1905).

50. *See* note 46 *supra*.

51. Some early cases, for example, Montoya v. United States, 180 U.S. 261 (1901), and United States v. Rogers, 45 U.S. (4 How.) 572 (1846), referred to Indians as a "race." More contemporary cases do not do so. The explanation of these early cases probably lies in the different meanings of the word race.

The contemporary concept of the race of Indians includes Indians from the Carribean, Latin America, and Canada, none of whom enjoy a special status under United States law. In addition, there are United States citizens who, although racially Indian, do not share the special status. Reasons for that lack of status include: (1) the tribe is one toward which the United States has never assumed a trust relationship; (2) the tribe has been terminated by Congress, *see, e.g.*, 25 U.S.C. § 564 (1976); and (3) the individual has severed his or her tribal ties, *see* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

52. *See* note 46 *supra*.

53. 25 U.S.C. (1976).

54. *See* note 147 *infra*.

55. *See* 25 C.F.R. (1978).

56. Morton v. Mancari, 417 U.S. 535 (1974). The Court stated:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived

sifications between Indians and non-Indians as political rather than racial[57] and, second, by according the federal government special deference in the area of Indian legislation because of the *sui generis* status of Indians both constitutionally and historically.

A. The Mancari *Test*

The cornerstone of modern Indian equal protection doctrine is *Morton v. Mancari*.[58] In *Mancari* a federal statute provided for an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA).[59] Non-Indian employees of the BIA challenged the preference on grounds that it was impliedly repealed by the 1972 Equal Employment Opportunity Act[60] and that it constituted invidious racial discrimination in violation of the due process clause of the fifth amendment.[61] The lower courts found that the preference had been repealed by the 1972 Act which proscribed discrimination in federal employment on the basis of race.[62] The Supreme Court reversed.

The Court began its analysis by noting the long history of Indian preference statutes.[63] The purpose of these statutes, according to the

---

from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id. at 552–53.

57. The Court generally uses the term Indian in the restricted sense meaning those persons who are members of federally recognized tribes. This definition excludes many persons whose racial makeup would be classified as Indian. *See id.* at 553 n.24; notes 48, 49 & 51 and accompanying text *supra*. There is authority for the proposition that technical "membership" in a tribal entity is not essential, so long as there is an ancestral relationship to the tribe; this is especially true where there is a close, continuing cultural, religious, and domicile relationship. *See* Morton v. Ruiz, 415 U.S. 199 (1973).

58. 417 U.S. 535 (1974).

59. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified in scattered sections of 25 U.S.C. §§ 461–479 (1976)). The statute also provides that the Secretary of the Interior shall establish standards "for Indians who may be appointed, without regard to civil-service laws, to the various positions [of the BIA] .... Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions." *Id.* § 472. The Bureau adopted a policy in 1972 to accord a preference not only at the initial hiring stage but also in granting a promotion when both an Indian and a non-Indian were in competition. *Mancari*, 417 U.S. at 538.

60. *Mancari*, 417 U.S. at 551. *See* 1972 Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e to 2000e–17 (1976).

61. 417 U.S. at 551.

62. Morton v. Mancari, 359 F. Supp. 585 (D.N.M. 1973).

63. *See, e.g.*, Act of June 24, 1910, ch. 431, § 23, 36 Stat. 861 (1910) (codified at 25 U.S.C. § 47 (1976)) (preferences for Indian labor); Act of June 7, 1897, ch. 3, § 1, 30

Court, "has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[64] The Indian Reorganization Act,[65] which contained the employment preference, was designed to foster self-government by giving tribal Indians an increased role in BIA operations.[66] The preference was necessary because no adequate training program existed to qualify Indians to compete on civil service examinations.[67] Displacement of non-Indians was both unavoidable and desirable.[68] The Court also concluded that the Equal Employment Opportunity Act did not impliedly repeal the Indian preference.[69]

1. The Indians' unique legal status

Turning to the due process issue, the Court rejected a traditional equal protection analysis, because of the unique legal status of Indian tribes under federal law.[70] Congress derives broad power to deal with Indian tribes from two sources. The first source is express constitutional authority to deal with Indians. The commerce clause provides that Congress shall have the power "[t]o regulate commerce . . . with the Indian Tribes."[71] The Constitution also provides the President with the power to make treaties with Indian tribes with the consent of two-thirds of the Senate.[72] The second source is the guardian-ward re-

Stat. 83 (1897) (codified at 25 U.S.C. § 274 (1976)) (employment in Indian schools); Act of July 4, 1884; ch. 180, § 6, 23 Stat. 97 (1884) (codified at 25 U.S.C. § 46 (1976)) (employment on reservations).

64. 417 U.S. at 541-42 (citations omitted).

65. The Act is codified in scattered sections of 25 U.S.C. §§ 461-479 (1976). *See* note 59 *supra.*

66. 417 U.S. at 542 (quoting *Hearings on S. 2755 Before the Senate Committee on Indian Affairs,* 73d Cong., 2d Sess. pt. 1, 26 (1934) (remarks of John Collier, Commissioner of Indian Affairs)).

67. 417 U.S. at 543-44 (quoting 78 CONG. REC. 11,729 (1934) (remarks of Rep. Howard)).

68. 417 U.S. at 544.

69. The Court looked to previous statutes and executive orders that treated Indian preference as exceptions. *Id.* at 545-46. *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(b), 2000e-2(i) (1976) (preferential employment of Indians by Indian tribes on Indian reservations exempted from coverage). *See* Exec. Order No. 7423, 3 C.F.R. 189 (1935). The Court looked also to new Indian preference laws enacted after the 1972 Act. 417 U.S. at 548-49. *See, e.g.,* 20 U.S.C. §§ 887c(a), (d), 1119a (1976) (giving Indians preference in teacher training programs for Indian children).

70. 417 U.S. at 551-52.

71. U.S. CONST. art. I, § 8, cl. 3.

72. *Id.* art. II, § 2, cl. 2. In 1871 Congress passed a bill notifying the President that it would no longer consent to any treaties with the several Indian tribes. Act of Mar. 3,

lationship[73] between the federal government and the Indian tribes that came about as a result of the "conquest" of the Indians which left them "an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation."[74]

2. *Tribal Indians as a political rather than a racial group*

The Court characterized the preference not as a racial classification but as an employment criterion to allow Indians to participate in their own governance. "The preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activites are governed by the BIA in a unique fashion."[75] The Court continually referred to "tribal" Indians—it noted that the preference "is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."[76] The Court's analysis, then, is based on the political status of the Indian tribes and on the federal government's unique responsibility to the tribes.[77]

The political classification is useful only in describing the group to

---

1871, ch. 120, § 1, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (1976)). *See generally* Antoine v. Washington, 420 U.S. 194, 201–02 (1975).

73. *See* notes 16–19 and accompanying text *supra*.

74. *Mancari*, 417 U.S. at 552 (quoting Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

75. 417 U.S. at 554. The Court stressed the "sui generis" status of the BIA which made it unnecessary to deal with Indian preference statutes which did not relate to the Indian agency. *Id.* The rationale of *Mancari* has been applied, however, in other contexts. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976); notes 83–85 and accompanying text *infra*.

76. *Mancari*, 417 U.S. at 553 n.24. The eligibility criteria required that the individual be one-fourth or more degree Indian blood and a member of a federally recognized tribe. *Id. See also* 25 C.F.R. pt. 259 (1978).

77. *See* notes 16–19 and accompanying text *supra*. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), in which the Court indicates that the analysis used for Indian preference legislation will not be transferred to cases involving preferences for other minorities:

> We observed in [*Mancari*], however, that the legal status of BIA is *sui generis*. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to

whom the government owes a unique trust relationship.[78] This reltionship exists toward tribal Indians and those with ancestral ties to tribes,[79] but not toward all Indians as a racial group.[80]

make the BIA more responsive to groups . . . whose lives are governed by the BIA in a unique fashion.

Id. at 304 n.42 (quoting from *Mancari,* 417 U.S. at 554) (citations omitted).

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

79. United States v. John, 98 S. Ct. 2541 (1978); Morton v. Ruiz, 415 U.S. 199 (1973). Various federal regulations, particularly in 25 C.F.R., providing benefits to Indians include more than just members of politically operating tribes in the benefited class.

In part 16 of the regulations in 25 C.F.R., dealing with estates of the Five Civilized Tribes, "[t]he Term 'Indian of the Five Civilized Tribes' means an individual who is either an enrolled member of the Cherokee, Chickasaw, Choctaw, Creek or Seminole Tribes of Oklahoma, or a descendant of an enrolled member thereof." 25 C.F.R. § 16.1(d) (1978). Part 20, concerning financial assistance and social services programs defines "Indian" as meaning "any person who is a member or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe." *Id.* § 20.1(n).

Part 31 deals with federal schools for Indians:

> Enrollment in Bureau-operated schools is available to children of one-fourth or more degree of Indian blood reside [*sic*] within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs except when there are other appropriate school facilities available to them as hereinafter provided in paragraph (c) of this section.
>
> (b) Enrollment in Bureau-operated boarding schools may also be available to children of one-fourth or more degree of Indian blood who reside near the reservation when a denial of such enrollment would have a direct effect upon Bureau programs within the reservation.

Id. § 31.1(a).

Part 32 governs the administration of educational loans, grants and other assistance for higher education:

> Funds appropriated by Congress for the education of Indians may be used for making educational loans and grants to aid students of one-fourth or more degree of Indian blood attending accredited institutions of higher education or other accredited schools offering vocational and technical training who reside within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs. Such educational loans and grants may be made also to students of one-fourth or more degree of Indian blood who reside near the reservation when a denial of such loans or grants would have a direct effect upon Bureau programs within the reservation. After students meeting these eligibility requirements are taken care of, Indian students who do not meet the residency requirements but are otherwise eligible may be considered.

Id. § 32.1.

80. The United States clearly does not accept such a trust relationship toward Canadian, Mexican, or Guatemalean Indians.

It is important to note the test the Court applied in *Mancari:*

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[81]

Although it is clear that the Court has eschewed strict scrutiny,[82] it has nevertheless employed something more rigorous than minimal scrutiny. The permissible legislative purposes have been limited to those which fulfill Congress' unique obligation toward the Indians. In addition, although the Court requires that the special treatment be tied only "rationally" to the permissible purpose, the approach that the Court in fact undertook in *Mancari* suggests something more than minimum rationality.

Several questions remained unanswered after *Mancari.* Would the *Mancari* test be applied if the legislation, although designed to fulfill Congress' obligation to Indians, prejudiced an individual Indian? Must the legislation be limited to tribal members? To what extent would a court defer to a declaration by Congress that a particular act was enacted for the benefit of Indians?

B. Subsequent Cases

Three subsequent cases have provided some of the answers to (and left some confusion regarding) these questions.

1. Fisher v. District Court

In *Fisher v. District Court,*[83] all the parties to an adoption proceeding were members of the Northern Cheyenne Tribe. The plaintiffs were denied access to state courts on the grounds that the tribal court had exclusive jurisdiction. They contended that this denial of access constituted invidious discrimination in violation of the equal protection clause of the Montana Constitution.[84]

---

81. 417 U.S. at 555.

82. Although the "unique obligation toward the Indians" may be a compelling governmental interest, the classification need be tied only rationally to that end. *Id.* at 555. *See* notes 31–34 and accompanying text *supra.*

83. 424 U.S. 382 (1976) (per curiam).

84. The Montana Supreme Court held that the denial of access to the state court violated the equal protection provision of the Montana Constitution. Firecrow v. District

The Supreme Court rejected this claim and characterized the issue as a jurisdictional question between state and tribal courts. The solution depended on " 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,' "[85] a test first enunciated in the landmark case of *Williams v. Lee*.[86] Because state court jurisdiction over this adoption proceeding would clearly interfere with the tribe's powers of self-government, it was impermissible.[87]

In summarily rejecting the equal protection challenge, the Court noted that the "exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[88] The Court further noted that even in a situation in which an Indian plaintiff is denied access to a judicial forum which is available to a non-Indian, the different treatment is justified "because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."[89]

2. Delaware Tribal Business Committee v. Weeks

In *Delaware Tribal Business Committee v. Weeks*,[90] a federal

Court, 167 Mont. 149, 536 P.2d 190 (1975). Federal recognition of Indian tribes and the creation of the reservation preempt state authority from interfering with tribal self-government in matters affecting Indians within Indian country. Bryan v. Itasca County, 426 U.S. 373 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The state constitution would, therefore, not be applicable to a situation involving Indians on the reservation.

85. 424 U.S. at 386 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

86. 358 U.S. 217 (1959). The test has been relied upon by the Court in many cases since *Williams*. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168–73 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Kennerly v. District Court, 400 U.S. 423, 426–27 (1971).

87. *Fisher*, 424 U.S. at 387–89. Plaintiffs sought to invoke the jurisdiction of the state court in an effort to circumvent an order of the tribal court of the Northern Cheyenne Tribe that they allow the mother of their foster son to have temporary custody for six weeks during the summer. Plaintiffs wanted to adopt the boy in state court. *Id.* at 383.

88. *Id.* at 390. The quasi-sovereign status of Indian tribes was articulated by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See* note 17 *supra*.

89. 424 U.S. at 391.

90. 430 U.S. 73 (1977).

statute[91] providing for the disbursement of funds to certain Delaware Indians while excluding other Delawares was challenged as a violation of equal protection under the fifth amendment. The Supreme Court rejected an argument that the constitutionality of Congress' action presented a nonjusticiable political question because of Congress' pervasive authority to control tribal property provided for by the Constitution.[92] Regardless of the political nature of Congress' power, the Court may still examine Indian legislation in light of equal protection guarantees. " 'The power of Congress over Indian affairs may be of a plenary nature; but is not absolute.' "[93]

The Court applied the *Mancari* test to determine the validity of the distribution statute and found that it was "tied rationally" to Congress' obligation toward the Indians.[94] In so doing, the Court noted that Congress has traditionally been thought to have extensive constitutional power in the control and disbursement of tribal property.[95] Nevertheless, the Court analyzed the statute in some detail before concluding that it is rationally related to the trust purpose set out in *Mancari*.[96]

Weeks is significant in that it demonstrates that the Court will not summarily dismiss equal protection challenges to federal Indian legislation even when the legislation is in an area in which Congress' constitutional power with respect to Indians is greatest. Also, despite the fact that no Indian/non-Indian[97] classification was involved in *Weeks*,

91. 25 U.S.C. §§ 1291–1297 (1976).

92. 430 U.S. at 83–84.

93. *Id.* at 84 (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)).

94. 430 U.S. at 85.

95. *Id.* at 84. The Court noted that Congress may "differentiate among groups of Indians in the same tribe in making a distribution, . . . or on the other hand to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, United States v. Jim." *Id.* at 84–85 (citations omitted). The Court also quotes Felix Cohen for the proposition that the "authority of Congress to control tribal assets has been termed 'one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . . .' Cohen, Handbook of Federal Indian Law 94, 97 (1942)." 430 U.S. at 86.

96. Justice Stevens, in his dissent, argues that the statute lacks any reasonable explanation and does not "represent any rational attempt at 'fulfillment of Congress' unique obligation toward the Indians.' " 430 U.S. at 93 (quoting *Mancari*, 417 U.S. at 555). He notes that Congress' obligation toward Indians "surely includes a special responsibility to deal fairly with similarly situated Indians." 430 U.S. at 97 n.8.

97. Indian/non-Indian is used here in a racial sense because the plaintiffs in *Weeks*, although racial Indians, were not affiliated with any tribe. *Id.* at 77–78.

the Court applied the *Mancari* standard of review—whether the challenged classification has a rational relation to fulfillment of Congress' obligation toward Indians.[98]

3. United States v. Antelope

In *United States v. Antelope*,[99] decided two months after *Weeks*, the Supreme Court upheld the convictions of three Indian defendants for the murder of a non-Indian woman in the course of a burglary. Under the Major Crimes Act, federal law defined the murder as first-degree felony murder.[100] If the defendants had been non-Indian, they would have been subject to Idaho law which contained no felony-murder provisions and required proof of premeditation and deliberation for a conviction of first-degree murder.

The Indians, on appeal, contended that they were victims of dis-

98. "The standard of review most recently expressed is that the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . .' " *Id.* at 85 (quoting *Mancari*, 417 U.S. at 555).

99. 430 U.S. 641 (1977).

100. 18 U.S.C. § 1111 provides that "every murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery . . . is murder in the first degree." 18 U.S.C. § 1111 (1976).

Criminal jurisdiction on Indian reservations, because of the complexity inherent in a division of jurisdiction between state, federal, and tribal governments, presents a host of potential equal protection problems. Treatment of these complexities is beyond the scope of this article. *See* F. COHEN, *supra* note 41, at 358; Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975). Which court has jurisdiction and what law is applied are both dependent upon the nature of the crime, whether the victim is Indian or non-Indian, whether the defendant is Indian or non-Indian, and in which state (and even which reservation within the state) the crime occurs.

Of importance for the inquiry here, however, is a line of cases out of the courts of appeals decided since *Mancari* that have overturned convictions of Indian defendants because Indians were subject to harsher penalties than were non-Indians. *See* United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). *See also* Gray v. United States, 394 F.2d 96 (9th Cir. 1967). *But see* United States v. Analla, 490 F.2d 1204 (10th Cir.), *vacated and remanded on other grounds*, 419 U.S. 813 (1974).

In *Big Crow*, for example, the court held the statute unconstitutional on the ground that a non-Indian committing an assault on an Indian on a reservation would be subject to six months imprisonment under state law while an Indian would be subject to five years imprisonment under federal law. 523 F.2d at 957. The court found that, while special legislation had been upheld by the Supreme Court in *Mancari* when tied to the "fulfillment of Congress' unique obligation toward the Indians," it was difficult for the court "to understand how the subjection of Indians to a sentence ten times greater than

crimination "because of the racially based disparity of governmental burdens of proof" under federal and state law.[101] The Ninth Circuit Court of Appeals reversed the convictions.[102] The court thought that the federal guardianship of Indians could not justify a criminal statute that worked to the disadvantage of the Indian defendant.[103] Having placed the case outside the *Mancari* rule, the court strictly scrutinized the law and found that the defendant had been subject to invidious racial discrimination.[104]

In reversing the court of appeals, the Supreme Court rejected the claim that the statute put Indians at a racially based disadvantage. The essential question was whether legislation which may operate to disadvantage Indians can be tied to the fulfillment of the federal government's unique obligation to Indian tribes.[105]

The Court began by rejecting the claim that legislation which singles out Indian tribes for different treatment is based on racial classifications.[106] The Court relied on *Mancari* and *Fisher,* in which such legislation had been sustained against claims of racial discrimination on the ground of the important governmental purpose to further Indian self-government.[107] The situation in *Antelope* did not involve self-government; the issue was one of federal regulation of criminal

---

that of non-Indians is reasonably related to their protection." *Id.* at 959. The court suggested that strict scrutiny should be used when racial classifications "are used to impose burdens on a minority group rather than, as in *Mancari,* to help the group overcome traditional legal and economic obstacles." *Id.* at 959–60. The government would then have to demonstrate a compelling interest to justify the racial classification. In this situation, the government had "failed to offer any justification for this disparate treatment of Indians." *Id.* at 960. The court implied that a dual standard of review exists. If the legislation helped further the guardian-ward relationship, a rational basis test would be applied. Where a greater burden was placed on Indians than on non-Indians, strict scrutiny would be the proper standard of review. *Id.* at 959–60.

101. United States v. Antelope, 523 F.2d 400, 403 (9th Cir. 1975), *rev'd,* 430 U.S. 641 (1977).

102. *Id.* at 407.

103. *Id.* at 406. The court also rejected the argument that sufficient governmental justification can be found in the need for uniform federal law:

> [W]e view a possible legal fortuity based on location to be much less onerous than one based on the inherently suspect classification of race. Consistency in federal criminal law is ordinarily a highly laudable legislative objective, but not when it operates to deprive citizens of their right to equal treatment.

Id.

104. *Id.* at 403–05.

105. *See Mancari,* 417 U.S. at 555.

106. 430 U.S. at 641.

107. *See* Parts V–*A* & V–*B*–*1 supra.*

activity in Indian country.[108] The Court noted, however, that "principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[109]

Antelope may provide authority for expanding the holding of *Mancari* to permit special federal Indian legislation applicable to individual Indians, regardless of affiliation with a tribe. First, it should be noted that the foundation of both *Mancari* and *Fisher* was the relationship of the federal government with Indian tribes. The Court attempted to include the situation of the defendants in *Antelope* within this framework by stating that they were enrolled members of the tribe. Enrollment in a tribe, however, is not a requirement for the exercise of jurisdiction under the Major Crimes Act.[110] The Court declined to hold that the term "any Indian" in the statute means an enrolled tribal member.[111] The statute, then, appears to apply to Indians on the basis of race or ancestry.[112] Second, the Court stated that federal regulation of Indian "affairs" was not based on an impermissible classification.[113] The use of the term "affairs" rather than "tribes" also indicates potential validity of legislation directed at individual Indians.[114]

The Court's position regarding the deference granted Congress' extensive power to legislate regarding Indians is uncertain. Unlike

108. 430 U.S. at 646.

109. *Id.*

110. 18 U.S.C. § 1111 (1976).

111. 430 U.S. at 647 n.7.

112. The Court notes that there are situations in which the statute would not apply to an individual racially classified as an Indian, for example, members of terminated tribes, citing the Klamath Indians as elucidated in United States v. Heath, 509 F.2d 16 (9th Cir. 1974), as one example. 430 U.S. at 647 n.7. The Major Crimes Act was held not to apply to the Klamaths. It is significant that the Klamath Termination Act specifically provided that "statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe." 25 U.S.C. § 564(q) (1976). In the absence of such a statute, it is not at all clear that the Major Crimes Act would not be applicable to members of terminated tribes.

113. 430 U.S. at 646. However, the Court in discussing Public Law 280, 18 U.S.C. § 1162 (1976), states that "Congress' selective approach in § 1162 reinforces, rather than undermines the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution." 430 U.S. at 647 n.8. This statement stresses the federal guardianship relation to Indian tribes rather than the broad scope of "affairs."

114. See also United States v. John, 98 S. Ct. 2541 (1978), in which the Court upheld a racial-ancestral definition of Indian in 25 U.S.C. § 479 (1976). This statute was intended to provide benefits to, rather than to disadvantage, the Indians involved.

Weeks, the Court in *Antelope* presents no analysis of the rationale behind the Major Crimes Act to determine whether it bears, in reality, a rational relationship to the furtherance of the trust relationship. The Court thus apparently increases its deference to congressional judgment. In essence, the Court in *Antelope* seems to imply that Congress always acts in good faith, and any legislation enacted which singles out Indians for special treatment is presumptively valid—regardless of detriment or benefit to Indians.

The Court avoids the problem of the increased vulnerability of Indian defendants to a first-degree murder conviction by declaring that the Indians were subjected to the same body of law as "any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave."[115] This statement is misleading. A non-Indian who murders a non-Indian on the reservation is subject to state, not federal law.[116] As to him, the reservation is not a federal enclave, at least not for jurisdictional purposes. The race of the perpetrator and the victim determine whether state or federal law is applicable.[117]

In summary, the opinion may be said to expand the *Mancari* rule in three respects. First, the *Antelope* Court skirts the issue of a tribal relationship as a requirement for the application of the Major Crimes Act.[118] The guardian-ward relationship is premised on viewing Indian tribes as entities to which the federal government owes a unique responsibility. The Court finds that, since the defendants are tribal members, it need not address the question of whether the Act could constitutionally be applied to nontribal members, thus leaving a gap in its analysis.[119] Second, the Court does not engage in the means-end

115. 430 U.S. at 648. Federal enclaves also include national parks, military installations, and U.S. vessels on the high seas.

116. This is the result of the Court's holding in United States v. McBratney, 104 U.S. 621 (1882).

117. The Court reserved judgment on the issue of whether an Indian defendant could be subject to a different penalty than a non-Indian when tried in the same court for the same offense. 430 U.S. at 649 n.11. Such a situation was possible under the Major Crimes Act prior to its 1976 amendments. 18 U.S.C. § 1153 (1970) (amended 1976). Lower court decisions holding that a differing penalty is a denial of equal protection thus retain their precedential value. Of particular importance is United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied,* 424 U.S. 920 (1976), in which the Eighth Circuit Court of Appeals held that a statute that disadvantages Indians does not fulfill the federal guardianship purpose and is therefore outside the *Mancari* rule. The court in that case applied a strict scrutiny analysis. *Id.* at 959–60.

118. *See* notes 110–11 and accompanying text *supra.*

119. If a tribal relationship is required, then the Act would fit more squarely into the *Mancari* rationale. If not, the court is expanding *Mancari* to cover individual racial

analysis by which it decided *Mancari* and later *Fisher*. Finally, the *Mancari* rule is applied to a situation where Indians are clearly prejudiced. In *Fisher,* although the plaintiffs were denied access to the state courts, they were not denied a forum.[120] Furthermore, any detriment suffered by the plaintiffs in *Fisher* was balanced by the benefit realized by the tribe through the enhancement of the integrity of the tribal court. The counterbalancing benefits in *Antelope* are much more speculative and are left unexamined by the Court.

The purpose of legislation which singles out Indians should be viewed in the context of the trust relationship which was designed to protect Indians. The logic of *Mancari,* based on the federal guardianship of Indian tribes,[121] is weakened when utilized to uphold prejudicial rather than beneficial treatment of Indians. At some point the prejudice to Indians must be great enough to raise the issue whether the challenged federal action indeed furthers Congress' fiduciary obligation to Indians.[122] Legislation which operates to the disadvantage of Indians should be examined to determine if it is closely related to furthering this obligation. The Court in *Antelope* did not so examine the Major Crimes Act, choosing instead the use of broad generalizations which indicate that any legislation directed toward Indians is not based upon impermissible racial classification and is therefore presumptively valid. This is scrutiny at its most minimal. Indians were accorded the status of wards of the federal government because Congress, not local government, was thought better able to protect them.[123] This justifies the quasi-racial classification. If such is the case, only statutes which benefit and protect Indians ought to be sustained. Laws which place an individual at a disadvantage because he is an Indian are antithetical to the trust relationship.

Before discussing the equal protection analysis that should be applied to state laws concerning Indians, it will be useful to summarize the doctrine that has emerged from *Mancari, Fisher, Weeks,* and *Antelope*. Read together, *Mancari, Fisher,* and *Weeks* may be said to

---

Indians. This raises the spectre of racial classification, which was disavowed in *Mancari* on the logic that the legislation was directed toward tribal members.

120. The tribal court had jurisdiction to handle child custody matters. 424 U.S. at 384 n.5.

121. *See* Part V-*A supra.*

122. *See* United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied,* 424 U.S. 920 (1976); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). *See* note 100 *supra.*

123. United States v. Kagama, 118 U.S. 375, 383–84 (1886). *See also* Note, *Indian Civil Rights Task Force, Development of Tripartite Jurisdiction in Indian Country,* 22 KAN. L. REV. 351, 353–55 (1974).

express a unique equal protection analysis applicable to Indians. First, the legislation is not characterized as a racial classification but is instead intended to further the federal government's trust responsibility toward Indians who are presently members of tribes subject to the United States' trust relationship or who have ancestral ties to such members. Second, legislation is to be tested with a standard of review requiring it to be tied "rationally" to the fulfillment of Congress' "unique" obligation toward the Indians. The examination of the means chosen to achieve this purpose is somewhat greater than that under minimal scrutiny. The standard, however, appears to be one closer to the rational basis test than to strict scrutiny, especially in light of the results—*i.e.*, the statutes generally withstand constitutional challenge.

The *Antelope* decision is troublesome because of the minimal level of scrutiny employed and because of the questions left unanswered, although the principles of *Mancari* and *Fisher* were reaffirmed.

VI. STATE ACTION, INDIANS, AND EQUAL PROTECTION

The federal trust responsibility toward Indian tribes is the dominant factor that shapes equal protection analysis of federal laws about Indians. Although states do not share this same relationship toward Indians,[124] state laws that are enacted under the explicit authority of federal legislation, such as Public Law 280,[125] are deemed to be expressions of the federal trust responsibility and are judged by the same equal protection standards used in determining the validity of federal laws.[126]

124. "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. . . . States do not enjoy this same unique relationship to Indians . . . ." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 99 S. Ct. 740, 761 (1979).

125. 18 U.S.C. § 1162 (1976); 28 U.S.C. § 1360 (1976).

126. Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 99 S. Ct. 740 (1979). The Court said that a Washington state law enacted pursuant to Public Law 280 was authorized under a federal law enacted in the exercise of Congress' plenary power over Indians. *Id.* at 746. The state law imposed state jurisdiction over (1) non-Indians on all lands of Indian reservations within the state, (2) Indians on fee patent lands on reservations, and (3) Indians on trust lands on reservations for eight subject-matter areas. The Ninth Circuit Court of Appeals had struck down this law as a violation of the fourteenth amendment equal protection clause. Confederated Bands & Tribes of the Yakima Indian Nation v. Washington, 552 F.2d 1332 (1977). It had found that the statutory classification was not on its face racially discriminatory and was not

The federal government has, through statutes and treaties, preempted most of the field of Indian affairs. It is not surprising, therefore, to find very few cases raising Indian equal protection issues in connection with state laws or administrative actions that are not derivative from federal laws.[127]

It is clear that states can enact legislation and take administrative action to implement Indian treaty rights and that such action does not violate the fourteenth amendment equal protection clause.[128] Going one step further, the Minnesota Supreme Court held that a settlement between an Indian tribe and the state did not violate the equal protection clause.[129] The settlement, which was ratified by state law, resolved an issue in litigation between the tribe and the state and gave to the Indians fishing rights not shared by non-Indians. The court used the standard rational basis test to determine the validity of the state law. Because the settlement agreement and ratifying law were designed to preserve the fishery resource for the people of the state and

---

adopted to mask racial discrimination. *Id.* at 1334. However, the court found that the title-based assumption of state jurisdiction could not meet even the rational basis test. The Washington Attorney General had identified the purpose of the legislation as providing criminal jursidiction over areas where the state "has the most fundamental concern for the welfare of those least able to care for themselves." *Id.* at 1334. The Ninth Circuit, however, could not detect any rational connection between this or any other valid purpose, and the imposition of state jurisdiction based on land title within the reservation. The court said the state's interest in enforcing criminal law was no less "fundamental" or "overriding" on nonfee lands than on fee lands, and held that this checkerboarding of jurisdiction on reservations was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 1336. The Supreme Court rejected this reasoning and ruled that a rational basis existed for the state law and that it did not violate fourteenth amendment equal protection principles. 99 S. Ct. at 762.

127. Only two such cases have been found. Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978); State v. Forge, 262 N.W.2d 341 (Minn. 1977). In Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 51 P.2d 1373 (1977), *cert. granted,* 99 S. Ct. 276 (1978), the Washington court erroneously characterized the issue as one involving state action involving the fourteenth amendment, when, in fact, it involved federal action and raised a fifth amendment question. *See* notes 150–51 and accompanying text *infra.*

128. Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977).

129. State v. Forge, 262 N.W.2d 341 (Minn. 1977). The court upheld a Minnesota law requiring non-Indians to pay a special license fee and secure a reservation stamp on their fishing licenses to fish on the reservation. The State Commissioner of Natural Resources collects the fee. Treaty Indians are exempt from payment of the fee. The statute was the result of a settlement agreement between the Indians and the state following lengthy litigation to determine the Indians' right to fish on the reservation. *See* Leech Lake Citizens Comm. v. Leech Lake Band of Chippewa Indians, 355 F. Supp. 697 (D. Minn. 1973). Non-Indian fishermen claimed the statute denied them equal protection under both the fourteenth amendment and the Minnesota Constitution because it exempted tribal members from paying the fee.

to compensate the Indians for their treaty rights, the court found that the classification was "reasonably related" to the resolution of the competing claims of the parties.[130] Upholding Indian treaty rights was held to be a valid state purpose for enactment of such legislation.[131]

States do not have the same trust relationship toward Indians as the federal government, and thus the equal protection analysis applied to state action would ordinarily differ from that applied to federal legislation. One court has held, however, that under the right circumstances the special federal relationship toward Indians also enables a state to single out tribal Indians for preferential treatment.[132] This presents some analytical problems. While it is not invalid for the state to adopt a protective attitude toward the tribes, a trust relationship between states and Indians has never been recognized by Congress or the Supreme Court. It is not clear, therefore, that because Indian preferential treatment is constitutional for the federal government, it is valid for a state.[133] The Court in *Mancari* stresses the unique status of

130. State v. Forge, 262 N.W.2d 341, 348 (Minn. 1977).

131. *Id.*

132. Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978). Plaintiffs challenged the constitutionality of state administrative action involving Indians. The Museum of New Mexico, a state owned and operated facility, had a policy of allowing only Indians to sell their crafts under its veranda. Two non-Indians challenged this policy as a violation of the equal protection clause of the fourteenth amendment. The court rejected this challenge. The court said the museum was established to preserve New Mexico's "multicultural traditions." Although the policy favoring Indian vendors was not limited to New Mexico Indians, it was limited to members of federally recognized tribes. Looking to the importance to the tribal Indians of the income derived from the sales, the court found a link between the museum's program and the national policy of encouraging Indian self-determination. The Indians were "the only remaining, relatively unchanged craftsmen of the original group who sold their wares under the portal," thus satisfying the purpose of the museum's policy which was to advance native art, "give impetus to the communities from which these arts arise, educate the public, and protect a unique tradition from assimilation so as to maintain, as best they can, its purity." *Id.* at 829.

The court rejected the argument that this preference was racial in nature, concluding instead that it was political and cultural, and saying that the state, as well as the federal government, had an obligation to insure the political, economic, and cultural survival of Indian tribes. *Id.* at 831.

133. There is nothing in the history of tribal-state relations to suggest any consistent altruistic attitude of most states toward Indians. Indeed, the opposite has often been the case. *See* United States v. Kagama, 118 U.S. 375 (1886). *See generally* W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS—REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN (1966).

The historic attitude of some states toward Indians is perhaps adequately demonstrated by the following quote:

> The premise of Indian sovereignty we reject. The treaty is not to be interpeted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. . . . Only that title was esteemed which came from white men, and the rights of

Indians in the context of federal action. Preferential state policy should ordinarily be sustained, if at all, on the basis of its relationship to other valid state interests, without putting the state in the same relationship to Indians as the federal government.[134]

VII. EQUAL PROTECTION AND TREATY RIGHTS

In addition to federal law, treaties are a source of many rights guaranteed to Indians. Treaties are analogous to contracts, inasmuch as the treaty is an exchange of promises that then operates as the law by which the parties agree to be bound.[135] Rights established in treaties are, by definition, not guaranteed to those who are not parties.

Members of treaty-signing Indian tribes are guaranteed rights and benefits not shared by nonmembers. The existence of special Indian treaty rights, especially rights to limited resources such as water or fish, has at times had a significant impact on non-Indians wishing to use the same resource.[136] Several recent cases have questioned

---

these have always been ascribed by the highest authority to lawful discovery of lands, occupied, to be sure, but not owned by anyone before. . . .

The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. . . .

These arrangements [for treaties and reservations] were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

State v. Towessnute, 89 Wash. 478, 481-82, 154 P. 805, 807 (1916). A recent example of a state court's hostility toward Indian sovereignty can be found in Brough v. Appawora, 553 P.2d 934 (Utah 1976), *vacated and remanded, mem.*, 431 U.S. 901 (1977).

134. It should be noted that, even if insuring the survival of Indian culture may be articulated as a valid state interest, the state action cannot conflict with federal law which would preempt state law. *See generally* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

135. *See* D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 30-32 (1972); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 608-19 (1975). At the risk of over-extending the analogy, it might be noted that contracts between a government and its citizens or corporations have never been thought to raise equal protection issues with respect to contracting and noncontracting citizens.

136. *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908) (water); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *cert. granted*, 99 S. Ct. 277 (1978) (fishing).

whether either the treaties themselves,[137] or state classifications required by the treaties,[138] are a denial of equal protection to non-Indians.

No treaty of any sort has ever been invalidated because it violated equal protection principles.[139] Treaties are normally made with foreign nations, thus, equal protection of the laws is inapposite. Treaties with Indian tribes, however, do involve the federal government and groups of its own citizens.[140] Nevertheless, there is little or no theoretical basis for equal protection challenges to Indian treaties themselves. The Constitution provides for treaty-making power,[141] and the Supreme Court has repeatedly enforced Indian treaties as a valid exercise of that constitutional power. Indeed, treaty rights are part of "Congress' unique obligation toward the Indians" that justifies special federal legislation favoring Indians.[142]

In order to fulfill Indian treaty rights, many statutes and regulations necessarily treat Indians and non-Indians differently.[143] When

137. *See* Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 571 P.2d 1373 (1977), *cert. granted,* 99 S. Ct. 276 (1978).

138. *See* State v. Forge, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed,* 435 U.S. 919 (1978); Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 548 P.2d 1058 (1976), *vacated and remanded,* 433 U.S. 165 (1977).

139. *But see* Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 571 P.2d 1373 (1977), *cert. granted,* 99 S. Ct. 276 (1978).

Because treaties are federal law, any equal protection analysis of them would be under the fifth amendment rather than the fourteenth amendment. *See* note 39 *supra.* Challenges to treaties may be nonjusticiable issues. *Cf.* Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977) (challenge to congressional settlement of an Indian claim arising out of treaty rights held to be a justiciable issue).

140. All Indians are now United States citizens. 8 U.S.C. § 1401(a)(2) (1976).

There have been no new treaties with Indian tribes since 1871, when Congress proscribed any additional treaties. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 21 (1976)).

141. U.S. CONST. art. VI, §2.

142. *Mancari,* 417 U.S. at 555. *See* notes 70–74 and accompanying text *supra.*

Some equal protection challenges to treaties are based on a false premise that the treaty granted a special benefit to tribal Indians. The Supreme Court has held that many treaty rights, rather than being grants from Congress, are reserved rights that tribes have always possessed. United States v. Winans, 198 U.S. 371 (1905). The Court has held that the reserved rights of Indian tribes are valid against all but the federal government. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Even those treaty rights which might be said to be a grant of a benefit to Indians constitute consideration to Indians for the cancellation of Indian claims to vast areas of land. *See* United States v. Washington, 384 F. Supp. 312, 333 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), *cert. granted,* 99 S. Ct. 277 (1978); F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834, at 43–50 (1962).

143. *See* cases cited in notes 136–39 *supra,* and notes 166–68 and accompanying text *infra.*

federal laws are involved, the *Mancari* analysis is clearly appropriate.[144] In light of the holding in *Washington v. Yakima Tribes,*[145] the *Mancari* rule appears to be appropriate in cases involving state laws as well. If state laws permitted by federal enabling legislation are tested in light of a rational relation to the fulfillment of the government's obligation toward Indians, then state laws required by federal treaties should be entitled to no less deference. An examination of a series of state and federal cases involving Indian fishing rights in the state of Washington[146] perhaps best illustrates the present state of law in this area.

In 1974, a federal district court held that certain 1855 treaties[147] guaranteed signatory Indian tribes the opportunity to take up to 50% of the harvestable salmon and steelhead in treaty waters instead of about 4% which they had taken in the past under state law.[148] Subse-

144. *See* Part V *supra.*

145. 99 S. Ct. 740 (1979). *See* notes 124–26 and accompanying text *supra.*

146. For general treatment of this controversy, see AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY (1967); Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 WASH. L. REV. 207 (1972); Comment, *Indian Treaty Analysis and Off-Reservation Rights: A Case Study,* 51 WASH. L. REV. 61 (1975).

147. The treaties were all negotiated by Territorial Governor Isaac Stevens with different Indian tribes and bands in the Pacific Northwest in 1854 and 1855. The treaties are: Treaty with the Nisqually and Other Indian Tribes, Dec. 26, 1854, 10 Stat. 1132 (Treaty of Medicine Creek); Treaty with the Duwamish and Other Indian Tribes, Jan. 22, 1855, 12 Stat. 927 (Treaty of Point Elliott); Treaty with the S'kallam and Other Indian Tribes, Jan. 28, 1855, 12 Stat. 933 (Treaty of Point No Point); Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939 (Treaty of Neah Bay); Treaty with the Yakima and Other Indian Tribes, June 9, 1855, 12 Stat. 951 (Treaty of Camp Stevens); Treaty with the Quinaielt and Other Indian Tribes, July 1, 1855, 12 Stat. 971 (Treaty of Quinaielt River). The Treaty of Medicine Creek provides that "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory." 10 Stat. 1132, 1133. Each of the other treaties contains a virtually identical provision. These provisions were intended to preserve Indian fishing rights at traditional off-reservation sites. United States v. Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), *cert. granted,* 99 S. Ct. 277 (1978).

148. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), *cert. granted,* 99 S. Ct. 277 (1978). The court also interpreted the treaty as entitling the treaty tribes to take fish for subsistence and ceremonial purposes. *Id.* at 343. The off-reservation treaty fishing right was construed as meaning the treaty Indians were entitled to the *opportunity* to harvest up to 50%. *Id.* In fact, to date they have only increased their take of the total Washington landing from about 4% in 1971 to about 18% in 1978. Brief of Respondents, United States v. Washington, 99 S. Ct. 277 (1978). The off-reservation entitlement is in addition to the on-reservation catch of fish which generally cannot be regulated at all by the state. *But see* Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977).

Because this article concerns the equal protection issue, it will not analyze the ques-

quently, several non-Indian fishermen's organizations brought suit in Washington courts to prevent the State Directors of the Department of Fisheries from implementing the federal district court decision.[149] In the most recent of these cases to reach the Washington Supreme Court, *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,*[150] the court held that the allocation of a proportionally unequal percentage of harvestable fish to treaty Indians was a denial of equal protection to non-Indians under the fourteenth amendment to the U.S. Constitution.[151] This is a position that the

---

tion whether the treaties were intended to guarantee to the Indians 50% or some other specific portion of the salmon and steelhead runs in treaty waters. The treaty interpretation issue has been examined exhaustively by the federal courts. *See* Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir.), *cert. granted,* 99 S. Ct. 277 (1978); Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), *cert. granted,* 99 S. Ct. 277 (1978). The Washington State Supreme Court has also examined the issue. Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 548 P.2d 1058 (1976), *vacated and remanded,* 433 U.S. 165 (1977).

The background of the Indian fishing rights cases is explored in depth in Comment, *Accommodation of Indian Treaty Rights in an International Fishery: An International Problem Begging for an International Solution,* 54 WASH. L. REV. 403 (1979).

149. Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 571 P.2d 1373 (1977), *cert. granted,* 99 S. Ct. 276 (1977); Purse Seine Vessel Owners Ass'n v. Moos, 88 Wn. 2d 799, 567 P.2d 205 (1977); Puget Sound Gillnetters Ass'n v. Moos, 88 Wn. 2d 677, 565 P.2d 1151 (1977), *cert. granted,* 99 S. Ct. 276 (1978).

Reacting to the anger of the non-Indian fishing organizations at the decision in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), *cert. granted,* 99 S. Ct. 277 (1978), agencies of the state of Washington took administrative action designed to thwart the Indians' rights. This prompted the Ninth Circuit Court of Appeals to comment, "[e]xcept for some desegregation cases [citations omitted], the district court [that decided *United States v. Washington*] has faced the most concerted official and private efforts to frustrate the decree of a federal court witnessed in this century." Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir.), *cert. granted,* 99 S. Ct. 277 (1978).

150. 89 Wn. 2d 276, 571 P.2d 1373 (1977), *cert. granted,* 99 S. Ct. 276 (1978). For an analysis of other issues in the case see Note, *The Interaction of Federal Equitable Remedies with State Sovereignty,* 53 WASH. L. REV. 787 (1978).

151. The Washington court has voiced this opinion with increasing conviction over the past ten years. *See* Puget Sound Gillnetters Ass'n v. Moos, 88 Wn. 2d 677, 684, 565 P.2d 1151, 1154 (1977), *cert. granted,* 99 S. Ct. 276 (1978); Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 680-81, 548 P.2d 1058, 1070 (1976), *vacated and remanded,* 433 U.S. 165 (1977); Department of Game v. Puyallup Tribe, Inc., 70 Wn. 2d 245, 252, 422 P.2d 754, 759 (1967). In Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968), Justice Douglas, for the majority, said that "any ultimate finding" on the validity of fish conservation laws "must also cover the issue of equal protection implicit in the [treaty] phrase 'in common with.'" *Id.* at 403.

The Washington court misconceived the nature of the equal protection issue. An In-

Washington court had previously taken in *Department of Game v. Puyallup Tribe, Inc.*[152] That decision was vacated about the time *Tollefson* was decided.[153] Although the soundness of *Tollefson* is questionable in light of the U.S. Supreme Court decision in *Puyallup Tribe, Inc. v. Department of Game*[154] *(Puyallup III),* it may provide some limited authority for the proposition that Indian treaties are subject to equal protection limitations.[155]

Three cases brought by the Washington State Department of Game

---

dian treaty cannot violate the fourteenth amendment to the federal Constitution. That amendment applies only to state action. The treaty is federal action. Nor can there be an issue in this case of state laws or administrative actions violating the fourteenth amendment. Under the supremacy clause, federal law, including treaties, preempts state law, even state constitutional law. U.S. CONST. art. VI, § 2. Thus, the real question is whether the treaties, which constitute federal action, violate the fifth amendment to the federal Constitution. The fifth amendment analysis, however, is virtually identical to that under the fourteenth. *See* note 39 *supra.*

152. 86 Wn. 2d 664, 680-81, 548 P.2d 1058, 1070 (1976), *vacated and remanded,* 433 U.S. 165 (1977).

153. 433 U.S. 165 (1977).

154. *Id.*

155. The limited authority for this proposition represented by *Tollefson* is further eroded by the weakness of the Washington court's analysis. The court begins by defining the issue as whether "Congress and the executive department, by treaty, or . . . a court of law, in interpreting a treaty, [may] ignore and supersede provisions of the federal constitution." 89 Wn. 2d at 279, 571 P.2d at 1375. The question as phrased clearly begs the issue and requires a "no" answer. Certainly no treaty or act of Congress can "ignore and supersede" provisions of the Constitution. Reid v. Covert, 354 U.S. 1 (1957); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 169-70 (1978).

The *Tollefson* court proceeds to argue that the treaty itself violates the fourteenth amendment by use of the following analogy:

> We think there can be no doubt that were the executive department to enter into a treaty with a foreign nation or were the Congress to pass a law which allocated a portion of the states' natural resources to a group of its citizens, based on their race or ancestry, that provision would be struck down as a denial of equal protection.

89 Wn. 2d at 281, 571 P.2d at 1376. The analogy clearly misses the mark on several accounts. First, the treaty did not allocate resources to citizens of a state, both because Washington was not a state in 1855 when the treaty was signed, *see* note 147 *supra,* and, more importantly, because Indians were not citizens, but rather members of sovereign entities. Second, the basis of the allocation is not race or ancestry but membership in the political entity of the tribe. *See Mancari,* 417 U.S. at 553 n.24, 554; *Tollefson,* 89 Wn. 2d at 299-300, 571 P.2d at 1385-86 (Utter J., dissenting). Finally, instead of being struck down as a denial of equal protection, Indian treaty rights have repeatedly been upheld and enforced by the U.S. Supreme Court. *See, e.g.,* Puyallup Tribe Inc. v. Department of Game, 433 U.S. 165 (1977); United States v. Winans, 198 U.S. 371 (1905).

The *Tollefson* court also concludes, in rather novel fashion, that the federal court's interpretation of the treaty violates the fourteenth amendment. 89 Wn. 2d at 285-86, 571 P.2d at 1378. It is not clear how a judicial interpretation itself, as distinguished from the statute or treaty as interpreted, violates equal protection principles. But if true, it would imply that when a court makes an incorrect ruling on an equal protection issue, it has

against the Puyallup Tribe, commonly referred to as *Puyallup I*,[156] *Puyallup II*,[157] and *Puyallup III*,[158] seem to have established, however, that the Supreme Court will not entertain equal protection challenges to Indian treaties.

In *Puyallup I* the Supreme Court held that the off-reservation fishing rights of treaty Indians could be regulated when necessary for conservation.[159] In the last sentence of the opinion Justice Douglas, for the majority, said that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the [treaty] phrase 'in common with.' "[160]

When this case again reached the Washington Supreme Court, the majority ruled that treaty Indians do have special off-reservation fishing rights not shared by non-Indians.[161] The court approved state fisheries department regulations allowing treaty Indians to fish for salmon in the Puyallup River at different times and with different equipment than non-Indians.[162] The court banned entirely, however, Indian net fishing for steelhead in the river.[163] The two dissenting justices explicitly raised the equal protection issue, arguing that the majority's decision recognizing special rights in treaty Indians "not only deprives citizens of the equal protection of the laws, but grants to some Indians as a class immunities and privileges not enjoyed by all citizens, including most Indians—all in violation of the Fourteenth Amendment."[164]

On appeal the United States Supreme Court reversed that part of

---

not merely committed reversible error, but may also have violated either the fifth or fourteenth amendments.

Finally, although retaining its precedential value at least in Washington, the *Tollefson* decision received the following criticism from the Ninth Circuit Court of Appeals:

> We reject [the Washington Supreme Court's equal protection arguments] for the reasons given [herein] and in Justices Horowitz' and Utter's dissents: We assume that the Washington court has unwittingly misconstrued the basic concepts of Indian law and failed to understand a long line of Supreme Court decisions beginning with *United States v. Winans*.

Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1128–29 n.5, *cert. granted*, 99 S. Ct. 277 (1978) (citations omitted).

156 Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

157. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973).

158. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977).

159. 391 U.S. at 398.

160. *Id.* at 403.

161. Department of Game v. Puyallup Tribe, Inc., 80 Wn. 2d 561, 571, 497 P.2d 171, 178 (1972), *rev'd and remanded*, 414 U.S. 44 (1973).

162. *Id.* at 570, 497 P.2d at 177.

163. *Id.* at 576, 497 P.2d at 180.

164. *Id.* at 579, 497 P.2d at 182 (Hale, J., dissenting).

the state court decision approving the total ban on net fishing, saying that the state had failed to show that a complete ban on treaty Indian steelhead net fishing was necessary for conservation.[165] The Court remanded the case to allow the state to come up with a formula that "fairly apportioned" steelhead between Indian net fishing and non-Indian sports fishing.[166] The Court did not discuss the state court dissenters' equal protection argument. To the contrary, the Court held that the total ban on Indian net fishing was discrimination under the treaty "because all Indian net fishing is barred and only hook-and-line fishing entirely preempted by non-Indians is allowed."[167] Thus, in light of Indian treaty rights, the state could avoid discriminating against Indians only by making special provisions for them.

Subsequent regulations allocated 45% of the natural steelhead run to the Puyallup Indian Tribe for their off-reservation fishing sites. The Washington Supreme Court in reviewing this allocation ruled that both the fourteenth amendment equal protection clause and the treaty language prohibited treating Indians and non-Indians differently, but that if the United States Supreme Court rejected this reasoning then an allocation of 45% to the Indians met the *Puyallup I* and *Puyallup II* criteria.[168] The United States Supreme Court approved the 45% allocation, but again failed to discuss the equal protection issue.[169]

That the Supreme Court in the three *Puyallup* cases ignored the equal protection arguments made by the Washington court argues with considerable force that the Court believes equal protection principles are not a basis for challenging Indian treaty rights. At the very least, the Court has upheld a preferential right to catch fish for members of a treaty tribe and required state action to implement that right.

VIII. THE INDIAN CIVIL RIGHTS ACT OF 1968

The Indian Civil Rights Act[170] (ICRA) was enacted in 1968 and contains an equal protection clause.[171] This clause, copied substan-

165. *Puyallup II*, 414 U.S. 44 (1973).
166. *Id.* at 48–49.
167. *Id.* at 48.
168. Department of Game v. Puyallup Tribe, Inc., 86 Wn. 2d 664, 681, 687–88, 548 P.2d 1058, 1070, 1074 (1976), *vacated and remanded*, 433 U.S. 165 (1977).
169. *Puyallup III*, 433 U.S. 165 (1977).
170. 25 U.S.C. §§ 1301–1341 (1976).
171. *Id.* at § 1302(8).

tially from the fourteenth amendment to the federal Constitution,[172] constrains all three branches of tribal governments—legislative, executive, and judicial—and protects non-Indians as well as Indians.[173] Not surprisingly, the federal courts' interpretation of the ICRA equal protection clause has drawn upon both traditional equal protection doctrine and the analysis developed by the courts in fifth amendment equal protection cases involving Indians.

Long before the ICRA, the case of *Talton v. Mayes*[174] held that the grand jury requirement of the federal Bill of Rights did not apply to Indian tribal governments. The rationale was that because Indian tribes derive their governing authority from inherent sovereignty rather than from the Constitution, the Bill of Rights does not apply to them.[175] As a result of alleged abuses of civil liberties by some Indian

---

172. The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The constitutional provision differs from the ICRA provision in that the latter guarantees "the equal protection of its [the tribes] laws," rather than "the laws." This difference was noted by the Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57, 62 n.14 (1978). No court, however, has yet relied on this difference to produce a different result.

173. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975); Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).

174. 163 U.S. 376 (1896).

175. *Id.* at 989–90. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). There the Court said:

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes* . . . this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed by the tribes." . . . In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.

Id. at 56. The court cited, *inter alia,* Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (due process clause of the fourteenth amendment); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (freedom of religion under first and fourteenth amendments); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1959), *cert. denied,* 358 U.S. 932 (1959) (fourteenth amendment). *But see* Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), *cert. denied,* 398 U.S. 903 (1970); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965). Both cases held that when a tribal court was so pervasively regulated by a federal agency that it was, in effect, a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution. The Court in *Martinez* also noted that "[t]he line of authority growing out of *Talton,* while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal Governments, of course does not relieve State and Federal Governments of the obligations to individual Indians under these provisions." 436 U.S. at 56 n.7. *See also* United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.3 (1978).

governments, Congress enacted the Indian Civil Rights Act in 1968, thus statutorily applying selected constitutional limitations to Indian tribes.[176]

A. Access to Federal Courts

Prior to *Santa Clara Pueblo v. Martinez*,[177] the federal courts had held that the ICRA waived tribal sovereign immunity and that a tribe could be enjoined in federal court from violating the provisions of the ICRA.[178] The Supreme Court in *Martinez*, however, held that habeas corpus was the exclusive basis for federal court jurisdiction to test tribal violations of the ICRA.[179] This remedy is traditionally available only when the plaintiff is in custody.[180] Thus, while the ICRA limits tribal government action,[181] a person complaining of a violation of the ICRA will generally have recourse only to the tribal court or the tribal government, unless habeas corpus is available.[182] Access to fed-

176. 25 U.S.C. §§ 1301-1303 (1976). The Supreme Court has observed:

> The provisions of § 1302 [of the Act] differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were omitted entirely. The provision here at issue, § 1302(8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of "the laws". Moreover, § 1302(7), which prohibits cruel and unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a $500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n.14 (1978). In addition, the ICRA provides that a defendant in tribal court is entitled "at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(6) (1976). Under the right to counsel provision found in the sixth amendment, as construed by the Supreme Court, an indigent defendant charged with a crime in a state or federal court where imprisonment is a possible punishment must be provided counsel at the expense of the government. Argersinger v. Hamlin, 407 U.S. 25 (1972).

177. 436 U.S. 49 (1978).

178. Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Daly v. Crow Creek Sioux Tribe, 483 F.2d 700 (8th Cir. 1973); McCurdy v. Steele, 353 F. Supp. 629 (W.D. Wash. 1973); Seneca Constitutional Rights Organization v. George, 348 F. Supp. 48 (W.D. N.Y. 1972).

179. 436 U.S. 66-70.

180. *See, e.g.*, Parker v. Ellis, 362 U.S. 574 (1959).

181. *Martinez*, 436 U.S. at 57.

182. When the plaintiff is in custody the court often applies stricter standards of due process and equal protection than it does in nonhabeas corpus cases. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

eral courts generally cannot be obtained, for example, for issues involving denial of enrollment in the tribe, voting rights, election apportionment, taxation, or zoning.[183]

The ten years of lower federal court decisions applying the ICRA to nonhabeas corpus issues nevertheless merit attention. These opinions are likely to provide the standards of due process and equal protection that federal courts will apply in ICRA habeas corpus cases, and to indicate the extent to which these standards differ from the traditional standards. The standards developed in the pre-*Martinez* decisions will also provide helpful, although not binding, authority for Indian courts interpreting the ICRA. Finally, the principles developed in these cases can provide a basis for future evaluation of the ICRA to determine whether it has achieved a proper balance between the rights of the individual and the interests of the tribe in preserving tribal customs and traditions.[184]

B. Standard of Equal Protection: Balancing Tribal Culture Against Individual Rights

The ICRA does not include all of the civil rights guarantees of the U.S. Constitution, nor is the language of those that are included identical to the wording in the Constitution.[185] The intent of Congress in enacting the ICRA was to guarantee individual rights with a mini-

183. *See Martinez*, 436 U.S. at 71.

184. Sooner or later Congress is likely to review tribal court experience under the ICRA to determine whether the present scope of federal court review should be broadened or whether substantive changes in the ICRA are needed. As Justice Marshall wrote for the majority in *Martinez*, "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." *Id.* at *72*.

Most Indian courts are not yet courts of record. NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS OF THE FUTURE (1978). Even fewer have appellate courts that regularly publish opinions. Thus their decisions on ICRA or on other questions are not readily available in printed form. A trend is now apparent to make more Indian courts courts of record and to publish Indian appellate court decisions. Any congressional review of the ICRA should, of course, examine these sources. Such a review will also have to rely on testimony of participants and observers in the Indian court process regarding application of ICRA principles, as Congress did when considering the ICRA itself. SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON CONSTITUTIONAL RIGHTS OF AMERICAN INDIANS, 88th Cong., 2d Sess. (1964). *See* Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557 (1972).

185. *See* note 176 *supra*.

mum infringement on tribal self-determination.[186] Courts interpreting the ICRA equal protection clause are faced with the problem of developing a standard of review that properly balances tribal and individual interests. The Supreme Court has not provided any definitive answer to this question. Its most substantial comment appears in *Martinez* when the court said, "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters," referring to the right of a tribe to define its own membership.[187] The Court was reluctant to "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[188]

In the absence of a conclusive answer, the lower federal court decisions have varied considerably.[189] However, they have generally accorded considerable weight to Indian cultural autonomy and traditional values and have given considerable deference to the judgment of tribal governments.[190] A careful and complete treatment of

186. Three court of appeals opinions have cited with approval a statement contained in a report by a Senate subcommittee:

> 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., the 15th amendment, certain of the procedural requirements of the 5th, 6th, and 7th amendments, and, in some respects, the equal protection requirement of the 14th amendment.

SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS, PURSUANT TO S. RES. 194, 25 (Comm. Print 1966). *See* Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975); White Eagle v. One Feather, 478 F.2d 1311, 1313 (8th Cir. 1973); Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971).

Reliance on this language is misplaced. The subcommittee was discussing a different version of the equal protection clause that was not enacted into law. This earlier version prohibited denial of equal protection to "members of the tribe." This explains why the subcommittee said the fourteenth amendment equal protection requirement applies only "in some respects." The enacted law prohibits denial of equal protection to any "person." *See* Burnett, *supra* note 184, at 602 n.239.

187. 436 U.S. at 72 n.32 (dictum).

188. *Id.* at 71–72 (dictum).

189. For examples of different approaches used by federal courts, see Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S. DAK. L. REV. 1 (1975). *See also* de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S. DAK. L. REV. 59 (1975). *Cf.* Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (1974) (court has power to set aside tribal action but could not substitute its judgment on merits for that of the tribe).

190. *See, e.g.*, Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1975), *rev'd on other grounds*, 436 U.S. 49 (1978); Howlett v. Salish & Kootenai Tribes, 529

this issue is contained in the opinion of the Court of Appeals for the Tenth Circuit in *Martinez v. Santa Clara Pueblo*.[191] Although this decision was reversed by the Supreme Court on other grounds, the Court nonetheless confirmed the ICRA equal protection analysis of the lower federal courts.[192]

1. Tribal enrollments

In *Martinez*, Mrs. Martinez, a member of the Santa Clara Pueblo, asserted that a tribal ordinance denying tribal enrollment of her children violated the equal protection clause of the ICRA. Her husband was a non-Santa Claran. The ordinance permitted enrollment of the children of male, but not the children of female, Santa Clarans who married outside the tribe. Holding that the ordinance did not violate the ICRA equal protection section, the district court ruled for the tribe.[193] That court's rationale was that restriction of the Pueblo's ability to determine tribal membership would threaten its culture because the male-female distinction was rooted in the Pueblo's patrilineal and patrilocal tradition.[194]

The circuit court of appeals reversed.[195] The court extensively reviewed the legislative history of the ICRA and concluded that Congress intended to temper the normal application of equal protection principles where the cultural autonomy and integrity of the tribe would be unduly impacted.[196] The court then adopted a "comparative weighing," or balancing, approach, saying:

> [T]he scope, extent and importance of the tribal interest is to be taken into account. The individual right to fair treatment under the law is likewise to be weighed against the tribal interest by considering the clearness of the guarantee together with the magnitude of the interest. . . .
>
> . . . . .
>
> . . . The concern of Congress was to protect against serious deprivations of constitutional rights while giving as much effect as the facts would allow to tribal autonomy.

F.2d 233 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Daly v. Crow Creek Sioux Tribe, 483 F.2d 400 (8th Cir. 1973); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

191. 540 F.2d 1039 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978).
192. 436 U.S. at 71–72.
193. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975).
194. *Id.* at 16.
195. 540 F.2d 1039 (1976), *rev'd on other grounds*, 436 U.S. 49 (1978).
196. *Id.* at 1042–45.

. . . .

. . . [W]here the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way.[197]

Applying this test the court nevertheless held that the denial of enrollment to Mrs. Martinez' children on the basis of gender effectively denied female members of the tribe "fundamental rights" that were extended to men, including rights of inheritance, residency, voting, and the right to pass tribal membership to their offspring.[198] The court said that under normal constitutional standards such a classification would be subject to strict scrutiny and would violate equal protection principles.[199] Although recognizing the special weight to be given to tribal culture and autonomy, the court nevertheless held that the evidence failed to establish a compelling tribal interest justifying such discrimination.

The tribal ordinance in question was enacted in 1939 to deal with an unprecedented number of mixed marriages arising out of boarding school contacts between Santa Claran young people and other Indians. Prior to that time enrollment rights had not been determined on the basis of sex. The ordinance was therefore not the product of any ancient or venerable Santa Claran patrilineal or patrilocal custom, but rather of "economics and pragmatics."[200]

The *Martinez* court clearly believed that a heightened level of scrutiny is appropriate in ICRA equal protection cases involving fundamental rights. Thus, an ordinance such as the one in question can survive judicial examination only if it is supported by a compelling tribal

197. *Id.* at 1045–46. This characterization of the test was first pronounced in Daly v. United States, 483 F.2d 700 (8th Cir. 1973), and was adopted in Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976).

198. 540 F.2d at 1045.

199. The court cited Frontiero v. Richardson, 411 U.S. 677 (1973), which applied strict scrutiny to a gender discrimination issue, but which was only a plurality opinion. It also cited the earlier case of Reed v. Reed, 404 U.S. 71 (1971), which in a majority opinion applied the midlevel scrutiny test to a gender discrimination case. 540 F.2d at 1046–47.

200. *Id.* at 1047. The "economics and pragmatics" referred to involved the tribes' fear that the offspring of mixed marriages would "swell the population of the Pueblo" and diminish individual shares of the property. *Id.* The court noted that the Martinez children were 100% Indian and 50% Santa Claran. They spoke Tewa, the language of the Santa Clara Pueblo. They practiced the customs of the tribe and were accepted into the tribe's religion. They were persons "within the cultural group who have been allowed to develop a substantial stake in the life of the Tribe," and to allow this arbitrary discrimination "would be tantamount to saying that the Indian Bill of Rights is merely an abstract statement of principle." *Id.* at 1048.

interest.[201] This approach differs significantly from the test applied to federal statutes in *Mancari* and in subsequent cases where the Supreme Court has explicitly rejected a strict scrutiny standard when examining federal action toward Indians.[202]

Although the *Martinez* standard more closely resembles the standard used in traditional equal protection analyses than the one used in *Mancari* and its progeny, it possesses some distinct features. As already noted, the circuit court implied that ancient customs and traditions, contrasted with mere "economics and pragmatics,"[203] are to be given special deference. It also noted that once a compelling tribal interest is found, the deference granted tribal autonomy might compel the court to require something less than a necessary relationship of the classification to that interest.[204]

2. *Right to hold tribal office*

Cases involving voting rights and the right to hold tribal office illustrate the balancing test that the court adopted in *Martinez*.[205] For

201. Other cases also apply the same standard as that applied under the Constitution. For example, the Ninth Circuit Court of Appeals applied the compelling governmental interest test to determine the validity of a residency requirement for tribal council candidacy, and held that the ordinance met this test. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 243-44 (1976). In Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), the court characterized the right to vote in the Oglala Sioux tribal election as a right of citizenship "protected by the Constitution." *Id.* at 839. It should be noted that the fundamental nature of a right seems to be determined by reference to traditional equal protection analysis and not by reference to the internal values of the tribe.

202. *See* Part V *supra.*

203. *See* note 200 *supra.*

204. *Cf.* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976). The equal protection clause in the ICRA may be implemented differently than "its constitutional counterpart" when a tribal practice or custom might be significantly altered and when the individual injury is likely to be comparatively small. *Id.* at 238.

205. In Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971), a federal court refused to enjoin on equal protection grounds officials of the Cherokee Tribe who were allegedly not operating the government in the best interests of the tribe because the defendants' actions violated neither fourteenth amendment nor ICRA equal protection principles. In the course of its discussion the court noted that section 1302(8) of the ICRA "was not as broad" as the fourteenth amendment. *Id.* at 682 (dictum).

In McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974), the court held that neither the equal protection principles of the Bill of Rights nor those of section 1302(8) required candidates for tribal council to file for office in order to be elected by write-in ballots or prohibited the use of write-in ballots. Again the court noted that, even though the language of the fourteenth amendment and that of the ICRA were essentially the same, "this does not necessarily mean . . . [that the ICRA clause carries] full constitutional impact." *Id.* at 655 (dictum). The court added that the ICRA was directed primarily at "the administration of justice by tribal authority" rather than at "tribal governmental structure, office holding, or elections." *Id.*

example, *Howlett v. Salish & Kootenai Tribes*[206] concerned a residency requirement for members of the tribal council. The tribal con-

Other courts of appeals' opinions concerning the distinction between ICRA and constitutional equal protection principles have announced the same general rule as *Martinez*, although the precise formulation has varied from case to case. *See, e.g.*, Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973). *See also* Johnson v. Lower Elwha, 484 F.2d 200 (9th Cir. 1973) (due process issue).

No decision from these circuits, or from the Fourth Circuit, the only other court of appeals to have considered the question, has given the issue the careful and extensive treatment accorded it by the Tenth Circuit in *Martinez*. The Eighth Circuit has considered the unique aspects of section 1302(8) on four occasions. In White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973), the court held that the one-person-one-vote principle was applicable via the equal protection clause of the ICRA to tribal elections where the tribe had established voting procedures precisely parallel to Anglo-American procedures. The court acknowledged that section 1302(8) does not "embrace in entirety all of its content in our applicable constitutional law," and noted, as examples of tribal practices "at variance with Anglo-American tradition," ethnic restrictions on tribal membership and blood percentage requirements for inheritance rights and for voting in tribal elections. *Id.* at 1313–14. But the court concluded that under the facts of this case, "we have no problem of forcing an alien culture, with strange procedures, on this tribe." *Id.* at 1314.

In Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975), the court held that section 1302(8) did not limit the power of the tribe to fix 21 years old instead of 18 or 19 as the age for allowing tribal members to vote in tribal elections. The court said it was "questionable" whether the result would be any different under constitutional principles in light of the recent United States Supreme Court decision in Oregon v. Mitchell, 400 U.S. 112 (1970). 507 F.2d at 1083.

In Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), the court ruled that allegations of a conspiracy to confuse the voting in a tribal election so that a certain candidate would be elected were sufficient, if proven, to establish an interference with plaintiff's voting rights and thus a denial of equal protection guarantees under either section 1302(8) or the Constitution. The court noted in passing that no tribal custom or governmental purpose was involved. *Id.* at 842. The right to vote is "fundamental" and its denial can only be sustained on a showing of a compelling governmental interest. *Id.* at 838–39.

Finally, in Daly v. United States, 483 F.2d 400 (8th Cir. 1973), the court decided that a classification that arguably violated the fourteenth amendment standards did not violate the equal protection clause of the ICRA. In *Daly* the district court ordered reapportionment of election districts for tribal elections in accordance with the one-person-one-vote principle. The court also ordered eliminated from the tribe's remedial plan a requirement based on a provision of the tribe's constitution that specified that at least one-half of the councilmen from each district had to be of at least one-half Indian blood. The court of appeals said this constitutional provision did not violate the ICRA equal protection clause because "this is one of those 'respects' [in which] the equal protection requirement of the 14th amendment should not be embraced in the Indian Bill of Rights." *Id.* at 705 (quoting Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971)). This is dictum, however, because the court of appeals declined to overturn the lower court's elimination of the classification from the election plan. The court of appeals explained that the blood quantum requirement did not fit the tribe's remedial plan, which included two single-member districts. 483 F.2d at 706.

206. 529 F.2d 233 (9th Cir. 1976).

stitution required that all candidates for the tribal council reside on the reservation for a period of one year preceding the election. The two plaintiffs, aspirants for office, had been physically absent from the reservation for five and one-half and six months respectively during the year preceding the election. The constitution also provided that the tribal council was the "sole judge of the qualifications of its members."[207] The council, which included plaintiffs' opponents, had ruled that "reside" meant physically present rather than domiciled. Plaintiffs claimed this gave the tribal council exclusive power to determine whether aspiring candidates met the necessary qualifications for council office and thus violated section 1302(8) of the ICRA.

The Ninth Circuit Court of Appeals held that while the non-Indian society did not generally give the legislative branch of government the power to interpret the law, such a governmental structure does not necessarily constitute a deprivation of equal protection.[208] The court then held that although the right to hold office was fundamental, the one-year residency requirement served a compelling governmental interest in allowing tribal voters to know personally the candidates for office. The court relied on federal constitutional cases to support this holding,[209] adding that because of the extremely local nature of tribal concerns, such as promoting Indian cultural identity and administering tribal government, the case for a compelling governmental interest was stronger than in the federal cases cited.[210]

IX. FUTURE APPLICATION OF THE INDIAN EQUAL PROTECTION DOCTRINE

In summary, the equal protection doctrine applicable to Indians derives from federal law, state law, and tribal law governed by the ICRA. The future application of the doctrine with respect to each of these sources bears discussion.

207. CONFEDERATED SALISH AND KOOTENAI TRIBES CONST. art. 3, § 7, *quoted in Howlett*, 529 F.2d at 240.

208. 529 F.2d at 240.

209. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd*, 414 U.S. 802 (1973); Draper v. Phelps, 351 F. Supp. 677 (W.D. Okla. 1972); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd*, 401 U.S. 968 (1971); *aff'd*, 405 U.S. 1035 (1972). These cases were cited in *Howlett*, 529 F.2d at 243.

210. "The case presently before us, even more so than the previously cited cases, presents a situation where compelling interests justify the imposition of a one-year durational residency requirement upon candidates." 529 F.2d at 244.

A. Federal Law

The better rule regarding federal law and derivative state law would require the courts to provide more rigorous scrutiny to laws concerning Indians in order to assure that they bear a rational relationship to the nation's trust responsibility toward Indians.

The United States' fiduciary responsibility toward Indians covers lands, minerals, waters, forests, and fisheries, as well as rights to self-government.[211] Important deposits of coal, oil, and natural gas, as well as timber, water, land, and fisheries are included in this trust. In recent years, as available non-Indian supplies of these resources have dwindled, the non-Indian community has begun to view Indian resources with increasing covetousness. Pressure to develop these trust-protected resources is certain to increase in the future as alternative sources of supply are depleted.

Recent non-Indian/Indian conflicts over natural resources and government powers have already resulted in several important court decisions favoring Indians,[212] and these have produced fright and anger among politically powerful groups in the affected areas of the country. Because they constitute less than one-half percent of the national population and are scattered widely across the nation, Indians are especially vulnerable to these political forces. Their political powerlessness has both permitted and encouraged the current anti-Indian "backlash," a phenomenon which poses a threat to the federal government's capacity to carry out its trust responsibility toward Indians. Congress is now being importuned to enact laws that would have the effect of dismantling some Indian reservations, imposing state laws on

211. *See* F. COHEN, *supra* note 41, at chs. 7 & 15.

212. The decisions concerning the Maine land claims, Joint Tribal Council of Passamaquoddy v. Morton, 528 F.2d 370 (1st Cir. 1975), and the Pacific Northwest fishing rights controversy, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *cert. granted*, 99 S. Ct. 277 (1978), have received the widest publicity, although numerous other Indian claims to land, minerals, water, and timber, and to governmental powers such as zoning and taxation have recently been decided or are still in the courts and have contributed to the growth of non-Indian political pressure to legislatively reduce Indian rights to their powers and resources. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribe of the Flathead Indian Reservation, 425 U.S. 463 (1976); Arizona v. California, 373 U.S. 546 (1963); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975); Confederated Tribes of Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978) (3 judge panel), *cert. granted*, 99 S. Ct. 740 (1979).

others, eliminating tribal courts, limiting the powers of tribal governments, and making tribal resources available to non-Indians.[213]

In the light of the imbalance of political power, Indian rights may be seriously imperiled if courts too readily presume that legislation affecting Indians has been enacted for the benefit of Indians. With adroit draftsmanship such legislation can be couched in language ostensibly benign toward Indians.[214] While it is true that at least since the 1930's, Indian tribal property can no longer be taken without payment of compensation,[215] this protection is in no sense coincident with the scope of the United States' trust responsibility toward Indians. There is, therefore, an important role for the courts in assuring that the nation's trust responsibility toward Indians is not abused.

To assure that both federal and derivative state legislation concerning Indians in fact furthers the government's trust responsibility toward Indians, the courts should subject such legislation to substantial, rather than minimal, judicial review.[216] To the degree that a law disadvantages Indians the scrutiny should become increasingly strict. Indeed, a law that disadvantages Indians should ordinarily be considered outside the scope of the government's trust responsibility toward Indians, and therefore subject to standard equal protection analysis. Because it would be dealing with a racial group,[217] such a law should ordinarily receive strict scrutiny.[218]

---

213. Norgren & Shattuck, *Still Fighting the Indians: America's Old-Fashioned Response to Native Legal Victories*, JURIS DOCTOR, Oct./Nov. 1978, at 30. *See* S. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE (1978) (study commissioned by The American Bar Foundation); H. WILLIAMS & W. NEUBRECH, INDIAN TREATIES: AMERICAN NIGHTMARE (1976).

There exist organizations whose primary purpose is to seek the abrogation of Indian treaty rights such as the Interstate Congress for Equal Rights and Responsibilities, Inc., 422 Main Street, Winner, S. Dak. 57580. The political pressure to abrogate Indian treaties has resulted in the introduction before Congress of legislation to achieve that end. H.R. 9054, 95th Cong., 1st Sess. (1977) (Native American Equal Opportunity Act).

214. *See* H.R. 9054, 95th Cong., 1st Sess. (1977) (Native American Equal Opportunity Act which proposes to abrogate all Indian treaties).

215. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935).

216. The justification for the *Mancari* rule allowing a low-level scrutiny of federal Indian legislation is the federal trust relationship toward Indians. If a law does not further that trust relationship, the rationale for the *Mancari* rule is absent. The courts should therefore insist on an adequate guarantee that the condition precedent to the *Mancari* rule has been met.

217. *See* notes 76–80 and accompanying text *supra*.

218. An additional or alternative guarantee could be provided by a rule of construction analogous to the rule that, as between a constitutional and an unconstitutional construction of a statute, Congress is presumed to have intended the constitutional construction. Whenever more than one interpretation is possible, the courts will choose the

B. *State Law*

The dangers faced by Indians due to their lack of political power are accentuated at the state level as compared to the federal level because of the immediate impact that Indian rights have on the surrounding non-Indian population. Therefore, state legislation should be subject to strict scrutiny, rather than the *Mancari* standard, unless the state law is derivative legislation.

C. *Indian Civil Rights Act*

Cases involving the ICRA equal protection clause have used standard constitutional equal protection language for determining the validity of tribal action challenged under that act. The difference between these cases and cases involving the equal protection clause of the Constitution lies in the application of the guarantee: the courts give special deference to long established tribal customs and tradition in the ICRA cases. Whether the courts will give more than lip service to the deference accorded custom and tradition in Indian equal protection cases remains to be seen.

Tribal treatment of nonmembers is one of the potentially most volatile areas for application of the equal protection clause of the ICRA.[219] The nonmember population of many reservations far exceeds the member population.[220] The equal protection problems in this context are particularly troublesome because nonmembers, lacking a right to vote in tribal elections, are not represented in tribal governments.[221] A tribal government's authority extends to all inhabitants of the reservation in many subject matters,[222] and tribal courts appar-

one that is consistent with the government's trust responsibility toward Indians. Such a legal principle would be consistent with the rule of construction that a statute shall not be construed as abrogating treaty or statutory rights of Indians unless the court finds a clear congressional intent to do so. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); United States v. Kagama, 118 U.S. 375, 383-84 (1886).

219. Section 1302(8) proscribes denial of equal protection of a tribe's laws to "any person." *See* notes 176 & 186 *supra*.

220. *See* Washington v. Yakima Tribe, 99 S. Ct. 740 (1979).

221. In addition to lacking representation in tribal government, nonmembers will have only a limited right to obtain review of tribal decisions affecting them. After the Supreme Court decision in *Martinez*, nonmembers, as well as members, will be able to test tribal ICRA equal protection issues in federal court only when a habeas corpus action can be brought. *See* notes 177-82 and accompanying text *supra*.

222. *See* Gonzalez, *Indian Sovereignty and the Tribal Right to Charter a Municipality for Non-Indians: A New Perspective for Jurisdiction on Indian Land*, 7 N.M.L. REV. 153 (1976); Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677 (1978).

ently have concurrent jurisdiction with state courts to try civil cases involving non-Indians.[223] Two areas of particular concern are taxation and zoning.

1. Taxing

Indian tribes have long been held to have the power to tax non-Indians owning property or doing business on the reservation.[224] A few cases have upheld such taxes, suggesting that the tax is imposed on the privilege of doing business or carrying on some other activity on the reservation and is thus akin to a license.[225] In the past, when few non-Indians did business on Indian reservations and when they were not competing with Indian businesses, such taxes probably would not have raised equal protection questions. Today, however, cities and towns exist on some reservations that are largely inhabited by non-Indian populations. A court might now question whether a tribal tax burdening a non-Indian grocery more heavily than an Indian grocery one block away can withstand an equal protection challenge.[226] One commentator, after analyzing the equal protection tax topic, concluded:

> Separate treatment of outsiders for purposes of matters such as voting, jury service, issuance of grazing permits, and perhaps even freedom of speech, may be justifiable to maintain tribal identity and distinctiveness. The problem is that special taxation of outsiders has no connection with these values, except perhaps as a means of regulating entry by outsiders, or protecting the income and property of Indians whose traditional pursuits do not leave them with sufficient funds to pay taxes.[227]

---

223. *See* Williams v. Lee, 358 U.S. 217 (1959). In *Martinez*, the Court stated: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. at 65.

224. *See, e.g.*, Buster v. Wright, 135 F. 947 (8th Cir. 1905); Confederated Tribes of Colville v. Washington, 446 F. Supp. 1339, 1361 (E.D. Wash. 1978) (the power to tax both Indians and non-Indians is "vested" in the Indian tribe by existing law).

225. *See* Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976); Eastern Band of Cherokee v. North Carolina Dept. of Natural & Economic Resources, No. BC-C-76-65 (D.N.C. Aug. 27, 1976) (appeal pending); Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722 (Minn. 1976).

226. Such a differential effect can in fact occur when a non-Indian enterprise, such as a smoke shop, is subject to state taxation while a tribal smoke shop is exempt. *See* Confederated Tribe of Colville v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978). This result, however, raises a jurisdictional, rather than an equal protection question.

227. Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 L. & CONTEMP. PROB. 166, 178 (1976).

Courts might possibly uphold a tribal tax that burdened nonmembers more heavily than members under either the fifth amendment or the ICRA if they were to treat nonmembers analogously to aliens; a reasonable relationship between the discriminatory treatment and the objective of the tax might then be sufficient.[228] Thus, such a tax might be upheld if it were based on certain rationales as, for example, that nonmembers deplete tribal resources, that it is more difficult to collect taxes from nonmembers than members, or possibly that there is a need to compensate Indians for long-suffered disadvantages.[229]

2. *Zoning*

Tribal zoning of privately owned lands on an Indian reservation also raises potential equal protection questions.[230] More restrictive zoning of non-Indian land than Indian land would be difficult to justify under an equal protection challenge. As applied to non-Indian held land which has meaning to the tribe as an historic meeting ground or as a religious site, such restrictive zoning might be justified, but the classification would be based on the historic or religious significance of the land, rather than on its non-Indian ownership. In theory it is arguable that the greater political influence and legal control that the tribe has over its members,[231] plus the likelihood that members of the tribe share cultural values, justify more restrictive zoning of non-Indian or nonmember land than Indian member land. It is not clear, however, how land use is related to either the landowner's cultural values or political control over the landowner.

The standard of review to apply in ICRA equal protection cases involving nontribal members is an area of the law completely devoid of authority. Because the tribe bears no relationship to nonmembers an-

228. *See generally* Albrecht, *The Taxation of Aliens Under International Law*, [1952] 29 BRIT. Y.B. INT'L L. 145, 169–71 (1953); Choate, Huroh, & Klein, *Federal Tax Policy for Foreign Income and Foreign Taxpayers—History, Analysis and Prospects*, 44 TEMP. L.Q. 441 (1971).

229. *See* Goldberg, *supra* note 227, at 177. *Cf.* Kahn v. Shevin, 416 U.S. 351 (1974) (state property tax exemption for widows upheld because it bore a reasonable relation to public policy).

230. The question of tribal power to zone non-Indian lands on a reservation has not been explicitly resolved by the United States Supreme Court and is not addressed in this article. *See* note 222 *supra*. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

231. Tribal legal control may extend to all Indians on the reservation, members and nonmembers. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); note 223 *supra*.

alogous to the trust relationship between the federal government and Indian tribes, the *Mancari* test appears inapposite.[232] The equal protection analysis applied in state cases,[233] with some changes where appropriate, appears more viable. Thus, the *Mancari* rule would be applied to tribal law that was expressly authorized by Congress or that was an exercise of a guaranteed treaty right. Other tribal classifications between members and nonmembers or between Indians and non-Indians would be tested at some middle level of scrutiny. Even in these cases, however, special deference should be accorded tribal laws designed to further tribal self-determination or to preserve ancient customs and traditional values.

232. *See* Part V *supra*.
233. *See* Part VI *supra*.