Michigan Law Review

Volume 75 | Issue 1

1976

Implication of Civil Remedies Under the Indian Civil Rights Act

Michigan Law Review

Implication of Civil Remedies Under the Indian Civil Rights Act

The field of American Indian law is complex and, to the uninitiated, often startling. Prior to 1968, for example, no person, whether or not he was an Indian, could sue an Indian government in federal court for the deprivation of his civil rights.[1] However, in that year the Indian Civil Rights Act[2] (ICRA) prohibited tribes from infringing upon certain enumerated rights, similar to those in the Bill of Rights and the fourteenth amendment,[3] and expressly provided that

1. *See* Talton v. Mayes, 163 U.S. 376 (1896) (no federal court habeas corpus review of Indian court conviction); Native American Church v. Navajo Tribe, 272 F.2d 131, 134 (10th Cir. 1959) (first amendment does not apply to Indian governments); Barta v. Oglala Sioux, 259 F.2d 553, 556-67 (8th Cir. 1958) (fourteenth amendment limitations on state action do not apply to Indian governments). *See also* Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973).

However, a possible ground for federal court review of Tribal infringement of civil rights has always existed. If there is sufficient federal involvement with a tribal government, the restrictions of the Bill of Rights might be applied to the tribal government's actions. *See* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); text at notes 112-26 *infra.*

2. 25 U.S.C. §§ 1301-41 (1970) (amended 1974). In addition to guaranteeing various civil rights for Indians, ICRA directs the Secretary of the Interior to draft a "model code to govern the administration of justice by courts of Indian offenses on Indian reservations," 25 U.S.C. § 1311 (1970), and establishes a mechanism by which jurisdiction over Indians previously assumed by states may be retroceded to the federal government. 25 U.S.C. § 1323 (1970). The Act also requires Indian consent to any further state assumptions of jurisdiction over Indians. 25 U.S.C. §§ 1321-22 (1970).

3. 25 U.S.C. § 1302 (1970):

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) taken any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500 or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or

persons detained by an Indian government in violation of the Act could bring a writ of habeas corpus in federal court.[4] Several courts have subsequently gone considerably further and found that ICRA also *impliedly* created a federal civil remedy for violation of the rights guaranteed by the Act.[5]

This Note will discuss neither the wisdom of the express provisions of ICRA nor the desirability of express creation by Congress of a federal civil remedy.[6] The purpose of this Note is, instead, to analyze

---

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury or not less than six persons.

ICRA varies from the Bill of Rights in three significant respects: the establishment of religion is not prohibited, the right to counsel is guaranteed only at the defendant's own expense, and an Indian government is prohibited from denying "equal protection of its laws," 25 U.S.C. § 1302(8) (1970), while the fourteenth amendment prohibits states from denying "equal protection of the laws."

In addition, ICRA's provisions have not been interpreted to create precisely the same rights and duties as the similarly worded provisions of the Bill of Rights. *See* Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975); Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438, 440 (D.S.D. 1974); text at notes 18-19 *infra*.

4. 25 U.S.C. § 1303 (1970): "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

5. *See, e.g.*, Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 202 (9th Cir. 1973); Brown v. United States, 486 F.2d 658, 661 (8th Cir. 1973); Solomon v. LaRose, 335 F. Supp. 715, 721 (D. Neb. 1971); Loncassion v. Leekity, 334 F. Supp. 370, 372 (D.N.M. 1971); Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). *Contra, e.g.*, Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157, 1160 (D. Wyo. 1970), *affd. sub nom.*, Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

6. ICRA seeks to accommodate the civil rights of individual Indians with the right of Indian nations to self-determination and self-government. In striking a balance between these countervailing interests, Congress provided for the enforcement of Indian civil rights in the federal courts only to the extent of habeas corpus actions; express civil remedies were apparently viewed as incompatible with the self-determination of Indian nations, or at least as not crucial to the protection of civil rights. *See generally* text at notes 127-77 *infra*.

It is obviously possible to disagree with the precise balance of interests struck in ICRA. Thus, one view may be that because Indians are United States citizens, the federal government is responsible for protecting their individual rights, even against Indian governments. From this perspective, enforcement provisions of ICRA may appear inadequate and the express creation of civil remedies necessary. *See generally* Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973) (implying a civil remedy because the "Indian Civil Rights Act creates a substantive body of rights . . . to 'extricate the individual Indian' from decisions holding a controversy between an Indian and his tribal government . . . an internal controversy").

On the other hand, ICRA may be viewed as essentially paternalistic legislation that interferes with the self-government of Indians. From this perspective, not only the proposed creation of express civil remedies but also the express habeas corpus provisions presently in ICRA would be rejected. *See* Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS L. REV. 49, 50 (1971) ("The Indians view Congress' action as a further weakening of Indian self-government in the name of protecting Indians from their own people. They see the Indian Bill of Rights as another imposition by a white government of white standards, values, and governmental

the bases upon which remedies have been implied by federal courts and to question whether implication is consistent with standards of statutory interpretation appropriate for Indian law. It is contended that the implication of federal civil remedies against Indian governments is improper and that if such remedies are to be created, precedent and policy mandate that they be the product of Congress. The Note will first briefly examine the potential impact that the implication of civil remedies may have upon Indian government and will then summarize the analytical deficiencies of those federal cases in which such remedies have actually been implied. The remainder of the Note will, in some detail, outline and discuss a proposed framework for judicial analysis of the implication of remedies in the field of Indian law.

The substantial impact that implied civil remedies may have upon Indian culture is evident from a survey of Indian practices that have been challenged in suits under ICRA. In making this review, it is essential to keep in mind that while the legal principles upon which ICRA claims are based have a solid foundation in the Anglo-American tradition, Indian nations have been guided for centuries by fundamentally different customs, mores, and legal practices. Any attempt, however well-intentioned, to force Indian institutions into the Anglo-American mold invites the danger that tribal governments long held legitimate by the Indian people will be altered beyond recognition. This potential for the radical alteration of cherished institutions is shown in *Dodge v. Nakai.*[7] In that case, the federal district court allowed a civil suit charging violations of the free speech,[8] due process,[9] and bill of attainder[10] provisions of ICRA to challenge a Navajo Advisory Committee order excluding a non-Indian employee from the reservation for excessive meddling in Navajo politics and for showing disrespect to the Committee. The court invalidated the order upon a finding that the Committee, which is vested with both legislative and judicial power, had failed to conduct itself like a "judicial" body[11] and that the punishment did not fit the offense.[12] This ruling, based as it is on Anglo-American legal principles, not only opens the substantive tribal law to challenge but also allows the federal court to scrutinize both the structure and procedures of the traditional Indian governments. The result in *Dodge* is nothing less than a judgment on the validity of the tribal government itself; the

theory upon once sovereign tribes"). *See also* AMERICAN INDIAN LAWYERS ASSOCIATION, THE ICRA—FIVE YEARS LATER 61 (1973); V. DELORIA, OF UTMOST GOOD FAITH 221 (1971); W. WASHBURN, THE INDIAN IN AMERICA 272 (1975).

7. 298 F. Supp. 26 (D. Ariz. 1969).

8. 25 U.S.C. § 1302(1) (1970) *reprinted in* note 3 *supra.*

9. 25 U.S.C. § 1302(8) (1970) *reprinted in* note 3 *supra.*

10. 25 U.S.C. § 1302(9) (1970) *reprinted in* note 3 *supra.*

11. 298 F. Supp. at 33-34.

12. *See* 298 F. Supp. at 31-32.

Navajos were apparently given the choice of transforming their institutions and practices or facing litigation in federal courts to enjoin their activities.

Other provisions of ICRA also portend substantial incursions upon Indian culture if civil actions based on these provisions continue to be recognized. Federal enforcement of the prohibition on the taking of private property without just compensation[13] could undermine the basic principles of property ownership held by many Indian nations.[14] Many rights and privileges in some tribes that are based upon matrilineal[15] and patrilineal[16] traditions would be subject to challenge on equal protection grounds.[17] The refusal of tribal governments to allow Indians to use Indian land may be challenged on ICRA due process grounds.[18] Although the courts have uniformly held that the statutory rights of equal protection and due process in ICRA are not coextensive with the similarly worded provisions of the fifth and fourteenth amendments,[19] some federal courts have applied these rights outside the criminal justice context.[20] Indian election procedures,[21] apportionment,[22] and land use controls,[23] all of which are directly related to the structure of Indian society, have

13. 25 U.S.C. § 1302(5) (1970) *reprinted in* note 3 *supra.*

14. Indian property is commonly owned by the tribe, not by individual Indians. *See* Crowe v. Eastern Bank of Cherokee Indians, Inc., 506 F.2d 1231, 1236 (4th Cir. 1974); Seneca Constitutional Rights Org. v. George, 348 F. Supp. 50, 59 (W.D.N.Y. 1972). This system of property ownership could be seriously undermined if termination of tribal land leases or assignments to individual Indians gave rise to claims for compensation cognizable in federal courts, which are insensitive to Indian culture. Leaving non-habeas enforcement of the substantive provisions of section 1302 to Indian courts, *see* text at notes 154-59 *infra,* insures an accommodation of Indian culture with the civil rights guaranteed by ICRA.

15. Many New York tribes follow a matrilineal tradition of inheritance. *See* G. SNYDERMAN, BEHIND THE TREE OF PEACE, A SOCIOLOGICAL ANALYSIS OF IROQUOIS WARFARE (1948).

16. Tribal membership is often based on patrilineal criteria. *See* Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975). *See also* Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974).

17. ICRA contains an equal protection provision. 25 U.S.C. § 1302(8) (1970); note 3 *supra.*

18. *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975). For the due process provision of ICRA, see 25 U.S.C. § 1302(8) (1970); note 3 *supra.*

19. *See, e.g.,* Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975); Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438, 440 (D.S.D. 1974).

20. *See* cases cited note 5 *supra.*

21. Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F. Supp. 1194 (D.S.D. 1975); White v. Tribal Council, 383 F. Supp. 810 (D. Minn. 1974); McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973), *revd.,* 506 F.2d 653 (10th Cir. 1974).

22. Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973).

23. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975).

also been challenged in civil suits based on these newly established civil rights.

The federal courts that have implied civil remedies under ICRA have used a deficient analytical framework. First, while these courts have properly assumed jurisdiction for such claims on federal question grounds,[24] they have not adequately explained their assumption of jurisdiction on grounds of the general grant over cases arising under civil rights acts.[25] Second, in their haste to reach the merits of a case, the courts have confused the presence of subject-matter jurisdiction with the existence of a cause of action, despite the fact that a grant of jurisdiction, even if it is explicit, does not automatically create grounds for the implication of civil actions and remedies.[26]

---

24. *E.g.*, Dodge v. Nakai, 298 F. Supp. 17, 21-25 (D. Ariz. 1968) (jurisdiction under 28 U.S.C. § 1331 (1970)). The leading case of Bell v. Hood, 327 U.S. 678 (1946), holds that, where a complaint in federal court is drawn to seek recovery under the Constitution or laws of the United States, the court must entertain the suit. 327 U.S. at 681-82. The only exceptions, where the alleged claim appears to be either immaterial or frivolous, 327 U.S. at 682, are inapposite to claims for relief under ICRA. One final problem, however, is whether ICRA claims have a matter in controversy that exceeds $10,000, as is required by section 1331. The general rule is that courts must not dismiss an action unless they can hold that, as a legal certainty, the plaintiffs at final hearing will be unable to justify the jurisdictional claims which they have pleaded. Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1972). Although a virtual presumption of jurisdictional amount has been attributed to such fundamental rights as free speech, *see* Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y. 1971), valuation of other rights protected by ICRA may be a matter for case-by-case determination.

25. *See, e.g.*, Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968) (jurisdiction under 28 U.S.C. § 1343(4) (1970)). Section 1343(4) provides: "The district courts shall have original jurisdiction of any civil action *authorized by law* to be commenced by any person . . . to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." (emphasis added). If read literally, the statute requires that a civil action be authorized by law before jurisdiction can be granted; thus, the absence of express civil remedies in ICRA would appear to preclude federal court jurisdiction over Indians under section 1343(4). The courts, however, with virtually no explication, have used an analytically dubious "bootstrap" approach by first using this provision to obtain jurisdiction in the absence of civil actions authorized by law and, after finding jurisdiction, then declaring that civil actions and remedies must be implied to effectuate the purpose of the statute. This approach has been both condemned, *see* Zionitz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 36-38 (1975), and endorsed, *see* Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1372-73 (1969). It is hoped that courts faced with the problem in the future will explain more fully their assumption of jurisdiction.

26. *See* M. PRICE, LAW AND THE AMERICAN INDIAN 749 (1973). For an example of the distinction between subject-matter jurisdiction and a claim for relief, see Turner v. United States and Creek Nations, 248 U.S. 354 (1919) (special act of Congress authorizing Court of Claims to render judgment as law and equity may require in the claim of Clarence W. Turner did not create a substantive right to recover on the claim absent specific legislation creating a cause of action). *See also* Zionitz, *supra* note 25, at 29-33.

Thus, to state that federal courts have jurisdiction over all civil actions found to arise under possible implications of ICRA in no way settles the essential question

Finally, the courts have failed to consider adequately the impact of their decisions on Indian society, though such a consideration should be part of any judicial implication of rights in the field of Indian law.

The two Supreme Court cases upon which courts have primarily relied to imply civil remedies, *Jones v. Mayer*[27] and *Bivens v. Six Unknown Agents*,[28] are not compelling authority for the implication of remedies under ICRA. The decision in *Mayer* empowered a district court to fashion remedies for civil rights violations notwithstanding the lack of an express remedy in the statute.[29] Clearly, then, the absence of an express remedy does not *prohibit* a federal court from fashioning appropriate equitable relief.[30] However, this in no way delineates the criteria by which a federal court should determine what remedies may be appropriate nor is it a mandate to fashion remedies notwithstanding countervailing policy considerations. The *Jones* Court clearly refrained from deciding the circumstances under which certain remedies might be implied.[31]

In *Bivens*, which is also frequently cited by lower courts,[32] the Supreme Court held that a cause of action for damages was sustainable against a federal official who, under color of law, carried on

---

of whether it is appropriate for federal courts to imply civil actions under ICRA at all.

27. 392 U.S. 409 (1968).

28. 403 U.S. 388 (1971).

29. *See* 392 U.S. at 412 n.1: "To vindicate their rights [under the Civil Rights Act of 1866 § 1,] 42 U.S.C. § 1982 [(1970)], the petitioners invoked the jurisdiction of the District Court to award 'damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .' 28 U.S.C. § 1343(4) [(1970)]." It is arguable that civil actions not expressly provided for by statute are not civil actions authorized by law so as to come within the jurisdictional grant of section 1343(4). *See* note 25 *supra*. If this is true, then the Court above passes over a number of steps in going from the rights articulated in section 1982, which provides for no express civil actions, to the jurisdiction granted in section 1343(4) to award civil remedies. The Court should have declared that a complaint requesting implied civil relief under section 1982 comes within the jurisdiction of federal courts under the federal question jurisdiction of section 1331. Having jurisdiction over the suit, the Court should have then determined that section 1982 implies the use of civil actions to enforce the rights created. This would have imparted "legal authorization" to civil suits under section 1982 bringing them within the federal court. The quoted footnote in *Mayer*, then, only supports the proposition that if civil actions are properly implied under a statute, federal courts have jurisdiction to grant a civil remedy under section 1343(4). The case is not support for the proposition that all federal civil rights statutes, due to section 1343(4), imply the use of civil actions for their enforcement. The criteria by which civil actions are to be implied from civil rights statutes were not articulated by the *Mayer* court. *See* text at note 31 *infra*.

30. 392 U.S. at 414 n.13: "The fact that [the Civil Rights Act of 1866 § 1,] 42 U.S.C. § 1982 [(1970)], is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy [under 28 U.S.C. § 1343(4) (1970)]." *See* note 29 *supra*.

31. 392 U.S. at 414 n.14.

32. *See, e.g.*, Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971).

unreasonable searches and seizures in violation of a person's fourth amendment rights.[33] *Bivens* is even less apposite than *Mayer* as a source of authority for implication of civil remedies under ICRA for at least two reasons. First, the *Bivens* Court was implying a remedy for a constitutional violation. Congress had neither provided for nor apparently even considered any remedies for such violations. In cases arising under ICRA, in contrast, the rights are statutorily based; Congress deliberated on the question of remedies and expressly settled on only one—habeas corpus. Moreover, aggrieved parties are not left without a means of redress, since they may also maintain an action in tribal courts.[34] Whether additional remedies should be implied is dependent upon a construction of the statutory rights contained in ICRA, which rights are clearly not coextensive with those guaranteed by the Constitution.[35]

Courts attempting to use *Bivens* as authority for implication of ICRA remedies have also failed to note the express qualification of the *Bivens* Court itself that the case involved "no special factors counselling hesitation [in implying a remedy] in the absence of affirmative action by Congress."[36] There are, indeed, "special factors" in the area of Indian law that counsel against implication of civil remedies and which in fact suggest that such implication actually violates the Court's intention in *Bivens*. These factors are the special status of Indians within the American legal system and the impact of civil suits on the ability of Indians to govern themselves. Concern for Indian self-government is well established in our law. First, many Indian nations have treaties with the United States that guarantee them the right of self-government,[37] and the precedent in Indian law is clear that although Congress may unilaterally modify the terms of a treaty,[38] such modification or breach will not be lightly implied.[39] Despite the direct interference with the rights to self-government that implied civil remedies represent, courts have uniformly failed to investigate whether the Indian nation defending the suit possesses such treaty rights. Second, Indian sovereignty is traditionally subject to infringement only by *express* congressional legislation.[40] Although it is possible for an Indian nation to become so related to the federal government that a "sovereignty" bar to implied civil actions may become inapplicable,[41] the courts implying civil remedies have also uniformly failed to examine the issue of sovereignty. The failure to

33. 403 U.S. at 389.
34. *See* note 156 *infra* and text at notes 154-58 *infra*.
35. *See* text at note 19 *supra*.
36. 403 U.S. at 396.
37. *See* text at notes 47-51 *infra*.
38. *See* text at note 59 *infra*.
39. *See* note 61 *infra* and text at notes 61-72 *infra*.
40. *See* text at notes 83-90 *infra*.
41. *See* text at notes 109-19 *infra*.

consider treaty rights and sovereignty is a fatal deficiency in the analysis of courts that have implied civil remedies under ICRA.

A final shortcoming of courts that have erroneously relied on *Mayer* and *Bivens* is their failure to follow other current Supreme Court decisions not involving Indian law that establish the proper framework for determining when a cause of action should be implied from a federal statute.[42] As will be demonstrated below,[43] even if no treaty rights of self-government or requisite sovereignty exist in a particular case to create a bar to implication of remedies, a proper consideration of the legislative history of ICRA indicates that a civil cause of action should generally not be implied.

A Proposed Framework

The above factors indicate that a court confronted with a civil suit based on ICRA should adopt the following analysis. It should first determine whether the defendant Indian nation possesses either a treaty that guarantees the right of self-government or a requisite degree of sovereignty. If the finding is affirmative, the court, in construing ICRA, should adhere to a long line of precedent holding that a statute in conflict with treaty rights or sovereignty should not be construed broadly.[44] Accordingly, because civil remedies may interfere with the ability of Indians to govern themselves,[45] thus violating treaty and sovereignty rights, a court should refuse to imply such a remedy unless the legislative history of the statute strongly supports implication. Even if the court determines that no treaty or sovereignty rights are involved, however, it should not imply civil remedies lightly. It should instead carefully balance the factors set forth by recent Supreme Court cases,[46] which include examination of congressional intent, and be extremely reluctant to impinge upon the decision-making processes even of Indian governments that lack the protections of treaties or actual sovereignty.

A. *Treaty Rights*

The Supreme Court has consistently recognized that treaties with Indian tribes bind the United States[47] and preclude state action that violates treaty provisions.[48] Among the rights that have been guaran-

42. *See* Cort v. Ash, 422 U.S. 66 (1975).
43. *See* text at notes 127-59 *infra*.
44. *See* text at notes 47-126 *infra*.
45. *See* text at notes 7-23 *supra*.
46. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975).
47. *See* Squire v. Capoeman, 351 U.S. 1, 6 (1956); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).
48. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

Treaties bind the United States and preclude inconsistent state action only in the absence of unilateral abrogation by Congress. *See* text at note 59 *infra*.

teed to signatory Indian tribes is the right of the tribe to control internal affairs solely through an Indian government. The provision of such rights is frequently explicit,[49] although the Supreme Court has held that they may be implicit within the terms of a treaty. In the 1958 case of *Williams v. Lee*,[50] for example, the Court reversed a state court order requiring an Indian to pay a debt incurred on the Navajo Reservation to a White shop-owner doing business on the reservation. One ground on which the Court denied state court jurisdiction was that,

> [i]n return for [Indian] promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except U.S. Government personnel, was to enter the reserved area. *Implicit in these treaty terms*, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the *internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists*.[51]

The scope of the right to self-government implied by this treaty was reaffirmed and expanded in 1972 by the Supreme Court in *McClanahan v. Arizona State Tax Commission*.[52] The Court stated that "[t]he beginning of our analysis must be with the treaty which the United States Government entered with the Navajo nation in 1868"[53] and went on to hold that the treaty barred the State of Arizona from imposing an income tax upon Navajos residing on the reservation.

Although most of the relevant cases have involved attempted state

---

49. For example, the 1866 treaty with the Creek Indian Tribe provided for congressional authority over the administration of justice and for the protection of property rights within Indian territory, subject to the proviso that "said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs." Treaty with the Creek Indians, June 14, 1866, art. X, 14 Stat. 785, 788 (1868). *See also* 2 C. KAPPLER, INDIAN LAWS AND TREATIES 702, 705 (1903).

50. 358 U.S. 217 (1958).

51. 358 U.S. at 221 (emphasis added). Because the Court in *Williams* ruled that implied treaty rights precluded the implication of *state* jurisdiction, the case does not directly settle the question of implied *federal* jurisdiction. However, the rationale of the Court—that the internal affairs of Indians remain within the jurisdiction of Indian governments absent express jurisdictional grants elsewhere by Congress—also supports a prohibition on implied federal jurisdiction. *See* text at notes 54-58 *infra*. The Court used the Major Crimes Act, 18 U.S.C. § 1153 (1970), which expressly grants jurisdiction to *federal courts* to hear cases involving enumerated Indian offenses, as an example of an express congressional grant of jurisdiction over the internal affairs of Indians. It supports the conclusion that the Court intended to prohibit implied federal jurisdiction as well as implied state jurisdiction.

52. 411 U.S. 164, 173-75 (1973) ("it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the land as within the exclusive sovereignty of the Navajos . . .").

53. 411 U.S. at 174. *See also* Moe v. Confederated Salish and Kootenai Tribes, 96 S. Ct. 1634 (1976).

incursions upon Indian rights, the principles of law derived from them are also applicable to federal intrusions absent a finding of specific congressional intent to abrogate a treaty obligation.[54] Thus, in one case, the Supreme Court held that a treaty transferring the fee to land "free of all charges or incumbrances whatsoever" exempted the land from federal taxation of timber sales.[55] Recently, the Eighth Circuit held that an implicit treaty right for Indians to hunt on their reservation immunized them from prosecution for hunting bald eagles —an endangered species generally protected by statute.[56] Moreover, the implication of self-government rights against *federal* incursions is also supported by the Supreme Court's frequent assertion that "treaties with the Indians must be interpreted as they would have understood them."[57] It is difficult to see how federal interference with internal Indian affairs would have been understood by Indian treaty signatories as less obnoxious than state interference. Few Indian nations, if any, would have construed their treaties to permit federal court review of actions taken by their tribal governments.[58] The wording of treaties does not suggest that some rights are to receive fuller protection than others, and treaty rights to self-government are certainly no less deserving of respect than the right to hunt or immunity from taxation.

The existence of a treaty right, whether express or implied, does not, however, pose an absolute bar to congressional action in violation of that right. It is well established that where a treaty and an act of Congress are in direct conflict, the later in date prevails.[59] Thus, although the express provisions of ICRA providing for habeas corpus review in the federal courts[60] violate prior treaties granting the right of self-government, these provisions should be enforced. Before abrogating treaty rights, however, courts must carefully examine both the impact of the remedy on the right and the intent of Congress in enacting ICRA.

Although the quantum of congressional intent that must be manifested in a statute or its legislative history to support a finding of abro-

54. *See* note 51 *supra.*

55. Squire v. Copoeman, 351 U.S. 1, 6 (1956).

56. United States v. White, 508 F.2d 453 (8th Cir. 1974). For a discussion of statutory abrogation of treaty rights, see text at notes 59-72 *infra.*

57. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

58. Some treaties indicate that the signatories understood that the United States would take control of internal Indian affairs. For example, the 1867 treaty with the Cheyenne and Arapahoe Indian tribes provides that "[t]he United States may pass such laws on the subject of . . . the government of the Indians on said reservations . . . as may be thought proper." Treaty with the Cheyenne Indians, Oct. 28, 1867, art. VI, 15 Stat. 593, 595 (1869). However, such treaties have been criticized as having been negotiated with improper Indian parties. *See* P. FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA 30 (1968).

59. *See, e.g.*, United States v. Len Yen Tai, 185 U.S. 213 (1902).

60. 25 U.S.C. § 1303 (1970); note 4 *supra.*

gation has not been uniformly defined, all of the courts have set up a heavy presumption against abrogation.[61] In fact, the Supreme Court has not found an Indian treaty to have been abrogated by less than express language in the past fifty years.[62] In the leading case of *Menominee Tribe v. United States*,[63] the Court considered whether a congressional act terminating federal supervision over an Indian tribe abrogated the hunting and fishing rights previously guaranteed by treaty. Despite the seemingly unequivocal language of the act that after termination of the reservation "the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,"[64] the Court noted that the act did not explicitly terminate treaty rights[65] and, finding the legislative history to be ambiguous,[66] declined to construe the act "as a back-handed way" of achieving this result.[67] The Court went on to say that "[w]hile the power to abrogate those rights exists . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' "[68]

Although the *Menominee Tribe* opinion presents only a sparse analytical framework for ascertaining the precise level of express congressional intent needed to abrogate treaty rights, the case at the

61. Courts use various expressions to describe the presumption against abrogation. *See* 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, 623-28 (1975). A common formulation of the test is that abrogation shall not be "lightly implied." *Id.* at 625. *See, e.g.*, Squire v. Capoeman, 351 U.S. 1, 8 (1956); Kimball v. Callahan, 493 F.2d 564, 568 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1004 (D. Minn. 1971). However, the Supreme Court has recently shown a preference for the formulation that abrogation will be found "only upon a clear showing" of congressional intent. Wilkinson & Volkman, *supra*, at 623; *see* DeCoteau v. District County Ct., 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481, 505 (1973). Under either formulation of the test, it is clear that a court will find a treaty to have been abrogated by a statute only if the face of the statute or the surrounding circumstances and legislative history evidence a congressional intent to abrogate. *See* DeCoteau v. District County Ct., 420 U.S. 425, 445 (1975) (face of statute, surrounding circumstances, and legislative history all clearly showed abrogative intent); Anderson v. Gladden, 293 F.2d 463, 466 (9th Cir. 1961) (face of statute created strong implication of intent to abrogate).

62. Wilkinson & Volkman, *supra* note 61, at 630.

63. 391 U.S. 404 (1968).

64. 391 U.S. at 410.

65. 391 U.S. at 408.

66. Senator Watkins, author of the bill in question, stated that the bill " 'in no way violate[s] any treaty obligation with this tribe.' " 391 U.S. at 413, *quoting* 100 CONG. REC. 8538 (1954). However, "counsel for the Menominees spoke against the bill, arguing that its silence would by implication abolish those hunting and fishing rights." 391 U.S. at 408, *citing Joint Hearings on S. 2813, H.R. 2828, and H.R. 7135 Before Subcommittees of Committees on Interior and Insular Affairs*, 83d Cong., 2d Sess., pt. 6, at 697, 704 (1954).

67. 391 U.S. at 412.

68. 391 U.S. at 412-13, *quoting* Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934).

very least requires courts to analyze carefully the legislative history of acts that conflict with those rights and to find a strong legislative intent to support their abrogation.[69] More recently, the Eighth Circuit went even further in the case of *United States v. White*,[70] where it considered whether the Bald Eagle Protection Act[71] had implicitly repealed a treaty right to hunt. The court concluded that "[t]o affect those rights [by statute], it was incumbent upon Congress to *expressly* abrogate or modify the spirit of the relationship between the United States and Red Lake Chippewa Indians on their native reservation."[72] Finding no discussion in the legislative history of the intended effect of this Act on these specific treaty rights,[73] the court held that the treaty rights had not been modified.

Despite the direct impact that implication of civil remedies for ICRA violations may have upon tribal self-government,[74] courts implying such remedies have uniformly failed to examine the affected tribes' treaty rights and thus have not analyzed ICRA for the congressional intent vis-a-vis those rights. If a treaty provides an Indian tribe with the rights of self-government, the principles set forth in *Menominee Tribe* should bar the implication of a civil remedy. The policy underlying the heavy presumption against abrogation is that, because of the sanctity of treaty obligations and their binding effect on the federal government, Congress should be encouraged to deliberate fully on any measure that violates those obligations. Not only did Congress fail to provide expressly for civil remedies, but the legislative history[75] is also devoid of any legislative consideration of the impact that authorization of such remedies would have on the ability of Indians to govern themselves, even though Congress did recognize that some treaty rights might be involved.[76] The reluctance

69. A stricter test has been suggested: "Treaty rights should be abrogated only by an explicit congressional statement, both of the specific promises about to be broken and of the intent of Congress to break them." Wilkinson & Volkman, *supra* note 61, at 660-61. This test would assure congressional awareness of treaty breaches because abrogation could only be found from the face of a statute.

70. 508 F.2d 453 (8th Cir. 1974).

71. 16 U.S.C. §§ 668-668d (1970) (amended 1972).

72. 508 F.2d at 457-58 (emphasis added).

73. 508 F.2d at 458.

74. *See* text at notes 7-23 *supra*.

75. *See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 1-124 (1969); 88th Cong., 1st Sess., pt. 4, at 815-905 (1963); 87th Cong., 2d Sess., pts. 1, 2, 3 (1962).

76. ICRA was passed as part of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, which also provided for riot control and which prohibited housing discrimination. The assassination of Martin Luther King created strong pressure to pass the entire Act quickly. *See* 114 CONG. REC. 9553, 9615, 9620 (1968). In this atmosphere, the Indian part of the bill was quickly put through committee, *see Hearings on H.R. 15419 and Related Bills Before a Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 23, 40, 43 (1968), and the only congressional recognition of treaty rights occurred incidentally during an argument over whether ICRA should be attached to

of courts to abrogate treaty rights has actually led them to bend express statutory language to avoid abrogation.[77] Implication of a civil remedy by a federal court is a radical departure from past practice. Although it must be recognized that the rights established by ICRA are important ones by Anglo-American legal standards, and are indeed binding on the tribal governments, it appears improper for a federal court to imply a civil remedy for a suit brought against an Indian nation that has been guaranteed by treaty the right to self-government.

B. *Tribal Sovereignty*

Even in the absence of a treaty guaranteeing the right to self-government, the courts have consistently recognized that Indian governments possess some sovereignty with respect to internal tribal affairs.[78] As early as 1831, the Supreme Court characterized the Cherokee Nation as "a state, as a district political society, separated from others, capable of managing its own affairs and governing itself . . . ."[79] A year later, Chief Justice Marshall reaffirmed the sovereignty of the Cherokee Nation:

> The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. *A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.*[80]

These principles have been repeatedly acknowledged in subsequent federal case law,[81] and as recently as 1975 the Supreme Court again

---

the Civil Rights Act, *see* 114 CONG. REC. 5837 (1968), rather than as an expression of congressional intent to abrogate treaty rights.

77. *See, e.g.*, Frost v. Wenie, 157 U.S. 46, 58 (1895); United States v. White, 508 F.2d 453 (8th Cir. 1974); Bennet County v. United States, 394 F.2d 8 (8th Cir. 1968); United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941).

78. Tribal "immunity" from the application of federal or state law based upon tribal sovereignty should not be confused with the narrower issue of tribal immunity from suit based upon traditional notions of sovereign immunity. Sovereign immunity operates as a defense to an alleged claim based on applicable law. For discussions of Indian sovereign immunity, which could also raise a bar to civil actions under ICRA, see United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); M. PRICE, *supra* note 26, at 747-48; Zionitz, *supra* note 25. Tribal immunity operates to render inapplicable the law upon which a claim is based. Tribal sovereignty over internal Indian affairs includes the power to define forms of government, to tax, to regulate domestic relations, and to administer criminal justice in many types of cases. For discussions of internal tribal sovereignty, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-50 (1942); M. PRICE, *supra* note 26, at 118-82.

79. Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1, 11 (1831).

80. Worchester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832) (emphasis added).

81. *See, e.g.*, Native American Church v. Navajo Tribal Council, 272 F.2d

recognized that Indian nations were "unique aggregations possessing attributes of sovereignty over both their members and their territory."[82]

The existence of tribal sovereignty does not preclude congressional action that violates it. Indeed, the powers of Indian governments have often been limited by Congress pursuant to the wardship power.[83] As with treaty rights, however, the courts have held that Indian nations retain sovereignty over internal affairs except where expressly qualified by a congressional act.

The Supreme Court recognized the existence of this "express qualification" requirement in *Williams v. Lee*,[84] in which a state court was attempting to exercise jurisdiction over a member of an Indian nation. After noting that non-Indians could be prosecuted in a state court for a crime against a non-Indian on a reservation, the Court stated that, as a general proposition, if the crime was by or against an Indian, tribal jurisdiction or that *expressly* conferred on other Courts by Congress has remained exclusive."[85] As an example of this proposition the Court referred to the Major Crimes Act,[86] which expressly grants federal court jurisdiction over certain crimes committed by Indians.[87]

This "express qualification" requirement has been directly applied to limit the jurisdiction of federal courts over Indians. In *Dicke v. Cheyenne-Arapahoe Tribes*,[88] for example, the Tenth Circuit Court of Appeals noted that a statute ceding land to the Cheyenne-Arapahoe Tribe could be interpreted as impliedly authorizing Indians to sue their tribal governments in federal court.[89] The court then went on to say:

> Traditionally, however, and in recognition of the fact that the power to regulate Indian affairs lies exclusively with Congress and not the courts, such statutes have been strictly construed. In [a previous case], we indicated that express authorization was necessary to overcome the sovereign immunity of Indian tribes . . . . Again and recently this court has held that federal court jurisdiction does not

131, 133-34 (10th Cir. 1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 92-93 (8th Cir. 1956); United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 237 (D. Neb. & D. S.D. 1975).

82. United States v. Mazurine, 419 U.S. 544, 5557 (1975).

83. A principle of international law, the doctrine of wardship between nations describes the relationship between conquering and dependent nations and has been used by the Supreme Court to describe the relationship between the United States and Indian nations. *See* United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). For a discussion of the wardship doctrine as applied to Indians, see F. COHEN, *supra* note 78, at 169-73.

84. 358 U.S. 217 (1959). For a discussion of the treaty aspects of *Williams*, see text at notes 50-51 *supra*.

85. 358 U.S. at 220 (emphasis added).

86. 18 U.S.C. § 1153 (1970).

87. 358 U.S. at 220 n.5. *See also* note 51 *supra*.

88. 304 F.2d 113 (10th Cir. 1962).

89. 304 F.2d at 114.

> lie in a matter of controversy between Indians and the Tribe "unless jurisdiction is expressly conferred by congressional enactment."[90]

Since the statute in the case at bar did not contain an express authorization of jurisdiction, the suit was dismissed.

Thus, the state of federal Indian law as described in 1940 by Felix Cohen, a noted authority on Indian law, remains the same today:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by iself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[91]

By allowing ICRA civil suits, courts have for the first time, by implication of a statute, deprived an Indian nation of an aspect of sovereignty.[92] Given the degree of infringement presented by civil suits

90. 304 F.2d at 114-15 (citations omitted).

91. F. COHEN, *supra* note 78, at 123.

92. A recent Supreme Court decision has reduced the geographic area within a tribal government's jurisdiction on the basis of implications derived from a congressional statute. DeCoteau v. District County Ct., 420 U.S. 425 (1975). If such a reduction constitutes deprivation of an aspect of internal Indian sovereignty, then *DeCoteau* represents a second instance of infringement through implication.

Indian country, over which Indian tribes have jurisdiction, includes "all land within the limits of any Indian reservation . . . and all Indian allotments, the Indian titles to which have not been extinguished . . . ." 18 U.S.C. § 1151 (1970). In *DeCoteau*, South Dakota courts asserted jurisdiction over Indian acts done on lands within a reservation created by treaty in 1867, but owned and settled by non-Indians since 1891. The issue was whether the Act of March 3, 1891, c.543, 26 Stat. 1035, which ratified an agreement between the United States and the Sisseton-Wahpeton Tribe under which the tribe sold to the United States their unallotted land, terminated the reservation status of that land and thus exposed it to state jurisdiction under 18 U.S.C. § 1151 (1970). The Court held the reservation status to have been terminated despite the absence of express language to that effect in the Act.

DeCoteau, however, does not provide support for implying civil remedies under ICRA. First, the implication of civil remedies under ICRA directly interferes with powers of tribal sovereignty, *see* text at notes 7-23 *supra*, while *DeCoteau* affects only the georgraphical scope within which powers of tribal sovereignty may be exercised.

Second, the Court found the reservation status to have been terminated only after finding evidence of congressional intent sufficient to override the presumption against abrogation of treaties by statute. *See* note 61 *supra*. As has been noted, no evidence exists concerning congressional intent in ICRA sufficient to override the presumption against treaty abrogation. *See* note 76 *supra* & text at notes 75-76 *supra*. There is, therefore, inadequate justification for interference with tribal sovereignty.

Finally, the Court in *DeCoteau* emphasized that the Act was "not a unilateral

upon internal Indian affairs,[93] and recognizing that the Senate subcommittee that drafted ICRA recognized that Indian sovereignty may be qualified only by express legislation,[94] this departure from precedent is unwarranted.

Underlying the "express qualification" requirement are important principles of judicial review and separation of powers. Weighing most heavily against implication is the doctrine that Indian policy should be made solely by the political branches of government. In the landmark reapportionment case of *Baker v. Carr*,[95] the Court defined the contours of the political question doctrine[96] and discussed the influence of this doctrine in limiting the extent of the judiciary's role in Indian affairs.[97] Several of the features enumerated by the Court are present in the implication of a civil remedy that infringes upon Indian sovereignty.

In *United States v. Consolidated Wounded Knee Cases*,[98] the court, without referring to *Baker* and without expressly mentioning the political question doctrine, used an analysis similar to that mandated by *Baker*. In this case the criminal defendants argued, *inter alia*, that Indian sovereignty barred federal jurisdiction over alleged crimes by Indians on a reservation.[99] In upholding federal jurisdiction, the court recognized that the Constitution requires commitment of Indian matters to the political branches of the government,[100]

---

action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented." 420 U.S. at 448. In contrast, ICRA was not formally approved by the Indian nations affected by its enactment, and many Indian leaders oppose ICRA. *See* Coulter, *supra* note 6, at 50.

93. *See* text at notes 7-23 *supra*.

94. *See* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 4 (Comm. Print 1964).

95. 369 U.S. 186 (1962).

96. 369 U.S. at 217:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.

97. 369 U.S. at 215.

98. 389 F. Supp. 235, 239 (D. Neb. & D.S.D. 1975).

99. 389 F. Supp. at 236.

100. 389 F. Supp. at 239:

> [T]he people of the United States have not given me or any other judge the power to set national policy for them. By the Constitution the people have assigned governmental powers and have set their limits. *Relations with Indian tribes are given exclusively to the executive and legislative branches.* Perhaps

and, hence, that the court must look to the legislative and executive branches to define the limits on federal incursion into Indian affairs. Although the specific result in *Wounded Knee* did not restrict intervention in internal Indian affairs, the case nonetheless stands for the proposition that since policy-making in Indian affairs belongs exclusively to the political branches of government, the courts should be reluctant to construe a statute in a manner that expands the role of the judiciary in Indian affairs. The pervasive role that some courts have assumed in allowing civil challenges to the actions of an Indian government is directly contrary to this proposition.

The underlying reason for such reluctance, according to the *Wounded Knee* court, is that "legislative bodies have investigative tools for listening to a wider community than do courts for ferreting out the deeper consciousness of the body politic," and those who are elected represent "an amalgam of many . . . [that] is more likely to reflect the conscience and wisdom of the people than a few who are appointed."[101] The problems of how to define the rights of individual Indians within the tribal context and how best to protect those rights are best left to the Congress.

Baker v. Carr states that courts must not deviate from adherence to a political decision already made[102] by the Congress in the area of Indian affairs and should not make decisions that may be "hampered by . . . possible interference with a Congressional program."[103] The currently stated policy of Congress[104] and of the executive branch[105] is that Indian sovereignty should be enhanced; ICRA itself establishes a policy of consultation with Indians before any action is taken that will affect them.[106] Such policies are predicated upon a long history of conflict and negotiation. As the court stated in the *Wounded Knee* cases:

> [R]elations with American Indians are rooted in international relations . . . , including the laws of conquest and of treaties developed over centuries, not by courts, but by executive heads of nations through negotiations. The United States in its early history accepted in its dealings with other nations the European concepts. Perhaps it should not have done so in its relations with the American Indians.

---

it should be otherwise, but it is not. When and if the people amend the Constitution to put limits on the executive and legislative branches in their affairs with Indian tribes, the federal courts will uphold those limits, but in the meantime the courts cannot create limits. In short, a judge must hold government to the standards of the nation's conscience once declared, but he cannot create the conscience or declare the standards (emphasis added) (citations omitted).

101. 389 F. Supp. at 239.

102. 369 U.S. at 217.

103. 369 U.S. at 215-16 n.43.

104. S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971). *See also* S. 2010, 94th Cong., 1st Sess. § 101 (1975).

105. Message on American Indians by President Nixon, July 8, 1970, in M. PRICE, LAW AND THE AMERICAN INDIAN 597 (1973).

106. *See* 25 U.S.C. §§ 1311, 1321(a), 1322(c) (1970).

> But it did. Changing now, after nearly two centuries, is a matter of massive public policy for broader exploration than courts are able to provide. Essentially, the issues here have to do with the methods of shifting power from one group to another—by war, threat of war, economic pressure or indictment, verbal persuasion, election, agreement, or gradual legislative encroachment. The acceptability of each method should be decided by the citizenry at large, which speaks directly or through its elected representatives.[107]

Absent any express Congressional determination to the contrary, the courts should conclude that the judicial branch is the improper forum for obtaining relief for a grievance involving the sovereignty of an Indian nation.[108]

Before such a conclusion can be reached, however, the threshold question at this stage of analysis—whether the Indian nation possesses requisite sovereignty—must be decided. It will not always be true that an Indian tribe posesses the degree of sovereignty necessary to set up a bar to the imposition of "foreign" jurisdiction over the Indians absent express federal legislation. In *Oklahoma Tax Commission v. United States*[109] the Supreme Court was faced with the question whether Oklahoma state inheritance laws applied to income that Indians received from oil wells. Noting that the Oklahoma Indians did not live on reservations and that they held their land in fee, the Court rejected the claim that all Indians are exempt from taxation:

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy . . . ; they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.[110]

The Court then proceeded to find state jurisdiction to impose a tax on the basis of traditional, non-Indian rules for analysis of legislative history and statutory construction.[111]

Similarly, not all Indian governments have been found to possess the requisite degree of sovereignty to support a bar to federal court jurisdiction over suits against them. In the 1965 case of *Colliflower v. Garland*,[112] for example, a federal court found jurisdiction to hear

---

107. 389 F. Supp. at 239.

108. Cases in which implied remedies are sought under ICRA may present the federal courts with such questions as whether electricity should be introduced into cultural and religious areas of a Pueblo. *See* Peoples Committee v. Tribal Council, Civil No. 75-393 (D. N.M., filed July 9, 1975). These seem to be the kinds of issues to which the Supreme Court in *Baker* was referring when it stated that if courts are "hampered by problems of the management of unusual evidence," they should rely on congressional determination. 369 U.S. at 215-16 n.43.

109. 319 U.S. 598 (1943).

110. 319 U.S. at 603 (citations omitted).

111. The Court did not require an express statement of congressional intent to rescind the tax exemption generally possessed by Indians.

112. 342 F.2d 369 (9th Cir. 1965).

a habeas corpus action by an Indian imprisoned by an Indian government. The court found the sovereignty bar to federal court review inapplicable to the Gros Ventres Indians because of the pervasive federal presence in the Indian courts: "Under these circumstances, we think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."[113] Neither the *Oklahoma Tax Commission* nor the *Colliflower* courts found that the statute or remedy involved overrode Indian sovereignty. They instead determined that the Indian nations involved lacked sovereignty,[114] apparently on the theory that the absence of a truly independent tribal government created an expectation that the government would operate pursuant to external regulation.

Several major factors are crucial to the determination of independence. The most important is whether the Indian tribe retains its traditional form of government or has been reorganized pursuant to a federal statute.[115] Governments based on traditional Indian culture should not be seen as "a part of a federal agency" over which federal courts have jurisdiction, but those organized pursuant to a federal statute[116] may be in a much different position. Many such governments operate under constitutions drafted by the Bureau of Indian Affairs (BIA),[117] which often provide for review and approval of tribal ordinances by the Secretary of Interior[118] and for adherence to the United States Constitution and federal law.[119]

Although federally reorganized Indian governments have obviously relinquished some degree of their sovereignty, a court should not mechanically conclude that these governments are "federal agencies" subject to federal judicial review. The extent to which the

113. 342 F.2d at 379.

114. In *Colliflower*, the Gros Ventres Indians had been organized pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-92 (1970), which subjected their bylaws and constitution to approval by the Secretary of the Interior. 25 U.S.C. § 476 (1970). Also, Indian prisoners were confined in a county jail by contract between the federal and county government. 342 F.2d at 374.

115. Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969). There are 485 federally recognized Indian governments. The organizational structures of 52 have been federally approved though not authorized by statute. In addition, 224 traditional Indian governments have been federally recognized without any formal federal approval of their organizational structures. *See* BUREAU OF INDIAN AFFAIRS, ORGANIZATIONAL STATUS OF FEDERALLY RECOGNIZED INDIAN ENTITIES (1975).

116. *See* Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970).

117. *See* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 88TH CONG., 2D SESS., *supra* note 94, at 4.

118. *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 968, 976-77 (1972). Amendments to constitutions drafted by the BIA *require* approval by the Secretary of Interior. 25 U.S.C. § 476 (1970).

119. *See* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, *supra* note 94, at 5.

continuing tribal governmental process is actually intertwined with federal action must be considered. Secretarial approval is not necessarily evidence of a continual involvement of federal instrumentalities in the Indian government's conduct of affairs. Approval may sometimes be granted automatically, and Indian governments may, on occasion, simply ignore the requirement and not submit tribal actions for such review.[120] Additionally, efforts of a tribe to amend its constitution to restrict secretarial review, affirmative tribal reaction to a statute authorizing Indian governments to assume supervision of BIA employees,[121] an insubstantial role of the Commissioner of Indian Affairs in the tribal government,[122] and a limited reliance of the tribe on BIA funding of reservation activities[123] all should be persuasive evidence that the tribal government is not in fact acting "in part as a federal agency."

A second factor that should be considered in determining tribal independence is the degree to which the Indian tribe has retained its traditional language, religion, and culture. Traditional Indians are less likely to have an expectation of federal regulation of their internal tribal customs. Even where departures from traditional customs exist, however, courts should not exaggerate their importance, since Indians are frequently less concerned with rigidly preserving particular forms or practices than they are with being permitted to evolve in a distinctly Indian manner, free from outside interference.[124]

Finally, the Indian nation's attitude toward federal domination should be examined. Passage by the tribal council of a resolution condemning the Indian policy of the United States as colonialist[125] and active opposition by the Indian government to the enactment of ICRA are evidence that there is neither an expectation nor an acceptance of operating pursuant to federal regulation.

Although no formulation may be presented by which a federal court can precisely ascertain the extent of sovereignty possessed by an Indian tribe, a court should at least weigh these factors before considering the implication of a civil remedy under ICRA. If the Indian nation is found to possess a degree of sovereignty sufficient to support the conclusion that it expects to conduct its internal affairs free

120. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN TRIBES AS GOVERNMENTS 135, 138-39 (June ed. 1975).

121. 25 U.S.C. § 48 (1970).

122. *See* Colliflower v. Garland, 342 F.2d 369, 374 (9th Cir. 1965). Appointment of a chief of an Indian government by the President further evidences extensive federal involvement. *See* Groundhog v. Keeler, 442 F.2d 674, 677 (10th Cir. 1971).

123. *See* Colliflower v. Garland, 342 F.2d 369, 373 (9th Cir. 1965).

124. *See* V. DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES 7, 206 (1974); Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1080 (1974).

125. Resolution of March 26, 1974, Standing Rock Sioux Tribal Council and Resolution of Feb. 16, 1975, Pitt River Tribal Council, in *Minutes to the Conference on International Law of the International Indian Treaty Council* (Feb. 21, 1975).

from federal regulation, then no civil remedy should be implied under ICRA.[126]

C. *Implying a Civil Remedy*

Even if an Indian tribe possesses neither treaty rights nor a requisite degree of sovereignty to bar the implication of civil remedies under ICRA, a civil remedy still should not be lightly implied by a federal court. The Supreme Court has developed a framework of analysis for implied remedies in several areas of non-Indian law that provides a suitable starting point for assessing the desirability of implication under ICRA. The analysis provides for consideration of a number of policy issues already raised concerning Indian law that should persuade courts to refrain from exceeding the express provisions of the Act.

This framework was recently summarized and applied in *Cort v. Ash*.[127] At issue in *Cort* was whether a penal statute prohibiting campaign contributions by corporations[128] would support a shareholder's civil action to secure derivative damage relief against corporate directors for violation of that statute. The Supreme Court delineated four factors relevant to a determination of whether a court should imply a private remedy for a statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that

126. Many of the courts implying a civil remedy under ICRA have done so only after requiring an exhaustion of tribal remedies. *See, e.g.*, O'Neal v. Cheyenne River Sioux, 482 F.2d 1140 (8th Cir. 1973); White v. Tribal Council, 383 F. Supp. 810 (D. Minn. 1974). While this practice may reduce the infringement of treaty rights and Indian sovereignty, it fails to protect fully Indian autonomy for two reasons. First, the presumption against treaty abrogation, *see* text at notes 61-62 *supra*, and the express qualification requirement, *see* text at notes 83-90 *supra*, mandate that the Congress actually considers treaty rights and Indian sovereignty when passing legislation and, thus, guarantee Indians an opportunity to apply political pressure to prevent congressional imposition of Anglo legal values. Requiring exhaustion of Indian remedies fails to present such a political opportunity.

Second, requiring exhaustion of Indian remedies only delays interference with tribal rule; tribal governments are still under pressure to follow federal law to avoid the embarrassment of being reversed. *See* Janis v. Wilson, 521 F.2d 724, 729 (8th Cir. 1975). This pressure is eliminated by the presumption against abrogation and the express qualification requirement, which isolate a sphere of exclusive tribal jurisdiction.

127. 422 U.S. 66 (1975).

128. 18 U.S.C. § 610 (1970) (amended 1972 & 1974).

it would be inappropriate to infer a cause of action based solely on federal law?[129]

It will now be shown that both the legislative history of ICRA and the traditional policy of federal abstention from internal Indian affairs support the conclusion that no civil remedy should be implied from ICRA.

A review of the legislative history indicates that criminal defendants constituted the class of persons for whose *especial* benefit ICRA was enacted. First, the focus of the hearings carried on for the five years preceding the Act's passage was on the deprivation of rights within the Indian criminal justice system.[130] Second, the testimony of Senator Ervin, chairman of the subcommittee that considered the legislation, emphasizes criminal proceedings: "The first title makes the Bill of Rights *applicable to an Indian when he is charged with a crime by a tribal court*, thus assuring the Indian citizen the basic rights and privileges in his relationship with his tribal government that every other American citizen now has in his relationship with his State, local and Federal Governments."[131] Finally, these indications of intent drawn from the congressional record are reinforced by general rules of construction and by a look at the context in which ICRA was passed. Thus, the familiar canon of statutory construction, that *expressio unius est exclusius alterius*,[132] suggests that because habeas corpus was the sole express remedy in ICRA,[133] and was viewed as an effective enforcement mechanism,[134] it should be construed as the only intended remedy.

This interpretation is reinforced by a glance at other civil rights legislation. The Fair Housing Act, for example, with which ICRA was passed, specifically established a civil remedy,[135] while the 1964 Civil Rights Act, prohibiting discrimination in places of public accommodation, expressly provided that either the Attorney General[136]

129. 422 U.S. at 78, *quoting* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis added by Court).

130. *See* authorities cited note 75 *supra.*

131. *Hearings on H.R. 15419 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess., ser. 90-23, at 132 (1968). *See* 113 CONG. REC. 35474 (1967) (remarks of Senator Ervin). Such a specific statement by Senator Ervin seems far more indicative of legislative intent than do general remarks made by him concerning the expansion of constitutional rights. *See, e.g.*, 113 CONG. REC. 35,472 (1967). For another statement of a congressman emphasizing criminal proceedings, see 114 CONG. REC. 9596 (1968) (remarks of Congressman Meeds).

132. *See, e.g.*, National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

133. 25 U.S.C. § 1303 (1970) *reprinted in* note 4 *supra.*

134. *See, e.g.*, 114 CONG. REC. 9552-53 (1968) (remarks of Congressman Reifel).

135. 42 U.S.C. § 3612 (1970).

136. 42 U.S.C. § 2000a-5 (1970).

or private parties[137] could bring suits in federal courts for injunctive relief.[138] Moreover, Congress demonstrated its awareness of the potential intrusiveness of ICRA into Indian sovereignty by taking no action on both a bill providing for a trial *de novo* in federal court for the deprivation of civil rights[139] and a provision to allow the Attorney General to bring civil or criminal actions to vindicate Indian rights.[140] Congress showed its concern with the scope of federal court intervention into Indian affairs and limited the available remedy accordingly.[141]

In fact, an underlying purpose of ICRA, in addition to the protection of criminal plaintiffs, was the promotion of the sovereignty of Indian governments. This concern is clearly reflected in Title IV of the Act.[142] Under congressional authorization prior to ICRA, states did not need the consent of the tribes to assume both civil and criminal jurisdiction over Indians.[143] Title IV was a response by Congress to bitter Indian complaints concerning the exercise of state jurisdiction.[144] It made consent of the involved Indian government a prerequisite to further state assumption of criminal[145] or civil jurisdiction[146] and authorized states to retrocede previously assumed jurisdiction over Indians.[147] This provision, in conjunction with Title III of the Act, which provides that proper qualifications of judges in tribal courts and a training program for tribal judges be established,[148] demonstrates that a major purpose of ICRA is to revest authority to the tribes and to upgrade tribal courts.[149]

---

137. 42 U.S.C. § 2000a-3 (1970).

138. The Voting Rights Act of 1965 § 3(a)-(c), 42 U.S.C. § 1973a(a)-(c) (1970 & Supp. 1975) also expressly provides for civil remedies.

139. *See* S. 962, 89th Cong., 1st Sess. (1965). The bill never emerged from committee. *See also* Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337, 347 (1969). *But see* Brunett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557, 602 (1972).

140. *See* S. 963, 89th Cong., 1st Sess. (1965) (the bill never emerged from committee); Zionitz, *supra* note 25, at 13-14.

141. In the 1969 hearings on S. 211, which contained identical language to Title II of ICRA and would have amended ICRA in other respects, Senator Ervin, in addressing the scope of federal review of civil and criminal trials, remarked: "The only provision in this bill that provides for federal court interference is writ of habeas corpus . . . ." *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 15 (1969).

142. 25 U.S.C. §§ 1321-26 (1970).

143. M. PRICE, *supra* note 26, at 103-04, 213-18.

144. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, *supra* note 94, at 9-14.

145. 25 U.S.C. § 1321(a) (1970).

146. 25 U.S.C. § 1322(a) (1970).

147. 25 U.S.C. § 1323(a) (1970).

148. 25 U.S.C. § 1311(3)-(4) (1970).

149. Attributing to ICRA the purpose of fostering Indian sovereignty places ICRA harmoniously within the broadly stated national policy of Indian self-determination. *See* Message on American Indians by President Nixon, *supra* note 105 ("The time has come to break decisively with the past and to create the conditions

Not only is the implication of civil remedies contrary to the purpose of fostering Indian self-determination, but such implication is not necessary to protect the rights created by ICRA. Courts suggesting that failure to imply a civil remedy would render the Act unenforceable and ineffectual are in error.[150] First, those provisions that guarantee rights to criminal defendants[151] may be enforced by the express habeas corpus action.[152] Moreover, normally expansive constitutional provisions such as the due process and equal protection clauses,[153] though limited if applicable only in habeas corpus proceedings, would effectively guarantee rights of the criminally accused. Second, even if such constitutional provisions as the right to free speech[154] and the prohibition on the taking of property without just compensation[155] cannot be fully enforceable in *federal* courts through a habeas corpus proceeding, these rights may still be enforceable in *Indian* courts.[156] Tribes organized under the federal reorganization act[157] often have provisions in their constitutions that incorporate into Indian jurisprudence rights created under federal statute.[158] Tribal courts are the most desirable forum for accommo-

---

for a new era in which the Indian future is determined by Indian acts and Indian decisions"); S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971):

> That it is the sense of Congress that (1) our national Indian policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government and that a government wide commitment shall derive from this relationship that will be designed to give Indians the freedom and encouragement to develop their individual, family, and community potential and *to determine their own future to the maximum extent possible* . . . (3) improving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and *self-determination shall be a major goal of our national Indian policy* (emphasis added).

150. *See*, e.g., Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972); Loncassion v. Leekity, 334 F. Supp. 370, 373 (D.N.M. 1971). *See also* de Raismes, *supra* note 112, at 91; Comment, *supra* note 25, at 1371.

151. 25 U.S.C. § 1302(2) (1970) (search and seizure); 25 U.S.C. § 1302(3) (1970) (double jeopardy); 25 U.S.C. § 1302(4) (1970) (self-incrimination); 25 U.S.C. § 1302(6) (1970) (speedy trial, compulsory process, information as to nature of accusation); 25 U.S.C. § 1302(7) (1970) (bail, excessive fines and imprisonment, cruel and unusual punishment); 25 U.S.C. § 1302(10) (1970) (right to jury trial); note 3 *supra*.

152. 25 U.S.C. § 1303 (1970) *reprinted in* note 4 *supra*.

153. 25 U.S.C. § 1302(8) (1970) *reprinted in* note 3 *supra*.

154. 25 U.S.C. § 1302(1) (1970) *reprinted in* note 3 *supra*.

155. 25 U.S.C. § 1302(5) (1970) *reprinted in* note 3 *supra*.

156. Zionitz, *supra* note 25, at 8; *see* legal memorandum of Mr. Kent Frizzell, the Solicitor to the Interior Department, to the Department of Justice, May 22, 1974, at 10-11, *quoted in* Zionitz, *supra* note 25, at 9 n.33: "Nor would [failure to imply remedies beyond habeas corpus] . . . render meaningless the substantive provisions of section 1302. Those provisions clearly bind tribal courts as well as all other tribal officers, and in addition bind the Secretary of the Interior in the exercise of his supervisory control over certain types of tribal action."

157. 25 U.S.C. §§ 461-79 (1970).

158. *See* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, *supra* note 94, at 5.

dating Anglo-American rights with traditional Indian culture.[159]

Thus, courts implying civil remedies have ignored the emphasis on criminal justice and the sensitivity to sovereignty that indicate congressional intent to provide federal court review only to the extent that criminal rights were at stake. The dual, and sometimes conflicting, purposes of ICRA in fostering Indian self-determination and yet protecting the rights of Indians *vis-a-vis* their tribal governments are best effectuated by limiting federal judicial intervention to the sole remedy of habeas corpus.[160]

This conclusion remains unchanged after consideration of the final factor deemed relevant in *Cort*—whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States . . . ."[161] Indian tribes have jurisdiction over their internal affairs[162] analogous to that possessed by the states.[163] With the exception of recent cases in which courts have implied civil remedies for violations of ICRA, federal courts have assumed an adjudicatory role over internal Indian controversies only where there was an express congressional mandate[164] or where Indian sovereignty had already been substantially diminished.[165]

There is simply no basis in precedent for the federal courts to imply such civil remedies, and the policy considerations that have countenanced judicial restraint remain persuasive. First, the legislative and executive branches have traditionally defined the relationship of the federal government to the Indians;[166] these branches are most qualified to weigh the consequences of any measure affecting tribal independence. The implication of civil remedies for ICRA not only portends fundamental changes in Indian government but may also place substantial financial burdens upon the tribes, both in the cost of litigation[167] and the potential for damages.[168] Most Indian nations are not wealthy,[169] and their income is allocated to benefit the entire tribe. Given the limited ability of tribes to bear increased financial burdens, the imposition of civil remedies may very well lead to a loss of jobs and services in the Indian community.[170]

---

159. *See* text at notes 171-72 *infra.*

160. *But see* Comment, *supra* note 25, at 1371.

161. 422 U.S. at 78.

162. *See* text at notes 47-58 *supra.*

163. *Cf.* Thebo v. Choctaw Tribe, 66 F. 372 (8th Cir. 1895).

164. *See* text at notes 84-91 *supra.*

165. *See* text at notes 109-26 *supra.*

166. *See* text at notes 95-107 *supra.*

167. *See, e.g.*, AMERICAN INDIAN LAWYER ASSOCIATION, *supra* note 6, at 55. *See also* Thebo v. Choctaw Tribe, 66 F. 372, 376 (8th Cir. 1895).

168. *See, e.g.*, Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971).

169. *See* A. JOSEPHY, RED POWER; THE AMERICAN INDIANS FIGHT FOR FREEDOM 3 (1971).

170. *See* Zionitz *supra* note 25, at 33-34.

A second, and more important, policy reason for preserving tribal courts as the forums for adjudicating individual rights is the inherent ethnocentrism of the federal courts. Concepts of law within the federal judiciary are based primarily upon Anglo-American legal principles. When conflicts are brought into a federal court, issues will be framed according to these principles and may ignore incompatible traditions that have legitimacy among the Indian people.[171] If Indian customs are to withstand the pressures exerted by the Anglo-American system of law, great sensitivity to Indian culture will be necessary—sensitivity that would clearly be more available in tribal courts. The wholesale exposure of tribal governmental systems to a culturally removed federal judiciary is an extreme and momentous development; it should not come about through implication from a statute that merely represents the initial extension by Congress of the federal judicial power into tribal government.[172]

The trend in federal Indian law since the Indian Reorganization Act of 1934[173] has been to allow increasing tribal autonomy. Statutes have, for instance, authorized Indian nations to take control of BIA employees.[174] A primary purpose of ICRA itself is to enhance the prospects of Indian sovereignty.[175] The Act provides for retrocession of currently held state authority over Indian nations.[176] and requires consent of Indian tribes prior to any expansion of such authority.[177] Coupled with a growing consciousness among Indians of the values in their traditional culture, such statutes may even allow Indian nations currently considered "a part of a federal agency" to regain their sovereignty. Absent congressional mandate, the courts should be reluctant to interfere with the evolution of Indian governments that Congress is presently supervising.

---

171. *See* Peoples Committee v. Tribal Council, Civil No. 75-393 (D.N.M., filed July 9, 1975) (issue of whether Tribal Council can prohibit the installation of electricity because of religious principles was argued on basis of "spot-zoning" precedents). *See also Hearings on S. 211 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 29 (1969) (testimony of Benny Atencio on behalf of the Santa Domingo Pueblo and the Indian Pueblo Council):

> Procedural protections of due process may vary from one social context to another. As an example: separation of powers is a basic principle in the Government of the United States. At Santa Domingo our tribal council acts as a legislature, a court, and the executive.
>
> I could go on pointing out disparities but it is obvious that your way of life is different from ours. The things you value, that which make life meaningful to you are not the same with us in many respects. But we respect your beliefs. We ask nothing more in return.

172. *See generally* M. PRICE, *supra* note 26, at 749.

173. 25 U.S.C. §§ 461-79 (1970).

174. 25 U.S.C. § 48 (1970).

175. *See* text at notes 142-49 *supra*.

176. 25 U.S.C. § 1323 (1970).

177. 25 U.S.C. §§ 1321, 1322 (1970).