

SPECIAL FEATURE

PRESERVING INDIAN PREFERENCE FOR NATIVE AMERICAN SELF-GOVERNANCE

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I. Introduction

Viewing the results of [the U.S. guardianship over Indian wards], it is difficult for me to speak dispassionately. I shall not ask my colleagues to examine in detail a certain page of history upon which no American may gaze with feeling of pride. Suffice it to say that it reveals an almost uninterrupted succession of broken treaties and promises, and a record of the ruthless spoliation of defenseless wards. With all the vigor at my command I protest against allowing that shameful and inhuman treatment to continue a day longer without doing all in my power to put an end to it.¹

If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men.²

Indian³ preference is an important part of an overall regulatory scheme enacted to foster self-governance among the tribes.⁴ Indian preference laws give Native American candidates hiring priority for parts of the Department

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1. 78 CONG. REC. 11,726 (1934) (statements of Rep. Edgar Howard on Wheeler-Howard Act, also known as the Indian Reorganization Act).

2. H.R. REP. NO. 23-474, at 98 (1834) (letter dated Feb. 10, 1834, from Indian Commissioners to the Secretary of War), *quoted in* Morton v. Mancari, 417 U.S. 535, 542 n.11 (1974).

3. This comment will use “Indian” and “Native American” interchangeably. There is controversy about which term is preferred, although “Indian” seems to be preferred by members of the group when a specific tribal name cannot be used. *See, e.g.,* Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 16-17 (2003).

4. 25 U.S.C. §§ 461-494a (2006).

of the Interior (DOI) that provide services to Indians.⁵ The laws create two main legal requirements. First, there must be separate job qualification standards⁶ for Indians that take into account their unique cultural and linguistic contributions.⁷ Second, if there are multiple qualified candidates for a position (whether there are two sets of qualification standards or only one),⁸ hiring priority will be given to Indians.⁹

Questions about what sort of preference Indians should receive,¹⁰ what constitutes “hiring,”¹¹ which positions are subject to preference,¹² and who is an Indian within the meaning of the United States Code and federal regulations have been the subject of much litigation.¹³ But the basic goals of Indian preference laws are clear: “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.”¹⁴ These are still worthy purposes today. But Indian preference is in jeopardy.

This comment proposes a two-pronged approach for preserving the self-governance benefits of Indian preference. First, the preference laws should base qualification methods on sovereign tribal affiliation rather than blood quantum. Second, the Department of the Interior (DOI), through a rule-

5. *Id.* § 472.

6. In hiring, the federal government sets standardized requirements for each position. *See, e.g.*, Civil Service Reform Act of 1978, Pub. L. No. 94-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); 5 C.F.R. § 300.103 (2010). These generic civil service qualification standards do not take into account unique Indian qualifications such as language skills or cultural familiarity, and high education requirements can introduce barriers to qualification.

7. *See, e.g.*, *Dionne v. Shalala*, 209 F.3d 705, 710 (8th Cir. 2000) (Lay, J., dissenting).

8. For some technical positions (e.g., medical professionals), it may be inappropriate to reduce the education requirements in favor of linguistic and cultural skills. In these cases, even though the position is subject to Indian preference, it may have just one set of qualification standards. Indian applicants meeting this set of standards would be hired before non-Indian applicants. Administrative positions, or positions that have direct contact with Native American populations, on the other hand, would obviously benefit from linguistic and cultural skills, and would have two sets of qualification criteria.

9. *See, e.g.*, *Prunier v. Norton*, 468 F. Supp. 2d 1344, 1351 (D.N.M. 2006).

10. *See generally* *Johnson v. Shalala*, 35 F.3d 402 (9th Cir. 1994).

11. *See generally* *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974).

12. *See generally* *Dionne v. Shalala*, 209 F.3d 705 (8th Cir. 2000).

13. *See generally* Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2001); Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97 (2007).

14. *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974) (citations omitted).

making, or Congress, through amending legislation, should clarify the requirements for determining which governmental positions are subject to Indian preference. A clear legislative mandate by Congress would make it more difficult for the DOI to circumvent Indian preference guidelines or to defend in court hiring practices that fail to respect Indian preference.

In Part II, this comment provides the historical rationale for creating Indian preference provisions, and addresses reasons for preserving Indian preference. First, the policy of promoting self-governance is just as strong today as it was in 1934 when Congress passed the Indian Reorganization Act.¹⁵ The tribes are still sovereign nations with unique issues distinct from other U.S. populations.¹⁶ Second, the statutory language,¹⁷ congressional intent,¹⁸ and the DOI's long-standing interpretation¹⁹ support a broader definition of positions qualifying for Indian preference than that found in the most recent interpretation adopted by the DOI and its sub-agencies²⁰ or the D.C. District Court.²¹ Third, because of the unique guardian-ward relationship between the federal government and the Indian tribes, canons of construction were created, requiring the resolution of statutory ambiguities in favor of the Indians.²²

In Part III, this comment examines four ways in which Indian preference laws are threatened. First, a recent court decision changed which positions are subject to preference,²³ and may have the effect of drastically limiting both the quantity and quality of Indian preference positions, potentially confining them only to low-level positions and excluding entirely positions

15. 25 U.S.C. §§ 461-494a (2006). The Indian Reorganization Act is also known as the Wheeler-Howard Act. Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 606 n.50 (2000). The Act was designed to "terminate[] allotment policy and procedure," which was "the ultimate hegemony of Western European values." *Id.* at 603-06.

16. *See, e.g.*, Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 99 (2000) (detailing how majoritarian perspectives and racial norms affect the native Hawaiian people).

17. 25 U.S.C. § 472.

18. *See, e.g.*, 78 CONG. REC. 11,731 (1934) (statements by Rep. Howard).

19. *See, e.g.*, *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 51 (D.C. Cir. 1991).

20. *See, e.g., id.*

21. *See, e.g.*, *Indian Educators Fed'n Local 4524 v. Kempthorne*, Civil No. 04-01215 (TFH), slip op. at 2 (D.D.C. Dec. 12, 2008) (Amended Final Order and Declaratory Judgment), available at <http://64.38.12.138/docs/preference/order121208.pdf>.

22. *See, e.g.*, *Haley v. Seaton*, 281 F.2d 620, 623 (D.C. Cir. 1960).

23. *Indian Educators Fed'n Local 4524 v. Kempthorne*, Civil No. 04-01215 (TFH), slip op. at 2.

of authority. Second, despite legal requirements, the government agencies do not follow Indian preference requirements in practice.²⁴ Third, there may be no viable means to enforce Indian preference requirements when the agencies do not follow them.²⁵ Fourth, Indian preference laws present constitutional concerns because they contain a racial component.²⁶ The rationale for allowing Indian preference despite the aforementioned racial component is that the preference is based on sovereign tribal affiliation rather than race,²⁷ although race is used as one method of defining “Indian” status.²⁸

In Part IV, this comment proposes two main avenues through which to save Indian preference and foster tribal self-governance. First, race should be removed from the definition of “Indian” for purposes of Indian preference, with the focus shifted to tribal affiliation. Second, the DOI or Congress should clarify precisely which positions are subject to preference.

This comment concludes in Part V.

II. Background: Why Indian Preference Should Be Saved

A. The Policy of Promoting Self-Governance Is Still Valid

Indian preference was created as part of an overall scheme to give Indians greater control in the management of their own affairs.²⁹ “Indian preference . . . recognizes that Indians doing for Indians is consistent with a humane and civilized policy that will strengthen the tribes’ right to exist into perpetuity.”³⁰ In 1934, Congress passed the Indian Reorganization Act (IRA), also known as the Wheeler-Howard Act.³¹ John Collier, the Commissioner for Indian Affairs, submitted a memo explaining the rationale behind the Act:

24. See, e.g., Letter from Carolyn Cohen, Dir. of Office of Pers. Policy, Dep’t of the Interior Office of the Sec’y, to Aurene M. Martin, Acting Assistant Sec’y for Indian Affairs (July 22, 2003) (on file with author).

25. See, e.g., *Beams v. Norton*, 327 F. Supp. 2d 1323, 1329 (D. Kan. 2004).

26. E.g., 25 C.F.R. § 5.1 (2010).

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

28. E.g., 25 C.F.R. § 5.1 (2010).

29. 25 U.S.C. § 461 (2006).

30. Harold A. Monteau, *Monteau: Is Indian Preference Dead?*, CALIFORNIA TRIBAL BUSINESS ALLIANCE (Feb. 19, 2010), <http://www.calitba.org/news/monteau-is-indian-preference-dead>.

31. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

The result [of present civil service rules] has been that the Indians have been given no opportunity to handle their own affairs or to be trained in their own affairs. This bill, we think, gives them the opportunity to which they are entitled . . . to make the Indians the principal agents in their own economic and racial salvation and . . . progressively reduce and largely decentralize the powers of the Federal Indian Service.³²

Nearly 80 years have elapsed since the IRA's passage, and tribes still face many problems caused by government agency actions. In *Cobell v. Salazar*,³³ the DOI mismanaged individual Indian trust funds to the extent that a government accounting was impossible, and resolution of the case took 14 years.³⁴ Millions of dollars of tribal trust funds may be missing.³⁵ Moreover, Native American students, whose education is overseen by the Bureau of Indian Education either directly or through grants, have the lowest level of academic attainment of any racial group in the United States.³⁶ Between 2005 and 2008, only 30 percent of Bureau of Indian Education schools attained the Adequate Yearly Progress goals set by their state.³⁷ These and many other tribal issues are subject to federal regulation and control.

Obviously there are counterarguments to be made. What proof is there that greater self-governance will solve these problems? Why do these problems persist to this degree when Indian preference laws have been in place for most of a century? The conquest of one people by another and the resulting systematic, long-term oppression creates many challenges: racial, social, economic, and scientific. Examining affirmative action studies is

32. *Freeman v. Morton*, 499 F.2d 494, 499 n.11 (D.C. Cir. 1974) (quoting *Hearing on S. 2755 Before the S. Comm. on Indian Affairs*, 73d Cong. 1, 19 (1934) (Memorandum by John Collier, Comm'r for Indian Affairs)).

33. 573 F.3d 808 (D.C. Cir. 2009).

34. *Id.* at 813.

35. *See id.* at 810. For an in-depth discussion of the *Cobell* dispute, see Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575 (2010-2011).

36. Nat'l Indian Educ. Ass'n, *National Native Education Agenda: A Transition Paper for the Department of Interior*, NAT'L INDIAN EDUC. ASS'N 1 (2008), http://otrans.3cdn.net/948ee4e335b7fe460c_iam6bqur2.pdf ("American Indians have the lowest level of educational attainment of any racial or ethnic group in the United States. The national graduation rate for American Indian high school students was 49.3 percent in the 2003-04 school year, compared to 76.2 percent for white students.")

37. *Id.* at 2.

instructive because one sees that different societal contexts require different approaches and conclusions for ameliorative programs to be successful.³⁸ The time needed for change and study on the effectiveness of adopted programs complicates the landscape further: “[a] ‘temporary’ program to eliminate a centuries-old condition is almost a contradiction in terms.”³⁹ To date, Indian preference has not received the consistent, long-term support⁴⁰ necessary for it to prove itself a success. It should, at the very least, enjoy a period of consistent interpretation and application before being abandoned as a failure.

Educating one’s children and managing a nation’s funds are fundamental matters. With so many pressing concerns before the tribes, the policy of promoting self-governance is just as vitally important today as it was in 1934. The nation we are becoming and aspire to be values diversity and self-governance over assimilation,⁴¹ as evidenced by President Obama’s

38. See generally, THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* (2004) (presenting affirmative action studies from around the world).

39. *Id.* at 6.

40. Equal opportunities for education are just one such source of support that has been lacking for Indians.

Today, after a two-hundred-year legacy of federally controlled subsidized education, Indians have a miniscule professional class who are responsible for a mineral resource contract, can build a bridge, can deliver babies, or can run a cottage industry. The politically motivated system did its job well – most Indians have the skills sufficient for manual labor, and only manual labor.

DELORES J. HUFF, *TO LIVE HEROICALLY: INSTITUTIONAL RACISM AND AMERICAN INDIAN EDUCATION XV* (1997). “Generations of Indians have been educated into a subservient mentality, believing in white technological superiority rather than themselves.” *Id.* at XIX.

41. The text of the Dawes Act makes it clear that U.S. citizenship was contingent on leaving the tribe and assimilating with the individual land-owning culture:

[E]very Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner affecting the right of any such Indian to tribal or other property.

General Allotment Act of 1887 (Dawes Act) § 6, ch. 119, 24 Stat. 388, 390 (1887) (codified as amended at 25 U.S.C. § 349 (2006)). See generally Rose Strelau, “*To Domesticate and Civilize Wild Indians*”: *Allotment and the Campaign to Reform Indian Families, 1875-1887*, 30 J. FAM. HIST. 265 (2005). Federal Indian policy has vacillated throughout history, shifting from allotment and assimilation, to Indian reorganization, to the current era of self-determination. For an historical overview of these shifting federal policies in the context of

formation of interfaith councils;⁴² appointment of Muslims,⁴³ Hispanics,⁴⁴ and Native Americans⁴⁵ to influential positions; and even diverse religious practices in the White House.⁴⁶ Supporting Indian preference is in line with these policies.

B. Plain Language, Congressional Intent, and the DOI's Longstanding Practice Support a Broad Definition of "Indian Office"

The current Indian preference statute uses the phrase "Indian Office." The plain language of the Indian preference statute supports a broad definition of "Indian Office" and, therefore, a greater number of positions.⁴⁷ Title 25 U.S.C. § 472, the section dealing with Indians, states:

Indian land claims, see Patrick W. Wandres, Note, *Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches*, 31 AM. INDIAN L. REV. 131 (2006-2007).

42. E.g., Press Release, Mara Vanderslice, Deputy Dir., White House Office of Faith Based and Neighborhood P'ships, A New Era of Partnerships: Advisory Council on Faith-based and Neighborhood Partnerships Presents Final Report of Recommendations (Mar. 11, 2010), available at <http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr> ("This first-of-its-kind White House advisory group made up of diverse religious and community non-profit leaders . . .").

43. E.g., Press Release, White House, Muslim Americans Serving in the U.S. Government (June 3, 2009), available at <http://www.whitehouse.gov/video/Muslim-Americans-Serving-in-the-US-Government> ("The United States government reflects the rich diversity of the American population. Meet three Muslim Americans who freely retain and express their own faith identities while serving their nation.").

44. E.g., Thomas Ferraro, *Senate Confirms Sotomayor, First Hispanic on Supreme Court*, REUTERS (Aug. 6, 2009, 5:14 PM), <http://www.reuters.com/article/idUSTRE5755FS20090806>.

45. E.g., Katherine Ling, *Senate Confirms 3 Nominees for DOE, 1 for Interior*, N.Y. TIMES (May 20, 2009), <http://www.nytimes.com/gwire/2009/05/20/20greenwire-senate-confirms-3-nominees-for-doe-1-for-inter-19116.html> (discussing how a Native American, Larry EchoHawk, was appointed head of the DOI).

46. See, e.g., 'There's Freedom to Be Won Everywhere', THE JERUSALEM POST (Mar. 31, 2010), <http://www.jpost.com/Home/Article.aspx?id=172113> (describing Obama's 2010 Seder, Obama having now held the first and second Seders in the history of the White House).

47. The scope of this comment is limited to federal Indian preference inside the DOI. The DOI is a Cabinet-level agency currently headed by Secretary of the Interior Ken Salazar. The BIA, one of five main sub-departments of the DOI, is currently headed by Assistant Secretary of Indian Affairs, Larry EchoHawk. The Office of the Assistant Secretary for Indian Affairs (AS-IA) is EchoHawk's office, which controls the BIA and many other agencies (including those for Indian trusts and gaming), but is not technically a part of it. The Office of the Special Trustee for American Indians (OST) is a part of the DOI reporting to Salazar but outside the BIA. *Interior Organizational Chart*, U.S. DEP'T OF THE INTERIOR, <http://doi.gov/whoware/orgchart.cfm> (last visited Apr. 23, 2012); *Assistant*

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws,⁴⁸ to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.⁴⁹

Section 472a is entitled “Indian preference laws applicable to Bureau of Indian Affairs and Indian Health Service positions,”⁵⁰ which some argue implies a more narrow construction, confining Indian preference to just the positions inside those two agencies. But this section also provides that:

[t]he term “Bureau of Indian Affairs” means (A) the Bureau of Indian Affairs and (B) all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.⁵¹

The courts have relied upon this definition in concluding that preference is to be applied broadly, including in the Office of the Special Trustee for American Indians (OST) and the Office of the Assistant Secretary for Indian Affairs (AS-IA).⁵²

In addition, for many years, the DOI used the same interpretation of 25 U.S.C. § 472 as the courts. In *Albuquerque Indian Rights v. Lujan*, the court stated that the DOI traditionally interpreted the term “Indian Office” broadly to include all units within the DOI “directly and primarily related to the providing of services to Indians,” and did not limit application of the

Secretary – Indian Affairs: Biographical Statement of Larry Echo Hawk, U.S. DEP’T OF THE INTERIOR, <http://www.bia.gov/WhoWeAre/AS-IA/index.htm> (last visited Apr. 23, 2012). The Indian Health Service used to be part of the BIA, but was removed entirely and relocated to within the Department of Health and Human Services. *Indian Health Service Introduction*, INDIAN HEALTH SERVS., <http://www.ihs.gov/index.cfm?module=ihsIntro> (last visited Apr. 23, 2012). Traditionally, it was clear that Indian preference existed throughout the BIA and Indian Health Service. The AS-IA and OST are disputed (for a full analysis, see *infra* Part III.A). See *Indian Educators Fed’n Local 4524 v. Kempthorne (Kempthorne I)*, 541 F. Supp. 2d 257, 265-66 (D.D.C. 2008).

48. *E.g.*, 5 C.F.R. § 300.103 (2010) (discussing civil service standards).

49. 25 U.S.C. § 472 (2006).

50. *Id.* § 472a.

51. *Id.* § 472a(e)(3).

52. *Kempthorne I*, 541 F. Supp. 2d at 265.

preference solely to positions within the Bureau of Indian Affairs (BIA).⁵³ The DOI abruptly changed its position in 1988, issuing a memo stating that preference applies only to the BIA and departments removed intact from within the BIA.⁵⁴ As discussed in detail in a later section of this comment,⁵⁵ the DOI failed to hold a rulemaking to support this change in interpretation, and the court found the change arbitrary.⁵⁶

In passing § 472, Congress's intent was to create an Indian Office staffed primarily by Indians. Congress planned gradually to change the demographics of the office to include not simply entry-level jobs, but also higher-level positions. A congressional record statement elucidated Congress's intent: "This does not mean a radical transformation overnight or the ousting of present white employees. It does mean a preference right to qualified Indians for appointments to future vacancies in the local Indian field service and an opportunity to rise to the higher administrative and technical posts."⁵⁷

Since the original passage of the IRA, Congress has amended § 472 in response to court decisions. In 1970, a court held that preference did not apply to reductions in force, only to vacancies.⁵⁸ In 1979, Congress responded by amending the statute specifically to provide protections to reductions in force.⁵⁹ In 1974, a court held that preference applied to lateral transfers, even when a non-Indian employee was being transferred away from one posting for safety reasons.⁶⁰ Congress again responded by including in the 1979 amendments provisions allowing lateral or downward transfers for the protection of the employee or his family, or when the employee is no longer able to serve the local tribe.⁶¹ If Congress objected to the courts' holdings that Indian preference applies to positions outside the BIA and Indian Health Service, it has had ample opportunity since 1991 to amend the statute to change its meaning. But it has not done so, leading to an implication that it endorses a broad definition of "Indian Office" – one

53. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 51 (D.C. Cir. 1991).

54. *Id.* (citation omitted). "Departments removed intact" generally refers to the Indian Health Service. *Id.*

55. *See infra* Part III.A.

56. *Kempthorne I*, 541 F. Supp. 2d at 266.

57. 78 CONG. REC. 11,731 (1934) (statement of Rep. Howard).

58. *Mescalero Apache Tribe v. Hickel*, 432 F.2d 956, 961 (10th Cir. 1970).

59. Act of Dec. 5, 1979, Pub. L. No. 96-135, § 2(a), 93 Stat. 1056, 1057 (1979) (codified as amended at 25 U.S.C. § 472a(a) (2006)).

60. *Freeman v. Morton*, 499 F.2d 494, 498 (D.C. Cir. 1974).

61. §2(b)(1)(A), (C), 93 Stat. at 1057 (codified as amended at 25 U.S.C. § 472a(b)(1)(A), (C)).

that could include positions within other departments of the DOI that provide services to Indians.

C. The Canons of Construction and Guardian-Ward Relationship Support an Inclusive Definition

There are special canons of construction for courts to use when examining issues relating to Indian tribes.⁶² In 1912, the Supreme Court stated that Indian issues require liberal statutory construction to protect a “weak and defenseless” people, and that this then-unwritten rule had been in place for more than a hundred years.⁶³ By 1960, the language had become slightly less condescending, but still affirmed the same basic idea: “avowed solicitude for welfare of [] Indian wards” requires liberal construction of statutes and rules of law relating to Indian matters, with ambiguities resolved in favor of the Indians.⁶⁴

In *Choctaw Nation v. Oklahoma*,⁶⁵ a 1970 Supreme Court case dealing specifically with treaties, the Court’s language about lack of consent is illuminating:

[T]reaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians’ favor.⁶⁶

Federal statutes, federal court decisions, and DOI rulemakings are similarly imposed without meaningful consent, despite the canon of construction requiring liberal interpretation of ambiguities in favor of the Indians. Although it appears that the Indian preference statute clearly refers to all positions within the DOI that provide services to Indians, should a court

62. These special rules arise from the conquest of the tribes:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving 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 and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Bd. of Cnty. Comm’rs v. Seber, 318 U.S. 705, 715 (1943).

63. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

64. *Haley v. Seaton*, 281 F.2d 620, 623 (D.C. Cir. 1960).

65. 397 U.S. 620 (1970).

66. *Id.* at 631.

find any ambiguity with respect to which positions are subject to preference, the canons of construction require that the ambiguity be resolved in favor of the Indians seeking the employment preference.

III. How Indian Preference Is in Jeopardy

Indian preference is an important part of an overall regulatory scheme enacted to foster self-governance among the Indian tribes.⁶⁷ While it enjoyed strong support from Congress and the courts for many years, it is currently threatened in four ways: (1) courts have limited the positions qualifying for preference,⁶⁸ (2) the DOI does not follow the existing court holdings or statutory preference requirements,⁶⁹ (3) effective enforcement is near impossible,⁷⁰ and (4) the use of blood-based definitions for “Indian” creates constitutional conflicts.⁷¹

A. Indian Educators Federation v. Kempthorne Changed the Definition of Positions Subject to Preference, Dangerously Narrowing its Scope

One of the ways to expand and contract Indian preference in practice is to change the interpretation of which positions are subject to preference. Historically, the dominant interpretation has been that, when an agency office or department⁷² is subject to preference, all positions in that department are subject to preference.⁷³ Recent litigation⁷⁴ has drastically constricted this interpretation.

67. 25 U.S.C. § 461 (2006).

68. *See, e.g.*, *Indian Educators Fed’n Local 4524 v. Kempthorne*, Civil No. 04-01215 (TFH), slip op. at 2 (D.D.C. Dec. 12, 2008) (Amended Final Order and Declaratory Judgment), available at <http://64.38.12.138/docs/preference/order121208.pdf>.

69. *See, e.g.*, Memorandum from Acting Dir., Office of Human Res. Policy, Dep’t of the Interior Office of the Sec’y, to Human Res. Dirs. (Sept. 4, 2003) (on file with author) [hereinafter Memorandum from Acting Dir.].

70. *See, e.g.*, *Beams v. Norton*, 327 F. Supp. 2d 1323, 1329 (D. Kan. 2004), *aff’d*, 141 F. App’x. 769 (10th Cir. 2005).

71. *See, e.g.*, Paul Spruhan, *Indian as Race / Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006) [hereinafter Spruhan, *Indian as Race / Indian as Political Status*].

72. For an overview of the departments at issue, see Interior Organizational Chart, *supra* note 47.

73. *See, e.g.*, 25 C.F.R. § 5.1 (2010) (“For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent”); 25 C.F.R. § 5.2(a) (2010) (“Preference will be afforded a person meeting any one of the standards of § 5.1 whether the appointment involves initial hiring, reinstatement, transfer, reassignment or promotion.”).

74. *See generally Kempthorne I*, 541 F. Supp. 2d 257 (D.D.C. 2008).

In 2008, the Indian Educators Federation Local 4524 of the American Federation of Teachers⁷⁵ filed suit⁷⁶ in the D.C. District Court, seeking a declaration that Indian preference applied to some disputed DOI positions.⁷⁷ The scope of the term “Indian Office” was central to the dispute. The statute that created Indian preference requires that the Secretary of the Interior establish standards “for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the *Indian Office*, in the administration of functions or services affecting any Indian tribe.”⁷⁸ The outcome appeared to favor the Indian plaintiffs.⁷⁹ The court entered a declaratory judgment stating that Indian preference encompassed not only positions within the BIA and departments removed intact from within the BIA, but also other departments within the DOI that directly and primarily provide services to Indians.⁸⁰ This includes the OST and the AS-IA.⁸¹ This holding expanded the number of potentially eligible positions in the OST from the 170 that the Secretary had deemed eligible to 550, the total number of positions in the OST.⁸²

The D.C. District Court’s adoption of the DOI’s suggested definition for determining which positions qualify for preference overshadowed this limited favorable outcome for the union.⁸³ The court ultimately declared that “the employment preference for American Indians . . . applies to all positions in the [OST and AS-IA] that primarily and directly relate to the provision of services to Indians.”⁸⁴

Prior to the court’s declaration, all positions within any department deemed to be part of the Indian Office were subject to preference.⁸⁵ Even if it was determined that the position had particular technical requirements that rendered separate qualification standards inappropriate, the courts interpreted the law as requiring the Secretary to make an individual determination for that position in order to lawfully apply the general civil

75. The Indian Educators Federation Local 4524 of the American Federation of Teachers is a union representing Indian employees of the OST and the BIA. *Id.* at 258-59.

76. *Id.*

77. *Id.*

78. 25 U.S.C. § 472 (2006) (emphasis added).

79. *Kemphorne I*, 541 F. Supp. 2d at 267.

80. *Id.*

81. *Id.* at 263-65.

82. Complaint at 5, *Indian Educators Fed’n Local 4524 v. Kemphorne*, 541 F. Supp. 2d 257 (Civil No. 04-01215 (TFH)).

83. Amended Final Order and Declaratory Judgment, *supra* note 21, at 2.

84. *Id.*

85. *Kemphorne I*, 541 F. Supp. 2d at 265.

service standard rather than a separate qualifications standard for Indian applicants.⁸⁶ But the court's holding in this case is a significant departure from the previous rule because the preference requirement is on a position-by-position basis, rather than by department.⁸⁷

The Secretary of the Interior advocated that the application of Indian preference should be "only to the positions in those offices that primarily and directly provide services to Indians."⁸⁸ As the Secretary had previously contended that there were no such positions within the OST or the AS-IA,⁸⁹ this definition would severely limit the effectiveness of the declaratory judgment granted to the union. The union argued that this definition would not only deny application to the offices in contention in the suit, but would also allow the Secretary "to strip Indian preference from many positions in the Bureau of Indian Affairs."⁹⁰ By restricting preference to *positions* that provide services, rather than applying it to all positions in a *department* that provides services, Indian preference is drastically limited.

Further, the definition allows the agency to determine on a case-by-case basis whether individual positions are subject to preference. Courts have held that the decision by the DOI about which positions are subject to preference is not a matter of discretion,⁹¹ making the D.C. Circuit court's recent order a significant precedential departure. Logically, positions that directly provide services to Indians will be lower-level positions in the organization. Higher-level positions with more policy-setting power are not directly providing services, and the agency can easily strip them of their preference classifications. If the DOI takes advantage of this holding to the

86. *Dionne v. Shalala*, 209 F.3d 705, 707, 710 (8th Cir. 2000).

87. *Kempthorne I*, 541 F. Supp. 2d at 265.

88. Memorandum of Law in Support of Defendant's Motion for Entry of Final Judgment at 9, *Indian Educators Fed'n Local 4524 v. Kempthorne*, 541 F. Supp. 2d 257 (Civil No. 04-01215 (TFH)).

89. Memorandum of Law in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 27-28, 48, *Indian Educators Fed'n Local 4524 v. Kempthorne*, 541 F. Supp. 2d 257 (Civil No. 04-01215 (TFH)) ("[R]ather than providing direct services to Indians or allowing Indians to govern themselves in the manner encouraged by the 1934 legislation, the focus of the OST is on helping the federal government fulfill responsibilities left over from the days of the allotment policy. The mission of the Office of the Assistant Secretary for Indian Affairs is, likewise, broad and national, rather than primarily local and service oriented.").

90. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Permanent Injunction and in Opposition to Defendant's Motion for Entry of Final Judgment at 1, *Indian Educators Fed'n Local 4524 v. Kempthorne*, 541 F. Supp. 2d 257 (Civil No. 04-01215 (TFH)).

91. *See, e.g., Freeman v. Morton*, 499 F.2d 494, 502 (D.C. Cir. 1974).

full extent possible, it will lead to abuse and ongoing litigation, and will place Indian preference as originally conceived in serious jeopardy.

B. Using Civil Service Definitions in Practice

While a full empirical study is outside the scope of this comment, the BIA and DOI do not consistently conform to the legal requirements for application of Indian preference laws. A DOI memo from July 2003 authorized the use of general civil service requirements⁹² as job qualification standards within the BIA:

Subject: Qualification Standards for Application in the Bureau of Indian Affairs . . .

Your request to establish Office of Personnel Management (OPM) job qualification standards as the Bureau of Indian Affairs standards for all General Schedule; Trades and Labor; and Senior Executive Service positions, as described in your memorandum, is hereby approved.⁹³

In response, the Acting Director of Human Resources Policy sent an instruction letter to all Human Resources Directors inside the DOI:

Subject: Qualification Standards for Application in the Bureau of Indian Affairs

The Attachment to this Memorandum gives approval to the Bureau of Indian Affairs (BIA) to establish all Office of Personnel Management's (OPM's) job qualification standards as the BIA's excepted standards for all General Schedule and Trades and Labor occupations. The OPM standards will be used to qualify all individuals, including those entitled to Indian Preference, applying for positions within the Bureau. Additionally, the Department approved BIA's adoption of OPM's Senior Executive Service (SES) qualifications criteria for filling SES positions. To account for the uniqueness of some positions within the BIA, use quality ranking factors and selective factors relating to American Indian/Alaska Native language and/or culture, when appropriate

92. See *supra* note 6 (giving an overview of the civil service qualification standards).

93. Memorandum from Carolyn Cohen, Dir. of Office of Pers. Policy, Dep't of the Interior Office of the Sec'y, to Aurene M. Martin, Acting Assistant Sec'y for Indian Affairs (July 22, 2003) (on file with author).

Use of the OPM standards and SES criteria for all BIA vacancies begins the date of this Memorandum. All previously issued BIA excepted standards are obsolete.⁹⁴

The memo leaves entirely to the discretion of agency human resource directors whether a particular position should take any notice of “selective factors” related to Indian status.⁹⁵ While this memo was issued in 2003 and does not prove the current state of agency actions with regard to individual jobs, this directive, given to all Human Resources Directors, was in direct opposition to settled law at that time.⁹⁶

There are three legal questions presented by this hiring policy. First, which positions are automatically subject to preference? Second, who is authorized to make decisions about exceptions to the general rule? Third, may general civil service standards be used in hiring for a position?

First, in examining which positions are subject to Indian preference, as a baseline, the IRA mandates that it includes all positions inside the BIA.⁹⁷ *Morton v. Mancari*, the foundational Supreme Court case on Indian preference, used this understanding as the starting point of further analysis.⁹⁸ The first sentence of the decision reads: “The Indian Reorganization Act of 1934 . . . accords an employment preference for qualified Indians in the Bureau of Indian Affairs”⁹⁹

From this basic understanding that Indian preference applied to all positions inside the BIA, much litigation has ensued to clarify its boundaries. In *Freeman v. Morton*, the Eighth Circuit addressed one of those boundaries: the extent to which agency discretion is appropriate to determine which positions are subject to preference.¹⁰⁰ The dispute was over whether preference applied to lateral transfers, in addition to hiring and promotion.¹⁰¹ The court held that it did apply to lateral transfers, and further, that the statute did not allow for agency discretion in the application of Indian preference:

[T]he controlling statute does not say the “Indians . . . *may* have preference.” It says: “. . . qualified Indians *shall* hereafter

94. Memorandum from Acting Dir., *supra* note 69.

95. *Id.*

96. *E.g.*, *Freeman*, 499 F.2d at 502.

97. 25 U.S.C. §§ 472-472a (2006).

98. *Morton v. Mancari*, 417 U.S. 535, 537-38 (1974).

99. *Id.* at 537.

100. *See generally Freeman*, 499 F.2d 494.

101. *Id.* at 497.

have . . . preference”, and “if Congress had intended to write discretionary power into the language of Sec. 472 it would have done so expressly . . . One need only look at various Indian preference statutes to recognize that Congress was well aware of the distinction between discretionary and mandatory action.”¹⁰²

In 1979, Congress responded to this decision, amending the Indian preference statute to exempt lateral transfers from Indian preference.¹⁰³ The exemptions were allowed when necessary to protect the health of the employee, as part of a reduction in force, or when that employee’s relationship with the tribe deteriorated to the point that effective service could no longer be given.¹⁰⁴ Congress again chose not to change the language about discretion and, aside from the exemptions, the preference remains mandatory.

Second, the DOI’s policy letter raises issues about authorization to make exceptions to the general rules. In 1979, Congress further specified that the Secretary of the Interior, a Deputy Secretary, or an Assistant Secretary must make the determination about when the three preference exceptions apply, and may not delegate such power to any other person.¹⁰⁵ In enacting this amendment, Congress made specific exceptions to the previous statute, and the exceptions accord with the DOI’s requested exceptions to the statutory language in *Freeman*.¹⁰⁶ Congress’s decision to amend for one specific dangerous scenario¹⁰⁷ implies congressional ratification of the Eighth Circuit’s holding that, in general, Indian preference applies to all hiring and promotion inside the BIA.¹⁰⁸

Third, the DOI’s policy letter violates statutory and common law in its blanket application of civil service standards. When Indian preference is mandated for a position, the DOI must use two separate sets of job qualification requirements: one to evaluate whether Indian candidates are qualified and one to evaluate whether non-Indian candidates are

102. *Id.* at 501 (emphasis added).

103. 25 U.S.C. § 472a (2006).

104. *Id.* § 472a(b)(1).

105. *Id.* § 472a(b)(2).

106. *Freeman*, 499 F.2d at 498 (“[C]ircumstances dictating the transfer of a particular non-Indian employee because of problems beyond his control or when his safety or continued effectiveness is threatened . . .”).

107. *Id.* at 499 (noting that it is the legislature that is responsible for granting power to the Secretary in emergency situations, such as that in *Freeman*).

108. *Id.* at 499-500.

qualified.¹⁰⁹ The Indian requirements include factors such as cultural awareness and language skills, and may de-emphasize formal education.¹¹⁰ Typically, the non-Indian requirements are the general civil service requirements for that position.¹¹¹ The statute is unambiguous,¹¹² and the Eighth and Ninth Circuits consistently state that separate job qualification requirements must be formulated for all Indian preference positions.¹¹³

The DOI memo gives general approval to use civil service standards, at the discretion of unnamed Human Resources Directors and presumably their staff, for broad categories of positions within the BIA, with only unique positions incorporating any Indian-specific job qualification requirements.¹¹⁴ Even in recent years, the DOI does not appear to feel any compulsion to conform its practices to the requirements of statutes or the decisions of the courts.

C. Structural Bars to Effective Enforcement

When Indian preference law requirements are not upheld in practice, enforcement options range from being limited and costly to nonexistent. Legal and structural obstacles that bar litigation and enforcement exist regardless of how clear the statute or how blatant the governmental violation. There are no private monetary remedies, so only declaratory and injunctive relief may be obtained. Appeals can only be made from final, nondiscretionary agency actions. When courts hold that a violation has occurred, they tend to remand back to the agency for review, rather than take direct action. Finally, a detailed case study of the injunctive relief

109. *Dionne v. Shalala*, 209 F.3d 705, 707 (8th Cir. 2000).

110. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 361-62 (1953).

111. *Dionne*, 209 F.3d at 706-07.

112. 25 U.S.C. § 472 (2006) (“The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office . . .”).

113. See *Dionne*, 209 F.3d at 709 (inferring in dicta that Indians applying for positions falling under the Indian Preference Act hiring standards are separate from the civil service job requirements); *Johnson v. Shalala*, 35 F.3d 402, 406-07 (9th Cir. 1994) (applying *Preston*); *Preston v. Heckler*, 734 F.2d 1359, 1371 (9th Cir. 1984) (declaring that separate and independent qualification standards must be considered); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717 (8th Cir. 1979) (stating that the BIA cannot apply general civil service rules to an Indian conflict of interest in an employment issue).

114. Memorandum from Acting Dir., *supra* note 69.

aspects¹¹⁵ of *Indian Educators Federation Local 4524 v. Kempthorne*¹¹⁶ will illustrate that permanent injunctions are extremely difficult to obtain.

The statute itself is silent as to whether courts can impose a private monetary remedy if the DOI violates Indian preference laws.¹¹⁷ In the absence of clear statutory language, courts determine whether a private remedy exists. In the courts' analysis, congressional intent is the critical factor.¹¹⁸ Recent decisions in both the Ninth and Tenth Circuits found that there was no congressional intent to create a private remedy for violations of Indian preference statutes.¹¹⁹ As the courts are currently construing the law, individuals cannot bring suit for money damages.

While possible, it is difficult to bring a suit for declaratory or injunctive relief in response to agency action. In 2004, the Secretary of the Interior acknowledged that "[i]f there is any right to proceed with an individual claim against an agency of the United States pursuant to the Indian Preference Act, it must proceed as one for nonmonetary relief pursuant to the Administrative Procedures Act,"¹²⁰ meaning an appeal of a final,

115. See *supra* Part III.A (addressing the declaratory relief aspects of *Indian Educators Federation Local 4524 v. Kempthorne*, specifically dealing with the definition of which positions are subject to the preference).

116. *Indian Educators Fed'n Local 4524 v. Kempthorne (Kempthorne II)*, 590 F. Supp. 2d 15 (D.D.C. 2008).

117. 25 U.S.C. § 472 (2006).

118. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

119. *Beams v. Norton*, 327 F. Supp. 2d 1323, 1329 (D. Kan. 2004); see also *Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1195 (9th Cir. 2002). Interestingly, the *Beams* court appears to misapply *Solomon* and uses the decision out of context, but that does not mean that the overall holding would be any different in another court. The *Beams* decision uses *Solomon* to support the Ninth Circuit's finding of no congressional intent to create a private cause of action for disappointed Indian job applicants: "Congress intended to allow Indian people and tribes greater freedom in self-governance at the tribal or community level, not to confer individual rights on individual Indians." *Beams*, 327 F. Supp. 2d at 1329 (quoting *Solomon*, 313 F.3d at 1198). Although *Beams* relied upon *Solomon* as authority for this proposition, this quote was analyzing the first factor (the class benefited), and was immediately preceded, in *Soloman*, by a paragraph with the opposite inference, and a conclusion that the first factor was in equipoise. *Solomon*, 313 F.3d at 1198 ("The very nature of the benefit is an employment and training preference in favor of Indian applicants, who are individuals by definition.").

120. *Beams*, 327 F. Supp. 2d at 1331 (quoting 5 U.S.C. §§ 551-559 (2006)) (internal quotation marks omitted).

*nondiscretionary*¹²¹ agency action.¹²² As a result, Indians seeking retroactively to apply Indian preference to positions for which they were not hired must first exhaust all agency appeals. Through litigation, the job applicant will have limited potential relief: a declaratory judgment that the position (already filled by another) should have been subject to preference, or an injunction issued providing that when that position (already filled by another) becomes vacant, preference must be applied in hiring. No remedy exists to restore a lost employment opportunity.

The courts have refused to take a more active role in setting the employment guidelines for Indian preference jobs, instead preferring to remand cases to the agency that created the original problem.¹²³ In *Heckler*, the Ninth Circuit Court of Appeals appeared deeply displeased with the agency action conducted before appeal:

There are no facts supporting, and there is no substance to, any of the Secretary's substantive arguments. To say that they are frivolous would be an act of generosity. The district court was correct in holding that, under section 10(e) of the Administrative Procedure Act, it was a continuing abuse of discretion for the Secretary to apply the generally applicable civil service standards to Indians applying for positions in the Indian Health Service. This abuse is one that has continued for decades – one which the Secretary, like her predecessors, persists in refusing to correct.¹²⁴

Despite this strong language, the court's only option was remand to the agency.¹²⁵

Finally, a detailed case study of the injunctive relief aspects of *Indian Educators Federation v. Kempthorne* will illustrate the staggering obstacles facing potential plaintiffs. In 2008, the D.C. District Court denied a request for a permanent injunction that would have forced the DOI to comply with the current Indian preference laws, choosing instead to limit its action to a

121. As discussed in Part III.A., the D.C. Circuit Court may have introduced further barriers to litigation in *Indian Educators Federation Local 4524 v. Kempthorne*. If the courts may only grant appeals from final, *nondiscretionary* agency action, as the definition of which jobs are subject to preference becomes more ambiguous, more decisions are subject to unfettered agency discretion and many opportunities removed from corrective litigation.

122. *Beams*, 327 F. Supp. 2d at 1331.

123. *See, e.g.*, *Preston v. Schweiker*, 555 F. Supp. 886, 892 (D. Alaska 1983), *aff'd in part, rev'd in part by Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984).

124. *Heckler*, 734 F.2d at 1373 (citation omitted).

125. *Id.*

declaratory judgment about the definition of positions subject to preference.¹²⁶ Although *Kemphorne I* was filed in 2004, the same fundamental issue was addressed in 1991 with a different group of Indian plaintiffs.¹²⁷ The history will illustrate why the final result in this case was so shocking.

In *Albuquerque Indian Rights v. Lujan*, the D.C. Circuit was highly critical of the manner in which the DOI had altered its interpretation of Indian preference.¹²⁸ The Albuquerque Indian Rights Association filed suit in 1991 against the DOI for failing to extend Indian preference protections to all positions within the DOI¹²⁹ that directly and primarily provided services to Indians, including positions within the Office of Construction Management.¹³⁰ The DOI contended that Indian preference applied only to positions inside the BIA and those departments removed intact¹³¹ from the BIA.¹³² The DOI adopted this new stance in 1988 without a rulemaking and in direct opposition to earlier agency interpretations.¹³³

In general, an agency cannot deviate from its prior statutory interpretation without some rational basis. "A statutory interpretation . . . that results from an unexplained departure from prior . . . policy and practice is not a reasonable one."¹³⁴ An agency can change its view, but it is obligated to explain its reasons for doing so by providing a "reasoned analysis."¹³⁵ If a rulemaking is required, the agency must provide notice in the Federal Register, accept written comment, and incorporate a concise

126. *Kemphorne I*, 541 F. Supp. 2d 257, 267 (D.D.C. 2008) (declaratory judgment issued); *Kemphorne II*, 590 F. Supp. 2d 15, 21 (D.D.C. 2008) (injunction denied).

127. See generally *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49 (D.C. Cir. 1991).

128. See *id.* at 58-59.

129. For a detailed review of agency structures, see *supra* note 47.

130. *Albuquerque Indian Rights*, 930 F.2d at 50.

131. Generally, the language "departments removed intact" refers to the Indian Health Service, which was relocated from the BIA to the U.S. Department of Health, Education and Welfare (now known as the U.S. Department of Health and Human Services) in 1954. See, e.g., C.L. Henson, *From War to Self-Determination: A History of the Bureau of Indian Affairs*, AMERICAN STUDIES RESOURCE CENTER AT LJMU (May 25, 2011), <http://www.americansc.org.uk/Online/indians.htm>.

132. *Albuquerque Indian Rights*, 930 F.2d at 51.

133. *Id.* at 52.

134. *Northpoint Tech., Ltd. v. Fed. Comm'n's Comm'n*, 412 F.3d 145, 156 (D.C. Cir. 2005).

135. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

general statement of the rule's basis and purpose.¹³⁶ The DOI took none of these steps.¹³⁷

The suit ultimately failed for lack of standing, but the D.C. Circuit issued a carefully worded caution in dicta.¹³⁸ The court suggested that, should other plaintiffs come before them with justiciable claims, the agency might lack a sufficient record to overcome a presumption of arbitrariness:

We certainly do not rule and do not intend to imply that the Department cannot successfully defend its new interpretation. We merely suggest that in order to prepare for doing so, should a justiciable case arise, the Department might give serious consideration to re-examining its interpretation in a forum providing more due process, allowing more opportunity for input from interested parties, and creating a more reviewable record, rather than simply adopting an *ex parte* memorandum followed by the posting of an employment notice.¹³⁹

Five years later, the DOI published a notice of a proposed rule, soliciting comment.¹⁴⁰ The rule proposed codifying the 1988 interpretation, which would apply Indian preference only within the BIA and departments removed intact from the BIA (for practical purposes, the BIA and the Indian Health Service). The notice stated:

The legal position of the Department of the Interior on the scope of the preference is set forth in a June 10, 1988, opinion by then-solicitor Ralph Tarr, "The Scope of Indian Preference Under the Indian Reorganization Act", M-36960, 96 I.D.1. It concludes, in general, that the preference is limited in application to the Bureau of Indian Affairs (BIA) or units removed intact from the Bureau of Indian Affairs to another Departmental bureau.¹⁴¹

The DOI never followed through with its own rule-making procedures, and still has not published a final rule.¹⁴² As a result, the DOI was again sued in the 2004 *Indian Educators Federation v. Kempthorne* case over the

136. Administrative Procedure Act, 5 U.S.C. § 553 (2006).

137. *Albuquerque Indian Rights*, 930 F.2d at 58-59.

138. *Id.* at 59.

139. *Id.*

140. Preference in Employment, 61 Fed. Reg. 36,671 (July 12, 1996) (to be codified at 25 C.F.R. §§ 5.1-5.6).

141. *Id.*

142. *Kempthorne I*, 541 F. Supp. 2d 257, 263, 265 n.5 (D.D.C. 2008) ("To date, no final rule has been published.").

same 1988 change in interpretation, with the same scanty agency record to support its actions.¹⁴³ This time, the plaintiffs represented Indians working in the OST, the AS-IA, and all other positions in the DOI that directly and primarily relate to providing services to Indians.¹⁴⁴ The D.C. Circuit held for the plaintiffs, and worded its displeasure with the DOI's actions much more strongly:

Remarkably, the Interior Department attempted to re-examine its interpretation in a forum providing due process by publishing for comment a proposed rule stating that the Indian preference would apply only to positions within the Bureau of Indian Affairs and those that were transferred intact to another office in the agency – but the agency never followed through with this process. Consequently, the agency has, in essence, simply adopted Solicitor Tarr's 1988 *ex parte* memorandum and then posted employment notices, which is exactly what the D.C. Circuit forewarned against. Having elected not to follow through with the published rulemaking process, and there being no new events to otherwise explain the departure from prior interpretations of the term "Indian Office," the Court is persuaded that the agency has failed to demonstrate a "reasoned" analysis for its change in course.¹⁴⁵

Technically, the Indian Educators Federation achieved a partial victory because the position and conduct of the DOI was declared unlawful.¹⁴⁶ The court was revisiting an issue against which the D.C. Circuit Court forewarned 17 years before, and one which the agency could have easily settled by following through with its abortive start to a rulemaking. And yet, despite its disapproval of the DOI's actions (or lack thereof), the court denied the Federation's request for a permanent injunction.¹⁴⁷ With a history so favorable to the defendants, the failure to achieve a verdict with any enforcement value could discourage any other prospective plaintiffs.

Overall, even when a plaintiff wins a case, the process requires (1) exhausting agency appeals procedures, (2) filing suit, (3) prevailing in court, and (4) waiting for the agency to take corrective action. If the new agency action is not in line with the law's requirements, the plaintiff then

143. *Id.* at 265 n.5.

144. *Id.* at 258-59.

145. *Id.* at 265 n.5.

146. *Id.* at 267.

147. *Kemphorne II*, 590 F. Supp. 2d 15, 21 (D.D.C. 2008).

begins again with the process of exhausting agency appeals. Because courts have failed to enforce Indian preference laws in the past, agencies have very little incentive to comply with statutory requirements, and plaintiffs have very little incentive to bring suit. In light of the Supreme Court's recent hostility toward Indian law issues,¹⁴⁸ there is also little chance of higher judicial intervention prompting a change in course.

D. Blood Quantum Laws Create Constitutional Conflict

Indian preference is at risk because it may constitute unconstitutional racial discrimination. Currently, it is not defined as "invidious racial discrimination,"¹⁴⁹ but this is only because the Supreme Court's holding in *Morton v. Mancari* established that the preference is granted to "quasi-sovereign tribal entities"¹⁵⁰ rather than a "discrete racial group."¹⁵¹ *Mancari* began in 1972 when the Commissioner of Indian Affairs issued a directive that the "BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau."¹⁵² Objecting to this change in policy, non-Indian employees of the BIA brought a class action lawsuit.¹⁵³ The plaintiffs claimed that this policy deprived them of property

148. See, e.g., Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 127-28 (2006) ("Until the 1977 case of *Delaware Tribal Business Committee v. Weeks*, the Supreme Court treated Indian cases with a soft touch, preferring to leave the policy choices to Congress and the Executive, often invoking the political-question doctrine in refusing to review the constitutionality of Indian legislation. But the explicit rejection of the political-question doctrine in *Weeks* was a signal of a parallel phenomenon – the increasing tendency of the Court to make policy in the field of federal Indian law. The Court's entrance into the field of federal Indian policy is unwelcome, largely because the Court's policy choices are frequently uneducated in terms of their on-the-ground impacts, but also because they are in direct contravention of explicit congressional and Executive Branch policy choices.") (footnotes omitted); Marcia Coyle, *Indians Try to Keep Cases Away from High Court*, NAT'L LAW J. (Mar. 29, 2010), available at <http://turtletalk.files.wordpress.com/2010/03/indians-try-to-keep-cases-away-from-high-court.pdf> ("We view this Court as not favorable on our issues. . . . [W]e are all batting zero.") (quoting Richard Guest, senior staff attorney at the Native American Rights Fund).

149. *Morton v. Mancari*, 417 U.S. 535, 552-54 (1974).

150. *Id.* at 554.

151. *Id.*

152. *Id.* at 538.

153. *Id.* at 538-39.

rights in employment by denying them an equal opportunity, and therefore, that it violated the Due Process Clause of the Fifth Amendment.¹⁵⁴

The *Mancari* Court unanimously held that there was no constitutional conflict.¹⁵⁵ The Court's analysis first examined the effect on other statutes:

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 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.¹⁵⁶

The Court then turned its analysis to the claim of "racial discrimination." The Court held there was no constitutional conflict because "the preference is reasonably and directly related to a legitimate, nonracially based goal."¹⁵⁷ The goal was "to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."¹⁵⁸ This principle was recently applied again, when a court held that a non-Indian did not have a claim for racial discrimination when Indian preference was applied.¹⁵⁹

154. *Id.* at 537, 539. Also at issue in the suit was whether the Equal Employment Opportunities Act of 1972 (EEO Act), prohibiting racial discrimination in federal employment, had repealed by implication the Indian preference statutes. *Id.* at 539. Title 42 U.S.C. §§ 2000e-16(a) reads: "All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-16(a) (2006). A unanimous Court held that the EEO Act did not impliedly repeal the Indian preference laws. See *Mancari*, 417 U.S. at 545-47 (noting that Title VII of the Civil Rights Act of 1964 made specific exemptions for Indian tribes and employers on or near a reservation in 42 U.S.C. §§ 2000e(b), 2000e-2(i), revealing "a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed"); *Mancari*, 417 U.S. at 550 ("A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race.").

155. *Mancari*, 417 U.S. at 554-55.

156. *Id.* at 552.

157. *Id.* at 554.

158. *Id.*

159. *Prunier v. Norton*, 468 F. Supp. 2d 1344, 1351 (D.N.M. 2006).

The constitutional threat to Indian preference arises when one looks beyond the word “Indian” to see how it is defined in statutes and federal regulations. Despite the *Mancari* analysis, legally, it is as much a racial classification as a political one. With the IRA’s passage in 1934, tribes received sovereign authority over who were members of their tribes, based on blood, group affiliation and participation, residence, or any other factors. And yet, the federal government reserved the right to determine Indian status by blood alone:

The IRA also was an important crossroads for tribal membership. The Bureau of Indian Affairs’ legal interpretation of the act recognized the inherent sovereignty of tribes to define their own membership. . . . However, definitions of Indian eligibility for federal programs, and the choice to use blood quantum or not, would remain within the authority of the federal government.¹⁶⁰

The BIA has heavily race-based qualification requirements.¹⁶¹ The BIA’s form for verification of Indian preference qualification sets out four categories that make one an “Indian” subject to preference.¹⁶² The first two address nation affiliation, requiring membership in a federally recognized tribe or descent from a member of a federally recognized tribe.¹⁶³ But the third option allows for qualification based solely on race and includes “[p]ersons who possess at least one-half degree Indian blood derived from tribes indigenous to the United States.”¹⁶⁴ Blood quantum is also the standard set out in the Code of Federal Regulations.¹⁶⁵ The end result is a remarkable degree of confusion about the definition of “Indian”:

The Census, for example, takes one approach; it allows individuals to self-identify as Indian by checking the racial category “Native American/Alaska Native.” Other laws are more restrictive, requiring membership in a federally recognized Indian tribe, “Indian descent,” one-half or one-quarter Indian

160. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 47 (2006) (footnotes omitted) [hereinafter Spruhan, *Blood Quantum*].

161. See BUREAU OF INDIAN AFFAIRS, FORM BIA-4432, OMB CONTROL NO. 1076-0160 (Expires Aug. 31, 2011), available at http://www.iowanation.org/Legacy/Government/Forms/form_4432_indian_preference.pdf.

162. *Id.*

163. *Id.*

164. *Id.*

165. See 25 C.F.R. § 5.1 (2010).

blood, and/or residence on a reservation. This definitional landscape is further complicated by the fact that these criteria often conflict with tribal membership provisions. The untenable result of this situation is that an individual may be an “Indian” for the purpose of receiving educational grants but not health benefits. Or, he may be eligible to be chief of his tribe but yet not an “Indian” for the purposes of obtaining a Bureau of Indian Affairs (BIA) loan or an Indian scholarship to a state university.¹⁶⁶

The oft-cited *Mancari* decision,¹⁶⁷ on which much of Indian preference’s support rests, is undercut by the racial methods of qualification for inclusion. The Court specifically built its reasoning for the lack of a constitutional conflict on the requirement that an Indian be a member of a federally recognized tribe: “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes.”¹⁶⁸

Moreover, because of the emphasis on “Indian” status rather than tribal affiliation, preference is applied in practice as though it is based on race.¹⁶⁹ If a federal Indian preference position opens up that serves the Navajo on or near their lands, any Indian, whether Yaqui, Cherokee, or Navajo, would be equally preferred. If, in practice, Indian preference were based on membership in a quasi-sovereign tribal entity,¹⁷⁰ then federal jobs geographically located on or near a particular tribe’s land, with functions that serve that particular tribe, would give preference first to members of

166. Brownell, *supra* note 13, at 276-77 (footnotes omitted).

167. *See generally* *Morton v. Mancari*, 417 U.S. 535 (1974).

168. *Id.* at 554 n.24.

169. The scope of this comment is limited to federal application of preference within the DOI. The individual tribes are free to (and frequently do) set their own preference laws. *See, e.g., Employment Practices*, NAVAJO NATION DEP’T OF PERS. MGMT., http://www.dpm.navajo-nsn.gov/ppm_seciii.html (last visited Apr. 23, 2012) (“The Navajo Nation gives preference in employment to enrolled members of the Navajo Tribe in accordance with the provisions of the Navajo Preference in Employment Act (15 N.N.C. §601 - §619) [sic].”). Among the tribal preference laws, many include provisions for preference first to members of their own tribes, second to any Indian, and finally to qualified applicants of any other race. *See, e.g.,* Chad Smith, Principal Chief of Cherokee Nation, *Exec. Order No. 12-10-CS, 2-3* (Feb. 8, 2010), available at http://www.cherokee.org/Docs/News/2010/2/executive_order.pdf (“[T]he Nation and its entities shall observe the following preferences: i. give preference to Indians in hiring, promotion and training of employees as follows: 1. primary preference to Cherokee citizens; and 2. second preference to other Indians.”).

170. *See Mancari*, 417 U.S. at 554.

the tribe served, rather than to all Indians. As a result, the practical applications of Indian preference appear to be contrary to the rationales that allow it to exist: "Indian" being a political classification based on tribal affiliation, local self-governance,¹⁷¹ and the general self-governance principles¹⁷² offered as the goal of Indian preference. If Indian preference survives constitutional scrutiny only through being a political affiliation, the racial requirements for membership in the class and the tribe-blind applications of it are significant unresolved problems.¹⁷³

The Secretary of the Interior noted this problem, and strongly argued that applying preference outside the BIA would be constitutionally unacceptable.¹⁷⁴ But it is unclear why preference is any better inside the BIA. It is possible that another concerted attack on Indian preference on these grounds could be successful,¹⁷⁵ especially in the face of a Court seemingly less supportive of Indian concerns.¹⁷⁶

IV. Proposal: Avenues to Save Indian Preference

This comment proposes two main avenues through which to save Indian preference and foster tribal self-governance. First, race should be removed from the definition of "Indian" for the purpose of Indian preference, with

171. 78 CONG. REC. 11,729 (1934) (remarks of Congressman Howard) ("The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. . . . The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so.").

172. See *Mancari*, 417 U.S. at 541-42.

173. For a detailed discussion of these blood quantum constitutional issues, see Spruhan, *Indian as Race / Indian as Political Status*, *supra* note 71.

174. Reply Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 7, *Indian Educators Fed'n Local 4525 v. Kempthorne*, 541 F. Supp. 2d 257 (D.D.C. 2008) (Civil No. 04-01215 (TFH)).

175. For a detailed treatment of these issues, including a discussion of the effect of the *Rice v. Cayetano* case, see Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801 (2008).

176. See, e.g., Coyle, *supra* note 148.

the focus shifted to tribal affiliation. Second, the DOI or Congress should clarify, in an unambiguous way, precisely which positions are subject to preference.

To resolve the constitutional issues, one possible solution is to remove the blood quantum aspects from the definition of "Indian."¹⁷⁷ This course of action raises concerns about genetic Indians who, for a myriad of reasons, may not be included on the tribal rolls of a federally recognized tribe.¹⁷⁸ The reasons for exclusion have roots in historical accident and modern political and economic pressures. Tribal politics place a greater premium on tribal membership and create incentives to reduce the number of tribal members.¹⁷⁹ The desire for a greater share of casino profits led to purging of membership rolls in multiple tribes.¹⁸⁰ If one is not already a recognized tribal member, the federal requirement for individual genealogical research and proof is often impossible to satisfy.¹⁸¹ Finally, when the original Dawes Act rolls¹⁸² were compiled, many Indians were mistrustful of the process and refused to participate,¹⁸³ thereby excluding them from what became the official list of Indians at the end of the nineteenth century.¹⁸⁴

177. Spruhan, *Indian as Race / Indian as Political Status*, *supra* note 71, at 28 ("Based on such concerns, some commentators advocate refining definitions of 'Indian' in federal law to eliminate blood quantum requirements, therefore avoiding the possibility that the unique treatment of Indians and Indian tribes be declared invalid as invidious racial discrimination.").

178. *See, e.g.*, Brownell, *supra* note 13.

179. *See, e.g.*, Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty In The Face Of Indian Casinos and The New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 320-27 (2010).

180. *See, e.g., id.* at 311 ("Some argue that the new wealth brought by casinos has increased fights over membership as tribes seek to expel current members or refuse to admit new members."); Tina Lamb, *Fight for Justice: On the Keweenaw Bay Indian Community Reservation*, DETROIT FREE PRESS (Mar. 22, 1996), available at <http://baragarose.tripod.com/free-press.htm> (noting that the Keweenaw Bay tribe purged 200 members from the rolls, allegedly to shift the outcome of a key vote in a casino money dispute).

181. *See generally* U.S. DEP'T OF THE INTERIOR, GUIDE TO TRACING YOUR AMERICAN INDIAN ANCESTRY (n.d.), available at <http://www.bia.gov/idc/groups/public/documents/text/idc002656.pdf>.

182. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, 388-91 (1887) (codified as amended at 25 U.S.C. §§ 331-358 (2006)).

183. The mistrust was hardly surprising, as one of the proponents of the plan was Commissioner of Indian Affairs Hiram Price, who supported the allotment system with the avowed goal "to domesticate and civilize wild Indians." COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORT FOR 1881, at III (1881).

184. General Allotment Act of 1887, 24 Stat. at 388-91.

Despite the many possibilities for exclusion, the tribe, as a sovereign nation, is the proper body to define its membership.¹⁸⁵ Tribal self-governance, as a value and a policy goal behind Indian preference laws, depends on the existence of a nation to self-govern. Once tribal members have left the national group and are no longer active participants, the rationale for giving them employment preference no longer stands.¹⁸⁶ If the choices are between an outcome where Indian preference on the whole cannot survive or limiting its scope to members of recognized tribes, the latter is preferable.

While addressing the constitutional concerns, it also might be prudent to change the scope of preference qualification for some positions based on specific tribal affiliation, rather than general membership in any tribe. If a BIA job is on the Navajo reservation and provides services to Navajos exclusively, giving equal preference to Yaquis and Navajos makes the preference a racial (rather than sovereign-national) one. Instead, the DOI could evaluate jobs to determine whether employees are providing services to multiple tribes, in which case all Indians would qualify for preference, or whether that position provides services exclusively to one tribe, in which case the preference would be tribe-specific. This may resolve the “invidious racial discrimination” issues otherwise implicated.

In addition, there are two primary avenues through which to clarify the scope of “Indian Office.” The DOI could elect to hold a proper “notice and comment” rulemaking, as advocated by the D.C. Circuit. Doing so would allow it to support its 1988 interpretive changes, or perhaps allow it to redirect its position again, as influenced by the new administration. President Obama appointed new heads of both the DOI (Ken Salazar)¹⁸⁷ and the BIA (Larry EchoHawk),¹⁸⁸ making a decisive course-correction possible. Alternately, Congress could amend the statute again, providing a

185. Spruhan, *Blood Quantum*, *supra* note 160, at 47 (“The Bureau of Indian Affairs’ legal interpretation of the [1934 Indian Reorganization] act recognized the inherent sovereignty of tribes to define their own membership.”).

186. *See, e.g.*, Painter-Thorne, *supra* note 179, at 339 (“Blood Quantum & DNA Are Bad Proxies for Culture.”).

187. Obama appointed a “liberal democrat,” Ken Salazar, to head the DOI. *See, e.g.*, Ken Salazar, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/s/ken_salazar/index.html?scp=1-spot&sq=ken%20salazar&st=cse (last updated June 21, 2010).

188. With a Native American in the highest position within the agency, one can hope for a more Indian-supportive leadership of the BIA. *See, e.g.*, Kevin Richert, *EchoHawk’s Return to the Public Policy Arena*, VOICES.IDAHOSTATESMEN.COM (Apr. 13, 2009), http://voices.idahostatesman.com/2009/04/13/krichtert/echohawks_return_public_policy_arena.

more detailed definition of "Indian Office" that precludes agency reorganization as a tool for avoiding preferential status for Indians.¹⁸⁹

V. Conclusion

Despite that Indian self-governance is an important policy goal of Congress, Indian trust funds, education, land management, and many other important issues are controlled by government agencies. Indian tribes are sovereign nations, wholly located within the borders of the United States. They do not have military might or the ability to enter into treaties with other nations to enforce their rights. Instead, they rely on the government to honor its promises and deliver on its obligations.

The IRA is one of those promises. The Act promises preference in employment for positions that provide services to Indians and for positions that administer their resources. For the last 20 years, the DOI imposed limits on the scope of this self-governance. It is time for this to stop.

To preserve Indian preference and foster tribal self-governance, race should be removed from the definition of "Indian," with the focus shifted to tribal affiliation. In addition, the DOI or Congress should clarify precisely which positions are subject to preference. These two steps will help to protect Indian preference from further weakening by the DOI and the courts. Indian preference remains viable and beneficial, and should be preserved.

189. While Indian preference still applies to the Indian Health Service because it was "removed intact" from the BIA, if the DOI creates a new department or moves individual positions to other departments, those positions and departments will not be subject to the same protections. In this way, agency reorganization can be used to limit the number of positions to which preference applies.