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Not For Sale: Restrictive  
Covenants Aimed At Preventing  
Tribal Land Acquisitions and  
Why Tribal-State Cooperation Is  
A Better Model

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**NOT FOR SALE: RESTRICTIVE COVENANTS AIMED AT PREVENTING TRIBAL LAND ACQUISITIONS AND WHY TRIBAL-STATE COOPERATION IS A BETTER MODEL**

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## INTRODUCTION

The Supreme Court in *United States v. Kagama*<sup>1</sup> noted, in reference to tribal-state relationships, that “[b]ecause of ill feeling, the people of the states where [Indians] are found are often their deadliest enemies.”<sup>2</sup> This statement characterizes the historical animosity between Indian tribes and states, and is a major reason that authority to regulate Indian affairs was vested in the federal government.<sup>3</sup> Issues involving land underlie much of the federal government’s past and current Indian policy, which historically revolved around how to move Indians out of land needed or wanted by encroaching colonies, states, and/or territories.<sup>4</sup>

This Note explores the use of discriminatory restrictive covenants by local governments to expressly prohibit an Indian tribe from purchasing land within its original reservation boundaries. This Note argues that the use of such restrictive covenants is discriminatory and void on a number of grounds.<sup>5</sup> As an illustration, this Note will examine the ongoing legal dispute between the Village of Hobart and the Oneida Tribe of Indians of Wisconsin (hereinafter Oneida Tribe).<sup>6</sup> While at the time of this writing the case illustration appears to be unique,<sup>7</sup> it is likely that restrictive covenants of this sort have been used, albeit without resulting litigation. This Note will propose that tribal-state cooperative agreements on a government-to-government basis are a more productive strategy for state and local governments than discriminatory actions based on adversarial and hostile relationships. Part I of this Note will examine the history of the federal government’s involvement with, and policies towards, Indian tribes. Part II explores the history and disputes between the Oneida Tribe and the Village of Hobart. Part III examines

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<sup>1</sup>118 U.S. 375 (1886).

<sup>2</sup>*Id.* at 384.

<sup>3</sup>*See infra* notes 15-21, Section II.C and accompanying text.

<sup>4</sup>*See infra* Sections I, II.D.

<sup>5</sup>*See infra* Section V.

<sup>6</sup>*Baylake Bank v. TCGC, LLC*, 2008 WL 4525009, (E.D. Wis, 2008).

<sup>7</sup>This author has been unable to locate another case where a party is seeking to enforce a restrictive covenant with the explicit purpose of preventing an Indian tribe from purchasing land.

restrictive covenants in general, and the limitation on race-based covenants in *Shelley v. Kraemer*.<sup>8</sup> Part IV considers the political status doctrine that applies to Indian tribes, equal protection considerations, and discriminatory state actions against Indian tribes. Part V explores the various grounds under which the restrictive covenant in *Baylake Bank v. TCGC, LLC*<sup>9</sup> is discriminatory and void. Finally, Part VI examines the policy implications of tribal efforts to have fee land taken into trust<sup>10</sup> and concludes that intergovernmental agreements are the appropriate mechanism to address state and local government concerns over tribal land acquisitions.

## I. HISTORY OF FEDERAL INVOLVEMENT WITH INDIAN TRIBES

Despite the fact that the history of each tribe and its relationship with the federal government is unique, there are three broad principles underlying the entire doctrine of federal Indian law.<sup>11</sup> Those principles are (1) that Indian nations originally possessed all the powers of an inherently sovereign state;<sup>12</sup> (2) that the federal government, particularly Congress and the Executive Branch, has primary authority over and responsibility to Indian tribes;<sup>13</sup> and (3) that the authority of the states in Indian affairs is limited.<sup>14</sup> Prior to the Revolutionary War and establishment of the United States of America, the British and other European conquerors dealt with Indian tribes as foreign sovereigns, entering into treaties with them and at times acting to

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<sup>8</sup>334 U.S. 1 (1948).

<sup>9</sup>2008 WL 4525009, (E.D. Wis, 2008).

<sup>10</sup>For an explanation of the trust application process see *infra* Section II.D.

<sup>11</sup>COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 2 (Nell Jessup Newton et al. eds.) (2005).

<sup>12</sup>*Id.* at 2 (noting that tribal sovereignty predates the Constitution and remains intact absent abrogation by a treaty, statute, or federal common law).

<sup>13</sup>*Id.* (noting the tension between the federal government's power over and obligations to Indian tribes, in particular the federal trust relationship).

<sup>14</sup>*Id.* (noting that while in general the supremacy clause leaves little room for state involvement, in some instances Congress has granted states regulatory powers over Indians and Indian country). In addition, the principle of federal supremacy over state jurisdiction in Indian affairs does not prevent mutually beneficial agreements and cooperation between tribal and state governments. *Id.*

protect the tribes from encroaching colonists.<sup>15</sup> Upon independence, Congress was granted power from the Constitution “to regulate Commerce with foreign nations, and among the several states, and with Indian tribes.”<sup>16</sup> In addition, the Constitution vested the Executive Branch with the power to make treaties including treaties with Indian tribes.<sup>17</sup> The Supreme Court has also recognized Congress’ plenary power to regulate Indian affairs.<sup>18</sup>

Arguably, Congress’ ability to regulate Indian tribes is one of two sources of potentially preconstitutional federal power.<sup>19</sup> The power to regulate Indian tribes was vested in the federal government in an attempt to avoid the problems of concurrent state regulation that had occurred under the Articles of Confederation.<sup>20</sup> Following adoption of the Constitution, the first Congress, in 1790, passed the Trade and Intercourse Act that explicitly vested authority to deal with Indian tribes in the federal government.<sup>21</sup> Importantly, for purposes of tribal sovereignty, the Trade and Intercourse Act did not mention or regulate the internal affairs of the tribes.<sup>22</sup>

Chief Justice Marshall authored three Supreme Court opinions that are considered foundational Indian law cases: *Johnson v. McIntosh*,<sup>23</sup> *Cherokee Nation v. Georgia*,<sup>24</sup> and *Worcester v. Georgia*.<sup>25</sup> *Johnson* dealt with the power of Indian tribes to alienate land and held

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<sup>15</sup>*See, e.g., id.* at § 1.02[1].

<sup>16</sup>U.S. CONST. art. I, § 8, cl. 3. .

<sup>17</sup>U.S. CONST. art. II, § 2, cl. 2.

<sup>18</sup>Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 521(2007).

<sup>19</sup>*See generally, id.* at 510-27 (asserting that the executive’s foreign affairs power and federal government’s power to regulate Indian tribes stem from sources of power which predate and exist outside of the Constitution).

<sup>20</sup>*Id.* at 524 (noting that the nonexclusive federal regulation of Indian affairs represented a weakness of the national government under the Articles of Confederation); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 656-57 (2003). While the Articles of Confederation granted exclusive power to regulate Indian affairs, it simultaneously preserved state jurisdiction over Indians who were members of that state and mandated that the state’s legislative rights could not be infringed upon. *Id.* The Constitution corrected the problems which naturally resulted by centralizing power over Indian affairs within the federal government. *Id.*

<sup>21</sup>Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2006)).

<sup>22</sup>*Id.*

<sup>23</sup>21 U.S. (8 Wheat.) 543 (1823).

<sup>24</sup>30 U.S. (5 Pet.) 1 (1831).

<sup>25</sup>31 U.S. (6 Pet.) 515 (1832).

that the Doctrine of Discovery<sup>26</sup> precluded exclusive tribal sovereignty over and alienation of tribal lands made without the approval of the dominant sovereign.<sup>27</sup> Thus, tribes retained possession of their historical lands via a right of occupancy that the dominant sovereign could destroy by either purchase or conquest.<sup>28</sup>

While the tribes lost the power to alienate and hold exclusive title to their lands, they retained the right to exercise jurisdiction within their own territory.<sup>29</sup> In *Cherokee Nation*, Chief Justice Marshall observed that the Cherokee Tribe was an independent state,<sup>30</sup> but was best characterized as a “domestic dependant nation” rather than an independent foreign sovereign.<sup>31</sup> The United States was in the position of a guardian to the Indian tribes, who were considered to be in a state of pupillage.<sup>32</sup> This concept was forcefully affirmed in *Worcester* when Justice

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<sup>26</sup>*Johnson*, 21 U.S. (8 Wheat.) at 573 (“This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against other European governments, which title might be consummated by possession.”).

<sup>27</sup>*Id.*, at 573-74. The Court stated:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

*Id.*

<sup>28</sup>*Id.* at 587.

<sup>29</sup>See *Cherokee Nation*, 30 U.S. (5 Pet.) at 16-18; *Worcester*, 31 U.S. (6 Pet.) at 561.

<sup>30</sup>*Cherokee Nation*, 30 U.S. (5 Pet.) at 16 (noting the Cherokee nation has the character of a state and is a “distinct political society, separated from others, capable of managing its own affairs”).

<sup>31</sup>*Id.* at 17-18. In the words of Justice Marshall:

Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

*Id.*

<sup>32</sup>*Id.*

Marshall held that the Cherokee Nation was a distinct political community “in which the laws of Georgia can have no force.”<sup>33</sup>

The federal government’s policies towards Indian tribes have shifted and changed over time.<sup>34</sup> As settlers moved westward, the demand for land occupied by Indians increased and the federal government began advocating a policy of removal.<sup>35</sup> This was accomplished via treaties with specific tribes beginning after the War of 1812<sup>36</sup> as well as via the Removal Act of 1830.<sup>37</sup> In 1871, Congress ended treaty making with Indian tribes.<sup>38</sup> However, removal continued as reservations continued to be created by specific statutes and by executive orders.<sup>39</sup>

Following removal, the next major shift in federal Indian policy was towards allotment<sup>40</sup> of Indian lands and assimilation of individual Indians into the general American population.<sup>41</sup> The General Allotment Act broke up reservations by allotting land to individual Indians.<sup>42</sup> The allotted land was to be held in trust for the allottee for a period of twenty-five years and then conveyed to the allottee in fee.<sup>43</sup> The Act also provided a path to citizenship for allottees and for

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<sup>33</sup>Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). The Court, again through Justice Marshall, held: The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

*Id.*

<sup>34</sup>See *infra* notes 35-58 and accompanying text.

<sup>35</sup>COHEN’S HANDBOOK, *supra* note 11, at 45. This federal policy developed through the practice of negotiating treaties with tribes for the purpose of relocating, or removing, such tribe from their territory in the eastern portion of the country in exchange for territory in the west. *Id.*

<sup>36</sup>*Id.*

<sup>37</sup>Act of May 28, 1830, ch. 148, §§ 1, 4 Stat. 411-12 (repealed 1980).

<sup>38</sup>Act of Mar. 3, 1871, ch. 120, §§ 1, 16 Stat. 566 (current version at 25 U.S.C. § 71 (2006)). This legislation did not abrogate treaties previously entered into by the U.S. government and Indian nations. COHEN’S HANDBOOK, *supra* note 11, at 76.

<sup>39</sup>COHEN’S HANDBOOK, *supra* note 11, at 75.

<sup>40</sup>See generally *id.* at §1.04 (explaining that the General Allotment Act of 1887 was created and implemented by policy makers with differing motivations, for example helping Indians assimilate to the dominant culture and opening up Indian lands to white settlement).

<sup>41</sup>See, e.g., *id.*

<sup>42</sup>Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (repealed 1934).

<sup>43</sup>*Id.* at § 5.

Indians who adopted a “civilized” life.<sup>44</sup> The allotment policy assumed that Indian tribes would cease to exist as separate, governing entities and that the federal government would gradually back out of Indian law and policy altogether.<sup>45</sup> The results of allotment were tragic and resulted in the loss of over 90,000,000 acres of tribal land.<sup>46</sup> In addition allotment created jurisdictional problems, which persist to this day, because allotted parcels fell out of Indian ownership and into non-Indian hands.<sup>47</sup> Finally, allotted lands that were retained by allottees became practically useless due to the undivided factional interests that descended to the individual heirs of allottees.<sup>48</sup>

Beginning in the 1920s, attitudes toward Indian policy began to shift away from forced assimilation and towards preserving tribal governments.<sup>49</sup> This shift culminated in the Indian Reorganization Act (hereinafter IRA) of 1934.<sup>50</sup> The IRA stopped the allotting of additional lands; extended indefinitely the trust period for allotments, which had not been parceled out in fee; and authorized the Secretary of Interior, among other things, to restore tribal ownership of remaining surplus reservation lands, to acquire additional land for the tribes, and to place any such land acquired into trust with the United States for the benefit of the tribes.<sup>51</sup> In addition, the

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<sup>44</sup>*Id.* at § 6. The statute reads, in pertinent part:

And every 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.

*Id.*

<sup>45</sup>Stacey L. Leeds, *Moving Toward Exclusive Tribal Autonomy Over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 440 (2006).

<sup>46</sup>COHEN’S HANDBOOK, *supra* note 11, at 78-79 (noting that “[w]hile Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, an additional 60 million acres that were either ceded outright or sold to non-Indian homesteaders and corporations as ‘surplus’ lands are not included in the 90 million acre loss.”).

<sup>47</sup>*Id.* at 78.

<sup>48</sup>*Id.*

<sup>49</sup>*See generally id.* at § 1.05; *see also infra* notes 50-58 and accompanying text.

<sup>50</sup>Act of June 18, 1934, ch. 576 §§ 1-19, 48 Stat. 984-85 (current version at 25 U.S.C. §§ 461-79 (2006)); *see also* COHEN’S HANDBOOK, *supra* note 11, at § 1.05.

<sup>51</sup>Act of June 18, 1934, ch. 576, §§ 1, 2, 3, 5, 48 Stat. 984-85 (current version at 25 U.S.C § 461 (2006)).



IRA provided for tribal self-governance by allowing tribes to organize and adopt a constitution and bylaws so long as the Secretary of the Interior approved of the original documents and any amendments thereto.<sup>52</sup> While the IRA had only somewhat limited success with tribal governments, it did, in most instances, stop the loss of tribal lands.<sup>53</sup>

Despite the fact that the two decades following the IRA became known as the termination era,<sup>54</sup> federal Indian policy up to the present has largely focused on tribal self-government and self-determination.<sup>55</sup> Increasingly, the focus has been on government-to-government relationships in which tribes are viewed as having primary authority over their own affairs.<sup>56</sup> Broadly speaking, much of the Indian policy promulgated since the 1960s has focused on tribal economic development, protection of tribal lands, and better use of federal programs and resources.<sup>57</sup> While results among individual tribes have varied, the era of self-governance and self-determination is successful, at least in part, because of the strong emphasis placed on Indian decision makers at the tribal level.<sup>58</sup>

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<sup>52</sup>*Id.* at § 16 (current version at 25 U.S.C. §476); *see also* COHEN'S HANDBOOK, *supra* note 11, at § 1.05 (explaining that the results of this portion of the IRA were mixed). Some tribes, such as the Navajo, chose to reject organization under the IRA and continue with their current governmental structure. *Id.*

<sup>53</sup>COHEN'S HANDBOOK, *supra* note 11, at 88.

<sup>54</sup>*See generally id.* at § 1.06 (explaining that while Congress did not explicitly repudiate the IRA, the brief shift to a policy of termination reduced programs and services to tribes, resulted in additional losses of land, and resulted in the end of the federal trust relationship for many tribes).

<sup>55</sup>*See generally id.* at § 1.07; *infra* notes 56-58 and accompanying text.

<sup>56</sup>COHEN'S HANDBOOK, *supra* note 11, at 97-101. President Nixon's speech to Congress on Indian Affairs sums up the foundation of the government's policy shift to self-determination and self-governance:

Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered. This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.

President's Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 566-67 (July 8, 1970).

<sup>57</sup>COHEN'S HANDBOOK, *supra* note 11, at 110-13.

<sup>58</sup>*Id.* at 112.

## II. HISTORY OF ONEIDA TRIBE OF INDIANS IN WISCONSIN, THE VILLAGE OF HOBART, THE CURRENT DISPUTE(S), AND FEE-TO-TRUST APPLICATIONS

The Oneida Tribe has a long history in Wisconsin.<sup>59</sup> The Oneida Tribe's reservation was created via treaty,<sup>60</sup> but much of the land was lost to allotment.<sup>61</sup> Since the passage of the IRA, the Oneida Tribe has worked diligently to repurchase its original reservation lands, and to petition to have land placed into trust with the federal government following purchase.<sup>62</sup> This has led to strained relations and an array of litigation with the Village of Hobart, a municipality located entirely within the Oneida Tribe's original reservation.<sup>63</sup>

### A. Oneida Tribe of Indians in Wisconsin

The Oneida Tribe was removed from New York during the 1820s.<sup>64</sup> However, the pressures that eventually led to removal began just after the American Revolution.<sup>65</sup> Between 1785 and 1846, the New York Oneidas lost over five million acres of their land.<sup>66</sup> This land loss occurred despite the fact that the Oneidas generally sided with the Americans during the revolution; despite the fact that there were constitutional, congressional, and treaty guarantees of protection from the federal government; and despite the fact that there were provisions in the New York State Constitution against the sale of Indian land.<sup>67</sup> In 1822, a small delegation of Oneida travelled to what would later become the Green Bay area of Wisconsin and settled on a small grant of land from the Menominee which the federal government had negotiated for

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<sup>59</sup>See *infra* Section II.A.

<sup>60</sup>See *infra* note 71 and accompanying text.

<sup>61</sup>See *infra* notes 80-82 and accompanying text.

<sup>62</sup>See *infra* notes 83-86 and accompanying text.

<sup>63</sup>See *infra* Section II.C.

<sup>64</sup>Plaintiff's Response Brief in Opposition to Defendant's Motion for Summary Judgment at 3, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>65</sup>*Introduction* to *THE ONEIDA INDIAN JOURNEY: FROM NEW YORK TO WISCONSIN, 1784-1860* 9 (Laurence M. Hauptman & L. Gordon McLester III eds., 1999).

<sup>66</sup>*Id.* at 10.

<sup>67</sup>*Id.*

them.<sup>68</sup> By 1825, 150 Oneida had immigrated to the area.<sup>69</sup> In the 1820s and 1830s, the Menominees attempted to argue that the land cessions they had made to the Oneida were void and should be invalidated.<sup>70</sup> However, in 1838, the dispute was settled via treaty and the Oneidas were granted a reservation of 65,000 acres at Duck Creek.<sup>71</sup>

Since relocating to Wisconsin, the Oneida Tribe has had a functioning system of government, albeit in varying forms due to changing federal policies.<sup>72</sup> Issues pertaining to land and tribal governance have been focal points of the Oneida Tribe's exercise of self-government since removal to Wisconsin.<sup>73</sup> For example, the Oneida Tribe participated in discussions of federal allotment proposed in the late 1800s, created a land committee in 1941, and adopted land use laws in 1966.<sup>74</sup> Following the passage of the IRA in 1934, the Oneida Tribe has governed itself continuously.<sup>75</sup>

In addition, the Oneida Tribe has maintained a steady population on the reservation.<sup>76</sup> When parcels were allotted in the late 1800s, some 1,520 Oneidas received allotments.<sup>77</sup> As of 1930, the reservation population had diminished somewhat to 1,147 but by 1940 had climbed

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<sup>68</sup>Reginald Horsman, *The Origins of Oneida Removal to Wisconsin, 1815-1822*, in *THE ONEIDA INDIAN JOURNEY: FROM NEW YORK TO WISCONSIN, 1784-1860* 64 (Laurence M. Hauptman & L. Gordon McLester III eds., 1999).

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*; Plaintiff's Response Brief in Opposition of Defendant's Motion for Summary Judgment at 3, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>72</sup>*Plaintiff's Response Brief* at 4, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302); *see also supra* notes 34-58 and accompanying text.

<sup>73</sup>*Plaintiff's Response Brief* at 4, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.* (advancing that the Oneida have, since 1936, governed itself under an IRA Constitution and through a General Tribal Council as well as through its Business Committee by delegated authority).

<sup>76</sup>*See infra* notes 77-79 and accompanying text..

<sup>77</sup>*Plaintiff's Response Brief* at 5, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

back to 1,497.<sup>78</sup> Despite the ups and downs of the Oneida Tribe's population in Wisconsin following removal, the tribe has maintained a strong presence on the reservation.<sup>79</sup>

With the passage of the Allotment Act,<sup>80</sup> nearly all of the reservation was allotted and eventually converted to fee simple parcels which fell out of Indian ownership.<sup>81</sup> The Oneida Tribe has identified four ways reservation land fell out of Indian ownership: (1) federal legislation passed in 1902 allowed for allotments of deceased members to be converted to fee parcels and sold to benefit the deceased's heirs; (2) federal legislation passed in 1906 allowed some Oneidas the ability to sell their allotted parcels for cash; (3) once converted to fee land, some Oneida mortgaged their properties which were eventually lost to foreclosure; and (4) once converted to fee land and subject to state property taxation, some Oneida lost their lands to tax foreclosure.<sup>82</sup>

Following the passage of the IRA the Oneida Tribe began working to rebuild the land base it lost through allotment.<sup>83</sup> As of 1941, 1,694 acres of reservation land were held in trust by the United States for the Oneida Tribe or in the form of an option to purchase for the tribe under the IRA.<sup>84</sup> Presently, 2,308 acres of fee land are still owned by tribal members.<sup>85</sup> In addition, the Oneida Tribe has substantially increased the amount of land held in trust by the United States

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<sup>78</sup>*Id.*

<sup>79</sup>*Id.*

<sup>80</sup>*See supra* notes 40-48 and accompanying text.

<sup>81</sup>*Plaintiff's Response Brief* at 6, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>82</sup>*Id.*

<sup>83</sup>*See infra* notes 84-86 and accompanying text.

<sup>84</sup>*Plaintiff's Response Brief* at 8, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>85</sup>*Id.*

and asserts that it has approximately 230 applications pending with the Bureau of Indian Affairs (hereinafter BIA).<sup>86</sup>

## B. The Village of Hobart

The Village of Hobart is contained entirely within the Oneida reservation.<sup>87</sup> Hobart became a town within Brown County, Wisconsin in 1908 and was named after an Episcopal Bishop influential in removing the Oneida from New York to Wisconsin.<sup>88</sup> The Village borders the west side of Green Bay, is thirty-three square miles, and home to some 5,700 residents.<sup>89</sup> The federal government was instrumental in the creation of Hobart in order to facilitate the building of roads and land sales.<sup>90</sup> Oneida Indians dominated both elected and appointed positions in Hobart prior to tribal efforts to organize under the IRA.<sup>91</sup> Since its founding in 1908, Hobart has functioned as a local unit of government and provided public services such as road development and maintenance, fire protection services, and zoning and land development functions, among others.<sup>92</sup> Currently, the Village of Hobart consists of 21,159 acres which make

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<sup>86</sup>Oneida Tribe of Indians of Wisconsin Office of Land Management, Moving Land from Fee to Trust Status, <http://www.oneidanation.org/uploadedFiles/2010%20Jan-%202012.1.09Moving%20Land%20From%20Fee%20Status%20to%20Trust%20Status.pdf> (last visited Feb. 14, 2010) (noting that in 2005 one parcel totaling twenty-six acres was successfully placed in trust while in 2008 thirty parcels totaling one thousand four hundred fifty six acres were successfully placed into trust for the tribe).

<sup>87</sup>*Plaintiff's Response Brief* at 8-9, Oneida Tribe of Indians of Wis. v. Village of Hobart, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302) (observing that the federal government was instrumental in creating the town of Hobart and that although Wisconsin passed enabling legislation for Hobart in 1903 the town was not organized until 1908).

<sup>88</sup>Debbie Schumacher, Hobart Trustee, Village of Hobart, Location & History, <http://www.hobart-wi.org/pages/2LocationHistory.htm> (last visited Oct. 30, 2009).

<sup>89</sup>*Id.*

<sup>90</sup>*Plaintiff's Response Brief* at 8, Oneida Tribe of Indians of Wis. v. Village of Hobart, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>91</sup>*Id.* at 9.

<sup>92</sup>Defendant's Combined Brief in Support of its Motion for Summary Judgment and Response Brief in Opposition to the Tribe's Motion for Summary Judgment at 10-12, Oneida Tribe of Indians of Wis. v. Village of Hobart, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

up approximately thirty two percent of the Oneida reservation.<sup>93</sup> In 2002, Hobart, which up until that time had been the Town of Hobart, incorporated to become the Village of Hobart.<sup>94</sup>

### C. The Current Dispute(s) Between the Village and the Oneida Tribe

The Oneida Tribe and the Village of Hobart have strained governmental relations.<sup>95</sup> Hobart was created within the Oneida reservation and defines its jurisdiction at the time of its founding as “all that part of the territory embraced within Oneida reservation situated in Brown County.”<sup>96</sup> In support of its continued jurisdiction over all but tribal trust lands, the Village notes that the majority of reservation lands fell out of Indian ownership through allotment and that the Oneida Tribe’s population and political control in Hobart has dwindled.<sup>97</sup> In Hobart’s view, the tribe is engaged in an “aggressive land acquisition program” aimed at repurchasing the original Oneida reservation lands.<sup>98</sup> One of the Village’s stated goals for 2009 was to “safeguard the Village’s property tax base from continuous tribal government actions to remove fee land from the Village tax base.”<sup>99</sup> However as of 2007, the Oneida Tribe was the largest taxpayer to the Village.<sup>100</sup> Between the years 2000 and 2006, the Oneida Tribe paid more than \$3.2 million in real estate taxes on fee land located within the Village limits.<sup>101</sup>

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<sup>93</sup>*Plaintiff’s Response Brief* at 9, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>94</sup>*Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d. 908, 913 (E.D. Wis. 2008); *see also* Village of Hobart, Ordinance 03-2008: 2009 Budget Adoption & Tax Levy, 21, [http://www.hobart-wi.org/2009%20Budget%20Final\\_1282009p.pdf](http://www.hobart-wi.org/2009%20Budget%20Final_1282009p.pdf) (last visited Oct. 30, 2009) (explaining that a village has the right to uphold the general welfare and safety of residents and must, because of its population, have a police force; whereas a town is not a municipality like cities, villages, and counties, has no home rule authority, and less control over land use through zoning).

<sup>95</sup>*See infra* notes 96-139 and accompanying text.

<sup>96</sup>*Defendant’s Combined Brief* at 6, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

<sup>97</sup>*Id.* at 8-9.

<sup>98</sup>*Id.* at 9.

<sup>99</sup> Village of Hobart, Ordinance 03-2008: 2009 Budget Adoption & Tax Levy, 34, [http://www.hobart-wi.org/2009%20Budget%20Final\\_1282009p.pdf](http://www.hobart-wi.org/2009%20Budget%20Final_1282009p.pdf) (last visited Oct. 30, 2009).

<sup>100</sup>*Id.* at 23.

<sup>101</sup>*Plaintiff’s Response Brief in Opposition of Defendant’s Motion for Summary Judgment* at 10, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302).

The Oneida Tribe also operates numerous governmental departments and programs which provide essential services to tribal members, residents, and visitors.<sup>102</sup> These services are funded through revenues from tribal gaming and business enterprises.<sup>103</sup> The Oneida Tribe has entered into government-to-government agreements since the 1980s and maintains good governmental relations with all surrounding governments except the Village of Hobart.<sup>104</sup> The Oneida Tribe characterizes Hobart's protective actions against tribal land acquisitions, among other things, as evidence of an "anti-tribal agenda."<sup>105</sup> The Oneida Tribe has been actively engaged for decades in attempting to rebuild its former reservation land base.<sup>106</sup>

There are three recent and/or currently proceeding legal cases involving the Oneida Tribe and the Village of Hobart: *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*,<sup>107</sup> *Village of Hobart v. Oneida Tribe of Indians of Wisconsin*,<sup>108</sup> and most relevant for purposes of this article *Baylake Bank v. TCGC, LLC*.<sup>109</sup>

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<sup>102</sup>*Id.* at 9-10; *see also* Oneida Nation of Indians of Wisconsin, <http://www.oneidanation.org/> (last visited Feb. 15, 2009).

<sup>103</sup>*Plaintiff's Response Brief* at 10, *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 542 F.Supp. 2d 908 (E.D. Wis. 2008) (No. 06-C-1302) (noting that the tribe employs around 3,000 people and had an annual budget for FY 2008 of over \$527 million).

<sup>104</sup>*Id.* at 11 (claiming to have entered into intergovernmental agreements with the United States, the State of Wisconsin, and the local governments of Hobart, Oneida, Ashwaubenon, Green Bay, DePere, Bear Creek, Hortonville, Seymour, and Shiocton).

<sup>105</sup>*Id.* at 12-13 (asserting that Hobart may be the only government to have initiated condemnation proceedings against tribal reservation lands). In addition, the tribe notes that the Village board sent a letter to U.S. Senators and Representatives arguing against the creation of separate tribal governments and that the Village hosted a forum which featured an anti-tribal speaker. *Id.*

<sup>106</sup>*Id.* at 8; *see also* 7th Generation Vision of the Oneida Nation, <http://www.oneidanation.org/land/mission.aspx> (last visited Feb. 15, 2009). The mission statement of the Division of Land Management is as follows:

In coordination with the goals and objectives of the "Seven Generations," it is the intent of the Division of Land Management to reestablish tribal jurisdiction of the lands within the 1838 Oneida Indian Reservation boundaries of Wisconsin and to preserve, maintain and distribute such lands according to the needs of our General Tribal Council.

*Id.*

<sup>107</sup>*See generally* 542 F.Supp. 2d, 908, (E.D. Wis. 2008).

<sup>108</sup>*See generally* 2009 WI Cir. Ct. 08-CV-1313U.

<sup>109</sup>*See generally* No. 08-C-608, 2008 WL 4525009 (E.D. Wis. 2008).

1. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*

In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, the tribe sued in Federal District Court seeking to invalidate a condemnation action initiated by Hobart against tribal fee lands.<sup>110</sup> The Village's 1974 comprehensive plan included the establishment of a 170 acre industrial park.<sup>111</sup> As the Village was moving forward with plans to develop the industrial park, the Oneida Tribe was also pursuing its long-term goal of recovering its original reservation lands, which included buying up land within the area identified for the proposed industrial park.<sup>112</sup> The Oneida Tribe ended up with ownership of seventy-five percent of this disputed area.<sup>113</sup> In 2006, the Village commenced a condemnation proceeding against a portion of the tribe's property.<sup>114</sup> At the time the Village condemned the property, the Oneida Tribe had an application pending with the Department of Interior to have the land placed into federal trust.<sup>115</sup>

The district court held that allotted fee land within a tribe's original reservation boundaries which had been transferred to third parties and later repurchased by the tribe on the open market remains subject to the Village's eminent domain power.<sup>116</sup> The court concluded that the Supreme Court's holding in *City of Sherrill v. Oneida Indian Nation of N.Y.*<sup>117</sup> that tribal fee lands were subject to property taxes implicitly meant that those lands could be subject to foreclosure sale for unpaid taxes.<sup>118</sup> The court reasoned from *Sherrill* that if tribal fee land could be subject to forced sale for tax foreclosure it could likewise be taken via eminent domain.<sup>119</sup>

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<sup>110</sup>See 542 F.Supp. 2d 908, 913 (E.D. Wis. 2008); *infra* notes 111-120 and accompanying text.

<sup>111</sup>*Oneida Tribe of Indians of Wis.*, 542 F.Supp. 2d at 913 (E.D. Wis. 2008).

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 914.

<sup>115</sup>*Id.* at 916 n.5. This author has, at the time of this writing, been unable to locate additional information regarding the tribe's trust application for this parcel of land.

<sup>116</sup>*Id.* at 935.

<sup>117</sup>554 U.S. 197 (2005).

<sup>118</sup>*Oneida Tribe of Indians of Wis.*, 542 F.Supp. 2d at 921 (E.D. Wis. 2008).

<sup>119</sup>*Id.*



The court also found express authority under the Allotment Act that upon the issuance of fee lands all federal protection from taxes or condemnation ceases.<sup>120</sup>

### 2. *Village of Hobart v. Oneida Tribe of Indians of Wisconsin*

The litigation in *Village of Hobart v. Oneida Tribe of Indians of Wisconsin* revolves around a cooperative service agreement entered into by the Oneida Tribe and Brown County which makes the tribe's law enforcement agency the primary agency to be dispatched within a 1,700 acre portion of the reservation.<sup>121</sup> This dispatch area includes a portion of the Village of Hobart.<sup>122</sup> The Village sued in Wisconsin State Court arguing that the agreement usurped its local home rule powers.<sup>123</sup> While the circuit court judge found that the Village had correctly interpreted the broad reach of the home rule statute, granting their request for a declaratory judgment would be in conflict with the State's 9-1-1 statute.<sup>124</sup> Thus, the court upheld the agreement between the County and the Oneida Tribe, allowing them to move forward in working out the details of the dispatch system.<sup>125</sup> The Village is, at the time of this writing, determining whether or not to appeal the decision.<sup>126</sup>

### 3. *Baylake Bank v. TCGC, LLC*

*Baylake Bank v. TCGC, LLC* was decided in the Eastern District of Wisconsin in October 2008 in favor of the Village of Hobart, and the court upheld a restrictive covenant effectively preventing the sale of land to the Oneida Tribe.<sup>127</sup> The case involves a bankruptcy proceeding

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<sup>120</sup>*Id.* at 923.

<sup>121</sup>*Village of Hobart v. Oneida Tribe of Indians of Wis.*, 2009 WI Cir. Ct. 08-CV-1313U; Malavika Jagannathan, *Brown County Can Dispatch Oneida Police, Judge Rules*, GREEN BAY PRESS GAZETTE, Oct. 15, 2009, at A1.

<sup>122</sup> *Village of Hobart*, 2009 WI Cir. Ct. 08-CV-1313U.

<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 14.

<sup>125</sup>Jagannathan, *supra* note 121, at A1.

<sup>126</sup>*Id.*

<sup>127</sup>*See generally* *Baylake Bank v. TCGC, LLC*, No. 08-C-608, 2008 WL 4525009 (E.D. Wis. 2008).

and dispute over the proposed sale of a golf course.<sup>128</sup> Initially, the golf course was owned by the Village of Hobart.<sup>129</sup> The Village sold the golf course to Jack Schweiner, a principal of TCGC, and required a restrictive covenant and right of first refusal which was approved and recorded.<sup>130</sup> The purpose of the restrictive covenant is to protect the Village's tax base and keep the golf course within the jurisdiction of the Village.<sup>131</sup> TCGC filed for Chapter 11 bankruptcy and subsequently filed this action against the Village seeking to invalidate or set aside the restrictive covenant.<sup>132</sup> TCGC was planning to sell the golf course to the Oneida Tribe, who intended to apply to have the land put into trust with the federal government.<sup>133</sup> Application of the restrictive covenant undermines the ability of the Oneida Tribe to purchase land within the Village of Hobart regardless of whether or not the tribe's purpose in the purchase is to have the land placed into federal trust.<sup>134</sup>

The court upheld the restrictive covenant, in part, on the grounds that the covenant was not contrary to public policy because the covenant was not a blanket prohibition on transfer to the Oneida Tribe; rather, the covenant required the consent of the Village and a payment

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<sup>128</sup>*Id.* at \*2.

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* The restrictive covenant reads in pertinent part:

Restriction on Transfer. Without the express written consent of the Village of Hobart, no owner of any interest in the Subject Real Estate . . . shall transfer any interest in the Subject Real Estate to any individual, entity, . . . organization, or sovereign nation, or during the period of ownership take any action the result of which would: (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of the Village of Hobart; (2) diminish or eliminate the payment of real estate taxes levied or assessed against the Subject Real Estate (or any part thereof) and/or (3) remove the Subject Real Estate (or any part thereof) from the zoning authority and/or jurisdiction of the Village of Hobart.

*Id.*

<sup>132</sup>*Id.* at \*3.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.* at \*3-7 (suggesting that the tribe may be able to purchase the parcel at issue provided that the Village of Hobart consents to the sale and that the tribe does not apply to have the land taken into trust so as to remove the land from the tax rolls, jurisdiction, and zoning authority of Hobart in violation of the covenant).

agreement in lieu of property taxes.<sup>135</sup> In addition, the court held that the covenant was not preempted by federal law.<sup>136</sup> While the court did not reach the Fourteenth Amendment's ban on race-based restrictive covenants in its opinion,<sup>137</sup> the underlying animosity between the Village and the Oneida Tribe indicate that something more than potential loss of tax revenue is at issue.<sup>138</sup> The court's footnote indicating that the parties did not raise such an argument infers that had an equal protection argument been raised it may have merited additional consideration or perhaps even a contrary result.<sup>139</sup>

#### D. Fee-to-Trust Applications

The Supreme Court has held that tribal lands held in fee are subject to local property taxes.<sup>140</sup> However, the IRA created a scheme for land to be taken into trust for tribes which ceases the ability of state and local governments to tax the land.<sup>141</sup> Thus, there is a natural tension that exists between state and local governments, within whose jurisdiction the fee land

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<sup>135</sup>*Id.* at \*6 (stating that the property is “fully alienable to any of the millions of would-be buyers whose purchase would not implicate the restrictive covenant at all”).

<sup>136</sup>*Id.* at \*12-16. The court held that “nothing in the IRA affects the ability of private entities to enter into a covenant that runs with the land, even though the covenant may adversely impact a given tribe’s desire to purchase that land.” *Id.* at \*15.

<sup>137</sup>*Id.* at \*7 n.2; *Shelley v. Kraemer* 334 U.S. 1, 4 (1948) (prohibiting judicial enforcement of a race-based restrictive covenant limiting the sale of land to Caucasians on fourteenth amendment grounds).

<sup>138</sup>See *infra* Section V and accompanying text.

<sup>139</sup>*Baylake Bank*, No. 08-C-608, 2008 WL 4525009, at \*7 n.2 (E.D. Wis. 2008) (“There is no suggestion that the covenant is some sort of race-based restriction intended to prohibit Indian tribes from owning the golf course.”).

<sup>140</sup>*Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113-15 (1997) (noting that to hold otherwise would undermine the scheme Congress created in the IRA for land to be taken into trust for tribes by the United States).

<sup>141</sup>See 25 U.S.C. § 465 (2006). This section provides in pertinent part:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

. . . .

Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

*Id.*

lies, and the tribes seeking to place land into trust.<sup>142</sup> As a result, the regulations promulgated by the BIA regarding both on and off-reservation trust applications require the BIA to notify state and local governments of any trust applications received.<sup>143</sup> These entities are then given an opportunity to provide the BIA with written comments on the potential impact the taking of land into trust will have on state and local property taxes, jurisdiction, and regulatory measures.<sup>144</sup> The regulations lay out a broad array of factors, including the impact on state and local governments, for the BIA to consider in making determinations on tribal trust applications.<sup>145</sup>

### III. RESTRICTIVE COVENANTS AND THE LIMITATION OF *SHELLEY V. KRAEMER* ON RACE-BASED COVENANTS

Restrictive covenants attached to real property are private agreements and are generally upheld in order to give the parties the benefit of their bargain.<sup>146</sup> Yet, there is a role for public policy when courts determine whether or not to enforce restrictive covenants.<sup>147</sup> In the landmark case, *Shelley v. Kraemer*, the Supreme Court held that judicial enforcement of race-based restrictive covenants aimed at preventing a group or groups of people from owning or occupying a piece of real property constituted discriminatory state action in violation of the Fourteenth Amendment's Equal Protection Clause.<sup>148</sup> Thus, while race-based restrictive covenants are

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<sup>142</sup>Mary Jane Sheppard, *Taking Indian Land into Trust*, 44 S.D. L. Rev. 681, 682 (1999) (noting that while taking land into trust is in the interests of federal and tribal governments local governments have an interest in preserving property tax revenue and regulatory authority over such lands).

<sup>143</sup>25 C.F.R. §§ 151.10-151.11 (2009). Each section requires that state and local governments are provided notice and an opportunity to respond in writing to the trust application within thirty days as to the potential impact on regulatory jurisdiction, real property taxes, and any special assessments. *Id.* For a thorough discussion of the legal and regulatory framework applicable to tribal trust applications see Sheppard, *supra* note 142.

<sup>144</sup>25 C.F.R. §§ 151.10-151.11.

<sup>145</sup>*Id.*

<sup>146</sup>*See infra* Section III.A.

<sup>147</sup>*See* note 155 and accompanying text.

<sup>148</sup>334 U.S. 1, 4 (1948); *see also infra* Section III.B.

private agreements such agreements are rendered toothless because they are judicially unenforceable.<sup>149</sup>

#### A. Restrictive Covenants

“A restrictive covenant is a negative covenant that limits permissible uses of land.”<sup>150</sup> A “negative covenant” requires that the covenantor refrain from doing something pertaining to the land.<sup>151</sup> A restrictive covenant is created “if the owner of the property that is burdened enters into a contract or makes a conveyance intended to create a servitude that complies with” the statute of frauds or “conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community.”<sup>152</sup> In general, a restrictive covenant is interpreted to honor the intention of the parties.<sup>153</sup> Courts will look to the language of the contract and the circumstances surrounding creation to determine the parties’ intentions.<sup>154</sup> However, servitudes should also be interpreted to be in accord with public policy.<sup>155</sup> The restrictive covenant at issue in *BayLake Bank v. TCGC, LLC*<sup>156</sup> is contrary to longstanding federal law and policy aimed at reviving tribal land bases and tribal self-determination.<sup>157</sup>

#### B. Limitation of *Shelley v. Kraemer* on Restrictive Covenants

In *Shelley v. Kraemer*, the Supreme Court considered and struck down the validity of a restrictive covenant, the purpose of which was to exclude persons of color from owning or

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<sup>149</sup>See *infra* Section III.B.

<sup>150</sup>RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.3(3) (2000).

<sup>151</sup>*Id.* § 1.3(2).

<sup>152</sup>*Id.* § 2.1(1)(a).

<sup>153</sup>*Id.* § 4.1(1).

<sup>154</sup>*Id.*

<sup>155</sup>*Id.* § 4.1(2).

<sup>156</sup>See *supra* Subsection II.C.3.

<sup>157</sup>See *infra* Sections VI.A, VI.B and accompanying text.

occupying the property at issue in the covenant.<sup>158</sup> *Shelley v. Kraemer* combined cases from Missouri and from Michigan where the restrictive covenants at issue barred the sale and occupation of the subject property by any person who was not Caucasian; both State Supreme Courts upheld the enforceability of the covenants.<sup>159</sup> The Supreme Court noted that among the civil rights the Fourteenth Amendment was designed to protect was the equality of rights in the enjoyment of property.<sup>160</sup> However, the Fourteenth Amendment only protects against discriminatory state action and therefore the court held that the restrictive covenants alone did not violate the plaintiff's Fourteenth Amendment rights.<sup>161</sup> Yet, the cases in *Shelley v. Kraemer* were not merely private agreements because the intention of the agreements were only given effect through judicial enforcement.<sup>162</sup> The Court held that by upholding and enforcing the restrictive covenants at issue, the States had denied the plaintiff's equal protection of the laws and therefore violated their Fourteenth Amendment rights.<sup>163</sup>

#### IV. UNIQUE POLITICAL STATUS OF INDIAN TRIBES, FOURTEENTH AMENDMENT IMPLICATIONS, AND DISCRIMINATORY STATE ACTIONS AGAINST INDIAN TRIBES

The sovereignty of Indian tribes is inherent, and European nations as well as the United States dealt with Indian tribes on a sovereign-to-sovereign basis.<sup>164</sup> Because of this history and the current federal trust relationship with tribal nations and their citizens, a doctrine of law has developed exempting some Indian preferences from the reach of the Fourteenth Amendment's

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<sup>158</sup>334 U.S. 1, 4 (1948).

<sup>159</sup>*Id.* at 4-8.

<sup>160</sup>*Id.* at 10.

<sup>161</sup>*Id.* at 13 (holding that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

<sup>162</sup>*Id.* at 13-14, 19 ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.").

<sup>163</sup>*Id.* at 20.

<sup>164</sup>*See supra* notes 11-22 and accompanying text.

Equal Protection Clause.<sup>165</sup> The reasoning is that the preferences are based on the unique political status of Indian tribes and the federal obligations towards tribes; thus, the preferences are not impermissibly race-based.<sup>166</sup> This does not mean, however, that states may discriminate against Indians or Indian tribes because tribal members are also state citizens.<sup>167</sup> States have been held accountable for equal protection violations involving Indians on a number of grounds.<sup>168</sup> In addition, states have been held accountable for discriminatory actions aimed at tribal governments.<sup>169</sup> This is so even though the dormant Indian Commerce Clause has lost much, if not all, of its former bite.<sup>170</sup>

#### A. Political Status of Indian Tribes

The Supreme Court recognized in *Morton v. Mancari* that certain preferences for Indians, in this case employment preferences at the BIA, are based on the unique political status of Indian tribes and not on impermissible race-based preferences.<sup>171</sup> Plaintiffs in *Morton* brought suit regarding a provision in the IRA which allows for Native American hiring preferences within the BIA.<sup>172</sup> Plaintiffs argued that the hiring preference violated the Due Process Clause of the Fifth Amendment and was contrary to the 1972 Equal Opportunity Act's nondiscrimination provisions.<sup>173</sup> The Court initially held that the preference under the IRA was not impliedly repealed for several reasons: (1) the 1964 Civil Rights Act, which the Equal Employment

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<sup>165</sup>See *infra* Section IV.A.

<sup>166</sup>See *infra* Section IV.A.

<sup>167</sup>See *infra* Section IV.A, IV.B.

<sup>168</sup>See *infra* Section IV.B.

<sup>169</sup>See *infra* Section IV.C.

<sup>170</sup>See *infra* Subsection IV.C.3.

<sup>171</sup>417 U.S. 535, 553, n.24 (1973).

<sup>172</sup>*Id.* at 537-38. Section 12 of the IRA reads as follows:

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, 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.

25 U.S.C. § 472 (2009).

<sup>173</sup>*Morton*, 417 U.S. at 537.

Opportunity Act amended in 1972, contained provisions excluding tribal employment preferences; (2) a few months following the Equal Opportunity Act of 1972 Congress passed two additional Indian preference laws; (3) Indian hiring preferences had previously been treated as exceptions to Executive Orders which forbade discriminatory hiring practices within the government; and (4) statutory repeals by implication are not favored.<sup>174</sup>

More importantly, in addressing the Fifth Amendment due process violation claim, the Court noted that the issue turned on the unique legal status of Indian tribes under federal law and Congressional plenary power.<sup>175</sup> The Court held that the preference was based on the political status of Indian tribes and that the preference did not constitute racial discrimination.<sup>176</sup> The unique, quasi-sovereign status of Indian tribes and their relationship to the BIA is the reason the Court applied a rational basis rather than a strict scrutiny test.<sup>177</sup> The Court reasoned that the statutes passed by Congress pertaining to Indian tribes were reasonably related to the government's trust relationship with tribes and individual Indians.<sup>178</sup> Although racial rhetoric towards Indian tribes abounds, there is a long line of historical, political, and legal support for the Court's holding in *Morton*.<sup>179</sup> The Court has continued to rely on this reasoning in

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<sup>174</sup>*Id.* at 545-51.

<sup>175</sup>*Id.* at 551-52.

<sup>176</sup>*Id.* at 553-54, n.24 (noting that the preference does not apply to all Indians, but rather only to members of federally recognized tribes and that "in this sense, the preference is political rather than racial in nature"). The Court noted the significance of this unique status in that:

[I]terally 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.

*Id.* at 552.

<sup>177</sup>Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 157-58 (2008).

<sup>178</sup>*Id.* at 158.

<sup>179</sup>For a comprehensive overview see *id.* at 164-80 (explaining the support for tribal political status, despite racial rhetoric, in the original understanding of the founders, the Trade and Intercourse Acts, Indian treaties, early federal Indian common law, and the congressional debates surrounding the adoption of the fourteenth amendment).



determining later cases dealing with the relationship of the federal government, Indian tribes, and individual Indians.<sup>180</sup>

*Morton*, however, is not a blanket political classification.<sup>181</sup> Rather, *Morton* is limited to federal and state actions or classifications fulfilling the federal government's unique obligations to Indians.<sup>182</sup> Thus, the proper analysis under *Morton* is whether a particular law can be justified as fulfilling the federal government's unique obligation toward Indians.<sup>183</sup> States may enact laws that protect or benefit Indians so long as such laws are consistent with federal obligations to Indians and Indian tribes.<sup>184</sup> For example, the Tenth Circuit held that a New Mexico art market at the Museum of New Mexico which allowed only Indian artists was valid under the *Morton* doctrine.<sup>185</sup> Therefore, the Indian artist market did not violate the Equal Protection Clause.<sup>186</sup> The court reasoned that no reverse discrimination existed because the State was furthering legitimate interests that outweighed the non-Indian plaintiffs' claim of exclusion.<sup>187</sup> It is, therefore, clear that while states may grant preferences consistent with federal obligations to Indians states may not discriminate against Indians or Indian tribes.<sup>188</sup>

## B. Equal Protection Implications

Tribes derive their sovereign powers inherently and not from the Constitution.<sup>189</sup> Indians originally were considered non-citizens, but were slowly granted citizenship on a piecemeal

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<sup>180</sup>*Id.* at 158-59.

<sup>181</sup>COHEN'S HANDBOOK, *supra* note 11, at 925 n.238 ("laws motivated by the desire to harm a particular racial group rather than to fulfill government obligations toward the Indians would not survive *Morton's* test").

<sup>182</sup>*Id.* at 925-26.

<sup>183</sup>*Morton v. Mancari*, 417 U.S. 535, 555 (1974); COHEN'S HANDBOOK, *supra* note 11, at § 14.03[2][b].

<sup>184</sup>*See* COHEN'S HANDBOOK, *supra* note 11, at § 14.03[2][b][iii]. States most commonly enact laws against the fraudulent imitation of Indian arts, but states have also enacted laws which benefit Indians by granting scholarships, granting free university tuition, preserving Indian families, and granting fish and game licenses. *Id.* at 933 n. 280.

<sup>185</sup>*Livingston v. Ewing*, 601 F.2d 1110, 1115 (10th Cir. 1979).

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 1115-16 (noting that the State was furthering cultural, artistic, and educational interests with the goal of allowing the general public to meet and learn about Indians).

<sup>188</sup>*See supra* notes 181-187 and accompanying text; COHEN'S HANDBOOK, *supra* note 11, at § 14.03[2][b][ii]-[iii].

<sup>189</sup>*See supra* notes 11-22 and accompanying text.

basis.<sup>190</sup> In 1924, Congress granted United States citizenship to all Indians born within the country.<sup>191</sup> United States citizenship also had the effect, via the Fourteenth Amendment, of making Indians citizens of the states in which they reside.<sup>192</sup> However, Indians residing within the territory and jurisdiction of their tribal governments continue to remain exempt from much state law.<sup>193</sup> Some states have continued to argue that reservation Indians are not United States and, by extension, state citizens.<sup>194</sup>

Notwithstanding the doctrine of *Morton v. Mancari*,<sup>195</sup> federal prohibitions on discrimination apply to Indians.<sup>196</sup> For example, some courts have relied on anti-discrimination laws to hold that discrimination directed towards Indians as a class is illegal.<sup>197</sup> A state's lack of authority to tax or impose regulatory authority over Indian lands does not give the state authority to refuse to provide state services to Indians.<sup>198</sup> In *Fallon Paiute-Shoshone Tribes v. City of Fallon*,<sup>199</sup> the City of Fallon rejected the tribe's application for utility services and indicated that it would refuse to provide them until tribal lands were taken out of federal trust.<sup>200</sup> The tribe filed suit claiming, among other things, that the city's determination violated the Equal Protection Clause.<sup>201</sup> The court held that the city's conduct did violate the Equal Protection

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<sup>190</sup>See COHEN'S HANDBOOK, *supra* note 11, at § 14.01[2]-[3]. Citizenship was often granted to individual Indians in tandem with Congressional efforts aimed at assimilation and destruction of tribal status. *Id.* at § 14.01[3].

<sup>191</sup>Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended 8 U.S.C. § 1401). *See also id.* at § 14.01[1].

<sup>192</sup>U.S. CONST. amend. XIV, § 1. *See also* COHEN'S HANDBOOK, *supra* note 11, at § 14.01[1] (noting that the Supreme Court has recognized that United States citizenship is not incompatible with tribal citizenship, self-government or the unique federal-tribal trust relationship).

<sup>193</sup>See COHEN'S HANDBOOK, *supra* note 11, at § 14.01[4].

<sup>194</sup>*Goodluck v. Apache County*, 417 F.Supp 13, 14 (D. Ariz. 1975) (arguing that 8 U.S.C. § 1401(a)(2) which makes reservation Indians United States citizens is unconstitutional).

<sup>195</sup>See discussion *supra* Section IV.A.

<sup>196</sup>COHEN'S HANDBOOK, *supra* note 11, at 908-09.

<sup>197</sup>See *id.* at 909 n. 116.

<sup>198</sup>See *id.* at 913, § 14.02[2][d][ii]-[iii] (noting that Indian lands held in trust are exempt from state and local taxes, including income and sales tax).

<sup>199</sup>174 F.Supp. 2d 1088 (D. Nev. 2001).

<sup>200</sup>*Id.* at 1090.

<sup>201</sup>*Id.*

Clause because the tribe was not treated like other similarly situated persons.<sup>202</sup> In addition, the tribe was being held to a more stringent standard even though the tribe had offered to negotiate over some of the city's concerns.<sup>203</sup> Other courts have also held that states may not deny essential public services to Indians.<sup>204</sup>

Voting rights is another area where courts have sustained equal protection arguments made by Indians and Indian tribes.<sup>205</sup> In 1975, Congress amended the Voting Rights Act to include American Indians and to provide additional regulations intended to ensure access to voting.<sup>206</sup> States have argued against the right of Indians to vote based on a number of grounds such as non-payment of state taxes and residence within a reservation.<sup>207</sup> Courts have held against all of these arguments.<sup>208</sup> For example in *Klahr v. Williams*, plaintiffs argued that the Arizona legislature had determined that every municipal area within a certain population range should be kept within a single legislative district, and that Arizona violated the Equal Protection Clause because the Navajo reservation fell within the population range but was impermissibly apportioned into three separate districts.<sup>209</sup> The court agreed that the State's action violated the

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<sup>202</sup>*Id.* at 1093-95. The court noted that city council members were not sure if other utility users such as the state or federal government were required to get zoning approval or build in accordance with the local building code, yet they refused service despite the tribe's willingness to abide by some of the municipalities regulations. *Id.* at 1094.

<sup>203</sup>*Id.*

<sup>204</sup>*See generally* Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978) (challenging city's refusal to hookup sewer and water line services); Meyers v. Bd. of Educ., 905 F. Supp. 1544 (D. Utah 1995) (challenging denial of education to students based on states lack of condemnation power); Piper v. Big Pine Sch. Dist., 226 P. 926 (Cal. 1924) (challenging exclusion from public schools); Acosta v. County of San Diego, 272 P.2d 92 (Cal. Ct. App. 1954) (challenging exclusion from general relief services); County of Blaine v. Moore, 568 P.2d 1216 (Mont. 1977) (challenging exclusion from health program for low-income persons).

<sup>205</sup>*See generally* Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004-2005).

<sup>206</sup>McDonald, *supra* note 205, at 43-50.

<sup>207</sup>WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 350 (4th ed. 2004).

<sup>208</sup>*Id.* *See also* Klahr v. Williams, 339 F. Supp. 922 (D. Ariz. 1972) (Arizona reapportionment plan that placed Navajo reservation within three districts so as to destroy Navajo's ability to successfully elect their own choices to the legislature was unconstitutional); Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (issuing writ of mandamus requiring the registration of Indian plaintiffs so as to allow them to exercise their right to vote); Montoya v. Bolack, 372 P.2d 387 (N.M. 1962) (portion of Navajo reservation within exterior portion of state is part of the state and Indians living on the reservation are state residents for the purpose of voting).

<sup>209</sup>339 F. Supp. 922, 927 (D. Ariz. 1972).

Equal Protection Clause on the grounds that no adequate explanation was given as to why the Navajo reservation was split into multiple districts and that it appeared as though the apportionment was based solely on the demands of an Arizona legislator.<sup>210</sup> The court found the State's action to be invidious discrimination.<sup>211</sup> Thus, tribes and individual Indians have successfully invoked the Equal Protection Clause on a variety of grounds to hold states accountable for a variety of discriminatory actions.<sup>212</sup>

### C. Discriminatory State Action Against Indian Tribes

In *Mescalero Apache Tribe v. Jones*, the Supreme Court synthesized previous precedent and pronounced generally that “absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”<sup>213</sup> *Mescalero Apache* related to the imposition of state taxes on a tribal business located outside the borders of the Mescalero reservation.<sup>214</sup> The Court found no explicit federal law that would exempt the tribe entirely from off-reservation taxation.<sup>215</sup> In addition, the Court found New Mexico's gross receipts tax to be nondiscriminatory.<sup>216</sup> Thus, the Court upheld the State's ability to tax the tribe's off-reservation businesses.<sup>217</sup> While *Mescalero Apache* has often been applied in tax cases, there are two lines

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<sup>210</sup>*Id.*

<sup>211</sup>*Id.* (holding that portion of the Arizona statute unconstitutional).

<sup>212</sup>*See supra* notes 189-211 and accompanying text.

<sup>213</sup>*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

<sup>214</sup>*Id.* at 146-47 (noting the tribe operates a ski resort adjacent to its reservation on land leased from the U.S. Forest Service and that New Mexico sought to impose sales tax on the resorts gross receipts as well as use taxes for the purchases of materials used to construct a ski lift).

<sup>215</sup>*Id.* at 150-55 (examining the text and purpose of the Indian Reorganization Act of 1934 and relevant case law to conclude that tribal off reservation activity is not immune from state taxes in general).

<sup>216</sup>*Id.* at 157-58. The Court, however, came to a different conclusion regarding New Mexico's attempt to impose a use tax on materials used to build a ski lift. *Id.* at 158-59. The Court held the use tax to be a tax on the property itself. *Id.* The tribal land is tax exempt in view of § 465 of the Indian Reorganization Act. *Id.*

<sup>217</sup>*Id.*

of cases invoking *Mescalero Apache* that deal with other potentially discriminatory state actions.<sup>218</sup>

1. *Cabazon Band of Mission Indians v. Smith*

In the *Cabazon Band of Mission Indians v. Smith* line of cases, the Cabazon Band sought a determination that the vehicles operated by the tribe's public safety department were permitted to display and use emergency light bars when responding to emergencies that required tribal law enforcement vehicles to be driven on public roads.<sup>219</sup> The California Vehicle Code only allows the display and use of emergency light bars on "authorized emergency vehicles."<sup>220</sup> The tribe's public safety officers were cited repeatedly by California law enforcement for displaying emergency light bars.<sup>221</sup> These stops resulted in tribal officers having to make absurd and time consuming adjustments to their vehicles while responding to emergencies.<sup>222</sup> The district court initially held in favor of the State,<sup>223</sup> and the Ninth Circuit affirmed.<sup>224</sup> Following these decisions, however, the tribe entered into a deputation agreement with the Bureau of Indian

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<sup>218</sup>See generally *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004); *Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673 (C.D. Cal. Oct. 16, 2002); *Cabazon Band of Mission Indians v. Smith*, 271 F.3d 910 (9th Cir. 2002); *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101 (9th Cir. 2001); *Cabazon Band of Mission Indians v. Smith*, 34 F.Supp. 2d 1201 (C.D. Cal. 1998); *Prairie Band of Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007); *Prairie Band of Potawatomi Nation v. Wagnon*, 402 F.3d 1015 (10th Cir. 2005); *Prairie Band of Potawatomi Nation v. Wagnon*, 253 F.3d 1234 (10th Cir. 2001).

<sup>219</sup>388 F.3d at 692-93 (noting that the vehicles must be driven on approximately thirteen miles of public roadways due to the non-contiguous nature of the reservation).

<sup>220</sup>CAL. VEH. CODE § 25251(a)(4), 25252, 25258, 25259, 27606 (West 2000). See also CAL. VEH. CODE § 165 (West 2000) (defining "authorized emergency vehicles").

<sup>221</sup>*Cabazon Band of Mission Indians*, 388 F.3d at 692-93.

<sup>222</sup>*Id.* at 693-94 (noting that to avoid stops and arrests, a responding officer would have to stop his or her vehicle before leaving the reservation to retrieve and attach covers for the light bars and then stop again to remove the covers upon reentering the reservation). The Court observed that the light bar prohibition on California public roads has led to increased response times to emergencies. *Id.* at 694 n.1. For example, one officer was delayed for over ten minutes in responding to a life-threatening emergency in which an individual died. *Id.*

<sup>223</sup>*Cabazon Band of Mission Indians*, 34 F.Supp. 2d at 1206-08 (noting that the court could not find requiring the tribe to comply with California's Vehicle Code when traveling off the reservation to place an undue burden on the Tribe's Public Safety Department to perform its on-reservation duties effectively).

<sup>224</sup>*Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101, 1105 (9th Cir. 2001) (finding California's Vehicle Code to be nondiscriminatory under *Mescalero Apache* and holding that the code's restrictions on light bar display and use applied to the tribe's law enforcement vehicles traveling off reservation), *vacated by* 271 F.3d 910 (9th Cir. 2001).

Affairs Office of Law Enforcement (hereinafter BIA).<sup>225</sup> Nearly all of the tribe's law enforcement officers are now commissioned by the BIA as agents of the federal government with authority to enforce "all federal criminal laws applicable to Indian Country."<sup>226</sup> As a result, the Ninth Circuit vacated its original decision and remanded to the district court for further consideration in light of the deputation agreement.<sup>227</sup>

The district court again found in favor of California.<sup>228</sup> The Ninth Circuit overturned, holding that California's Vehicle Code impermissibly discriminated against the tribe, in part, because of the deputation agreement.<sup>229</sup> The Ninth Circuit applied *Mescalero Apache* and defined discrimination as "[d]ifferential treatment; [especially], a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."<sup>230</sup> The Ninth Circuit noted that the California Vehicle Code allows all state, county, and city law enforcement, along with private security companies, law enforcement from bordering states, all federal law enforcement, and even tribal officers from other tribes to display and use emergency light bars on California public roads.<sup>231</sup> The court also found that Cabazon's tribal law enforcement was similarly situated to the law enforcement agencies of other states.<sup>232</sup>

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<sup>225</sup>*Cabazon Band of Mission Indians*, 388 F.3d at 695-96 (delegating some federal law enforcement authority and requiring tribal officers to meet certain minimum standards). For example, tribal officers commissioned by the BIA must meet the respective state's peace officer standard and training requirements, whether trained by the State or the BIA. *Id.* at 695 n.4.

<sup>226</sup>*Id.* at 695 (citation omitted).

<sup>227</sup>*Cabazon Band of Mission Indians v. Smith*, 271 F.3d 910, 910 (9th Cir. 2001).

<sup>228</sup>*Cabazon Band of Mission Indians v. Smith*, No. CV974687CAS(JGX), 2002 WL 32065673, at \*6-10 (C.D. Cal. Oct. 16, 2002) (finding that (1) the Deputation Agreement did not make tribal law enforcement vehicles "authorized emergency vehicles" under the California Vehicle Code, (2) the requirement of the BIA that tribal police vehicles have emergency light bars did not preempt state law, and (3) a letter from the Commissioner of the California Highway Patrol stating that section 165 of the Vehicle Code would allow commissioned tribal officers to use emergency vehicles did not exempt the Tribe from compliance with the California law).

<sup>229</sup>*Cabazon Band of Mission Indians*, 388 F.3d at 697-701.

<sup>230</sup>*Id.* at 698 (using definition from Black's Law Dictionary because the *Mescalero Apache* court did not define what constitutes a nondiscriminatory state law and Ninth Circuit therefore followed same procedures it would in determining the meaning of an undefined statutory term).

<sup>231</sup>*Id.* at 698-99.

<sup>232</sup>*Id.* at 699 (explaining that the Tribe is not similarly situated to Arizona, Nevada, or Oregon as a State, but merely as to those states' law enforcement agencies).

Thus, the court concluded that California had no rational distinction to justify prohibiting the tribe's police vehicles from displaying light bars, especially when California's requirement was in defiance of BIA regulations and disregarded the tribe's obligations to protect its community.<sup>233</sup>

## 2. *Prairie Band of Potawatomi Nation v. Wagnon*

The *Prairie Band of Potawatomi Nation v. Wagnon* line of cases revolves around the Prairie Band's attempt to require Kansas to recognize the tribe's motor vehicle titles and registrations.<sup>234</sup> In 1999, the Prairie Band enacted a motor vehicle code requiring all vehicles belonging to the tribal government and to tribal members residing on the reservation to be registered and titled under the Tribal Vehicle Code.<sup>235</sup> Approximately three months after the tribe issued its first registration and title, Kansas began issuing citations to carriers of tribal registration and title.<sup>236</sup> The district court granted a preliminary injunction and later a permanent injunction requiring Kansas to recognize the tribe's vehicle registrations and titles; both injunctions were upheld on appeal.<sup>237</sup> The Supreme Court granted certiorari, and vacated the decision in light of its ruling in a separate case between the Prairie Band and Kansas, *Wagnon v. Prairie Band of Potawatomi Nation*.<sup>238</sup>

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<sup>233</sup>*Id.* at 700-01 (holding that California failed to (1) establish that occasionally slowed traffic due to Tribal police vehicles was a safety risk, (2) provide any evidence that the Tribe employs or would employ untrained officers, and (3) distinguish reciprocity agreements between neighboring states and other tribes from the lack of reciprocity agreements with federal law enforcement agencies which may operate emergency light bars on California's public roads).

<sup>234</sup>*Prairie Band of Potawatomi Nation v. Wagnon*, 476 F.3d 818, 820 (10th Cir. 2007); *Prairie Band of Potawatomi Nation v. Wagnon*, 402 F.3d 1015, 1016 (9th Cir. 2005); *Prairie Band of Potawatomi Nation v. Wagnon*, 253 F.3d 1234, 1237 (10th Cir. 2001).

<sup>235</sup>253 F.3d at 1237 (noting that prior to enactment of the Prairie Band Motor Vehicle Code the tribe and its members registered and titled their vehicles in compliance with the Kansas motor vehicle code).

<sup>236</sup>*Id.* at 1238.

<sup>237</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d 818, 820 (10th Cir. 2007) (explaining the district court's preliminary injunction was affirmed on June 25, 2001 as was the district court's grant of a permanent injunction in 2005).

<sup>238</sup>*Prairie Band of Potawatomi Indians v. Wagnon*, 546 U.S. 1072 (2005) (mem.). In *Wagnon v. Prairie Band of Potawatomi Nation*, the Court upheld Kansas' motor fuel tax as nondiscriminatory because the tax is imposed off

On remand the Tenth Circuit, in consideration of the Supreme Court’s decision to vacate, applied the rule articulated in *Mescalero Apache Tribe v. Jones*.<sup>239</sup> The court distinguished *Mescalero Apache* from the *Prairie Band* cases on the grounds that motor vehicle titling and registration is a traditional government function implicating the tribe’s sovereign right to self-government.<sup>240</sup> Thus, explained the court, the rights at issue in *Prairie Band* relate to traditional government functions and should be analyzed for the effect of any discrimination between similar sovereigns and not between individual drivers.<sup>241</sup> The court rejected Kansas’ assertion that it could choose not to recognize Prairie Band titles and registrations based on the fact that Kansas recognizes titles and registrations from other states, the District of Columbia, Puerto Rico, foreign countries, and even other Indian tribes.<sup>242</sup> The court also rejected Kansas’ main justification of public safety for refusing recognition because Kansas recognized so many other jurisdictions without mention of any safety concerns or requirements.<sup>243</sup> The court again upheld the permanent injunction requiring Kansas to recognize the Prairie Band’s titling and registration, and held that Kansas’ recognition of other jurisdictions titling and registration but not the Prairie Band’s was impermissibly discriminatory.<sup>244</sup>

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reservation in a transaction between non-Indians and does not offend the Prairie Band’s sovereignty. 546 U.S. 95, 101-15 (2005). Of specific importance to the other Prairie Band cases, the Court concluded that its precedent requires the application of the rule in *Mescalero Apache Tribe v. Jones* that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State” when the State is asserting its authority, in this case to tax, outside a Tribe’s reservation boundaries. *Id.* at 110-15 (quoting 411 U.S. 145, 148-49 (1973)).

<sup>239</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d at 823-34. See also *supra* notes 213-217 and accompanying text.

<sup>240</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d at 823 (noting that the *Cabazon* court, in its final opinion, compared the application of emergency light bar regulation between law enforcement agencies as the proper comparison for discerning whether California’s action under its Vehicle Code was discriminatory); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 699 (9th Cir. 2004).

<sup>241</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d at 826.

<sup>242</sup>*Id.* (rejecting Kansas’ argument that requiring it to recognize the Prairie Band’s vehicle titles and registrations would subject the State to the exercise of the tribe’s powers).

<sup>243</sup>*Id.* at 826-27 (noting Kansas does not refuse to recognize other jurisdictions whose titling and registration are not linked to the national criminal database). Additionally, the Tribe has indicated it would be willing to take whatever steps are necessary to list its registration information within the national criminal database, thus negating Kansas’ public safety argument. *Id.* at 826 n.13.

<sup>244</sup>*Id.* at 827.



Additionally, the court distinguished the case from the Supreme Court's decision in *Wagon v. Prairie Band of Potawatomi Nation* which held that the tribe was not similarly situated to other sovereigns in relation to the motor fuel tax at issue in that case.<sup>245</sup> First, the court found that upholding the Kansas statute would obliterate the tribe's regulation and deprive the tribe of its own jurisdiction.<sup>246</sup> Second, although the Court in *Wagon* found the use of the fuel tax determinative, there was no evidence that the proceeds from titling and registration could serve as a point of distinction between the tribe and the State.<sup>247</sup> Lastly, the court went on to hold that the district court did not err in finding Kansas was not entitled to Eleventh Amendment immunity nor did it err in holding that the permanent injunction did not violate the Tenth Amendment.<sup>248</sup>

### 3. *Similarly Situated Sovereigns and the Indian Dormant Commerce Clause*

The Commerce Clause is generally considered to contain a positive grant of authority to Congress as well as limit state action by negative implication.<sup>249</sup> The Supreme Court recognized this duality early in the nineteenth century.<sup>250</sup> The Court's modern approach to dormant

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<sup>245</sup>*Id.*; see also 546 U.S. 95, 115 (2005) (holding Kansas tax nondiscriminatory despite fact that Kansas statute exempts all other sovereigns because the burden of the tax falls equally on retailers throughout the State, whether Indian or not, and because the Tribe is not similarly situated to other sovereigns as Kansas uses proceeds of tax to support infrastructure that is used by the tribe).

<sup>246</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d at 827 (as opposed to a tax case, as in *Wagon*, where "two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one jurisdiction does not oust the jurisdiction of the other" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184 n.9 (1980) (Rehnquist, J., concurring))).

<sup>247</sup>*Id.* (indicating without elaboration that use, or perhaps even existence, of revenue could dictate a different outcome in similar cases). The court notes that both parties agreed that revenue is not relevant to the case. *Id.*

<sup>248</sup>*Id.* at 827-29 (holding that Kansas officials may be sued under the doctrine of *Ex Parte Young* and that the case does not implicate the tenth amendment because the case addresses state law infringing on tribal rights guaranteed by the federal government).

<sup>249</sup>Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1059-60 (1995); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 421-23 (3rd ed. 2006); see also U.S. CONST. art. I, § 8.

<sup>250</sup>See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (characterizing the dual focus of the commerce clause as both a positive grant of power to Congress and also a limitation on state action); CHERMERINSKY, *supra* note 249, at 424-26; Clinton, *supra* note 249, at 1060-61. For two examples of the Court applying *Gibbons* see *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Mayor, Alderman & Commonality of New York v. Miln*,

Commerce Clause analysis focuses on balancing the benefits of a law against the burdens that same law imposes on interstate commerce.<sup>251</sup> If a state law is found to discriminate against citizens of other states, it is almost always found to be invalid.<sup>252</sup> Generally, courts will uphold a discriminatory state law only if the purpose of that law could not be met by other available, nondiscriminatory means.<sup>253</sup>

During much of the Nation's history, the Indian Commerce Clause has been treated as constraining state action even more so than the interstate Commerce Clause.<sup>254</sup> However, beginning in the 1970s and 1980s, the Supreme Court began to waiver over the proper role of the dormant Indian Commerce Clause.<sup>255</sup> In 1988 the Court in *Cotton Petroleum Corporation v. New Mexico* ignored past precedents<sup>256</sup> to hold that the Indian Commerce Clause posed no limitation on state power and imposed no judicially enforceable limitations on the exercise of state power into Indian affairs.<sup>257</sup> The ruling effectively sanctioned continued state intervention,

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36 U.S. (11 Pet.) 245 (1829). *See also* *Cooley v. Bd. Of Port Wardens*, 53 U.S. (12 How.) 299 (1851) (drawing a distinction between national subjects into which state law cannot interfere and local subjects controlled by state law).

<sup>251</sup>CHEMERINSKY, *supra* note 249, at 428 (explaining that in addition to the modern balancing approach, the Supreme Court has never expressly overruled any of the analyses previously favored and from time to time will invoke these older tests); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945) (holding that the essential test is whether “the relative weights of the state and national interests involved are such as to make inapplicable the rule . . . that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.”).

<sup>252</sup>*See* *Granholm v. Heald*, 544 U.S. 460, 476 (2005); CHEMERINSKY, *supra* note 249, at 430-31. For a discussion outlining the analysis and factors used by the Court in analyzing both facially and non-facially discriminatory state laws, see CHEMERINSKY, *supra* note 249, at 430-44.

<sup>253</sup>CHEMERINSKY, *supra* note 249, at 444.

<sup>254</sup>Clinton, *supra* note 249, at 1062. For a comprehensive overview of the history of the adoption of the Indian commerce clause and early judicial interpretation, see Clinton, *supra* note 249, at 1064-190.

<sup>255</sup>Clinton, *supra* note 249, 1190-1216 (tracing the Court's cases leading up to what Clinton characterizes as the demise of the Indian commerce clause in *Cotton Petroleum Corp. v. New Mexico*).

<sup>256</sup>*See generally* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979).

<sup>257</sup>490 U.S. 163, 191-92 (1988) (noting that the commerce clause draws a clear distinction between Indian tribes and states). The Court observed in upholding New Mexico's imposition of an oil and gas severance tax on a non-Indian lessee of Jicarilla Apache tribal oil and gas when the tribe already imposed its own oil and gas severance tax that, “the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply commerce clause doctrine developed in the context of commerce ‘among’ States with mutually exclusive territorial jurisdiction to trade ‘with’ Indian tribes.” *Id.* at 192. *See also* Clinton, *supra* note 249, at 1216-24.

limited tribal sovereignty, and ignored the intent of the Framers.<sup>258</sup>

#### V. THE RESTRICTIVE COVENANT IN *BAYLAKE BANK v. TCGC, LLC* IS DISCRIMINATORY AND SHOULD NOT BE UPHELD

The restrictive covenant at issue in *Baylake Bank* is discriminatory.<sup>259</sup> The covenant violates the rule from *Shelley v. Kraemer* because the State was a party to the agreement, and because given the circumstances surrounding the relationship of the Village of Hobart and the Oneida Tribe the covenant is impermissibly discriminatory.<sup>260</sup> The covenant is also void as an impermissibly discriminatory state action directed against the Oneida tribal government because the tribe is treated differently than any other group or purchaser would be.<sup>261</sup> Finally, the covenant fails on equal protection grounds because the Oneida Tribe and its members are treated differently by the state than any other state citizen would be.<sup>262</sup>

##### A. The Restrictive Covenant Violates the Rule in *Shelley v. Kraemer*

The basic holding in *Shelley v. Kraemer* is that judicial enforcement of a restrictive covenant which seeks to exclude persons from owning or occupying the subject property on the basis of race violates the Fourteenth Amendment's guarantee of equal protection.<sup>263</sup> Thus in *Shelley*, judicial enforcement of a private contractual agreement was action by the State which was impermissibly discriminatory.<sup>264</sup> Given the underlying animosity and mistrust between the Village and Oneida Tribe on numerous issues, it appears that something more than protecting

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<sup>258</sup>Clinton, *supra* note 249, at 1244-49.

<sup>259</sup>See *infra* Sections V.A, V.B, V.C.

<sup>260</sup>See *infra* Section V.A.

<sup>261</sup>See *infra* Section V.B.

<sup>262</sup>See *infra* Section V.C.

<sup>263</sup>334 U.S. 1, 20 (1948). The Court explained that “[i]t is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.” *Id.* at 19. See also *supra* Section III.B.

<sup>264</sup>*Shelley*, 344 U.S. at 19-20 (noting that the fourteenth amendment is not less effective when the particular form of discrimination, enforced by the State, originated via private agreement).

land and its tax base underlies the Village's actions.<sup>265</sup> In *Baylake Bank v. TCGC, LLC*, one of the parties to the restrictive covenant is the State itself.<sup>266</sup> Thus, the State is the discriminatory actor at the outset, notwithstanding subsequent judicial enforcement, because it was the Village of Hobart who required the restrictive covenant.<sup>267</sup> If enforced, the restrictive covenant would entirely prevent the Oneida Tribe from purchasing the land at issue.<sup>268</sup>

The conclusion that the restrictive covenant is discriminatory is not affected by the *Morton* doctrine which holds that in general Indian preferences do not violate the Fourteenth Amendment's Equal Protection Clause based on the unique political and legal status of Indian tribes.<sup>269</sup> This is true even though the restrictive covenant appears to deal facially with the Oneida Tribe in its political capacity.<sup>270</sup> Given the totality of the circumstances surrounding the relationship and litigation between the Village and Oneida Tribe,<sup>271</sup> the rule against state discrimination, and notwithstanding *Morton's* allowance of some Indian preferences,<sup>272</sup> the restrictive covenant is discriminatory in nature. The *Morton* rule is not at issue in *Baylake Bank v. TCGC, LLC* because no preferential treatment of Indians is involved.

The federal government initially became involved in Indian affairs in order to protect Indian tribes from discriminatory treatment by the states.<sup>273</sup> The sort of discrimination the federal government sought to prevent is the type at issue in this case. Thus, the Village of Hobart and other similarly situated municipalities should not be permitted to discriminate against

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<sup>265</sup> See *supra* Section II.C.

<sup>266</sup> See generally, *Baylake Bank v. TCGC, LLC*, No. 08-C-608, 2008 WL 4525009, \*2 (E.D. Wis. 2008) (explaining that the Village of Hobart required a principal of TCGC, LLC to agree to a restrictive covenant and right of first refusal).

<sup>267</sup> *Id.*

<sup>268</sup> See *supra* Subsection II.C.3.

<sup>269</sup> *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974); see *supra* Section IV.A.

<sup>270</sup> See *supra* Section II.C.3, note 131 and accompanying text.

<sup>271</sup> See *supra* Section II.C.

<sup>272</sup> See *supra* Section IV.A.

<sup>273</sup> See *supra* notes 15-22 and accompanying text.

Indian tribes through the use of restrictive covenants especially when, as in the *Baylake Bank* case, a tribe is actively seeking to repurchase lands which are located within its *original reservation boundaries*.<sup>274</sup> Furthermore, the Oneida Tribe is specifically engaged in activity in which significant federal interests are at stake.<sup>275</sup>

However, the Village of Hobart does have a legitimate concern regarding the potential loss of revenue that could result *if* the Oneida Tribe were allowed to purchase the golf course and *if* the Oneida Tribe were successful in petitioning the Secretary of Interior to take the land into trust.<sup>276</sup> No matter how relevant this concern may be, however, such speculation is not a justification for discriminating against an Indian tribe as a group. The proper procedure for the Village of Hobart, and any other municipality facing similar potential land loss issues, is to participate in the fee-to-trust application process through the BIA.<sup>277</sup> Even if a municipality were unsuccessful in persuading the BIA that tribal fee land should not be taken into trust, local governments are not without other policy-based options.<sup>278</sup> The Village certainly has the ability to negotiate with the Oneida Tribe regarding revenue and regulatory issues as well as the possibility of cooperative agreements to ensure essential services and infrastructures are maintained.<sup>279</sup>

B. The Restrictive Covenant is Discriminatory Based on the Precedent in *Mescalero Apache*, *Cabazon*, and *Prairie Band*

The Court in *Mescalero Apache Tribe v. Jones* held that “absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to

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<sup>274</sup>See *supra* notes 83-86, 97-106 and accompanying text.

<sup>275</sup>See, e.g., *supra* notes 49-53 and accompanying text.

<sup>276</sup>See *supra* Section II.D; *infra* Section VI.A.

<sup>277</sup>See *supra* Section II.D.

<sup>278</sup>See *infra* Section VI.B.

<sup>279</sup>See *infra* Sections VI.A, VI.B. This argument, of course, assumes that tribes are willing to participate in negotiations with states and neighboring municipalities.

nondiscriminatory state law otherwise applicable to all citizens of the State.”<sup>280</sup> The Ninth Circuit in *Cabazon* held that California had no rational distinction to justify its prohibition of the use of emergency light bars on tribal law enforcement vehicles driven on California public roadways; thus, the state law at issue was discriminatory.<sup>281</sup> The Tenth Circuit in *Prairie Band* granted the tribe’s request for a permanent injunction requiring Kansas to recognize the Prairie Band’s vehicle titling and registration system because Kansas’ refusal to do so when it simultaneously recognized the titling and registration of similarly situated sovereigns was impermissibly discriminatory.<sup>282</sup> Therefore, when a state law treats an Indian tribe differently than others similarly affected by the law, a court may invalidate the law on the grounds that it is impermissibly discriminatory against the tribe.<sup>283</sup> It is questionable, however, that the *Mescalero Apache* rule even applies to the restrictive covenant at issue in *Baylake Bank* because the Oneida Tribe is seeking to repurchase land within the boundaries of its original reservation. The *Mescalero Apache* rule applies to tribal activities that occur *off reservation*.<sup>284</sup>

If *Mescalero Apache* were to apply, it remains unclear to whom or to what the Oneida Tribe will be compared with.<sup>285</sup> For example, in *Cabazon* the court compared tribal law enforcement to other similarly situated law enforcement agencies<sup>286</sup> whereas in *Prairie Band* the court compared the tribe to other similarly situated sovereigns such as other states and other

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<sup>280</sup>*Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

<sup>281</sup>*Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 700-01 (9th Cir. 2004).

<sup>282</sup>*Prairie Band of Potawatomi Nation v. Wagon*, 476 F.3d 818, 827 (10th Cir. 2007).

<sup>283</sup>*See supra* Sections IV.B, IV.C.

<sup>284</sup>*Mescalero Apache*, 411 U.S. at 148-49.

<sup>285</sup>*See supra* Section IV.C.

<sup>286</sup>*Cabazon Band of Mission Indians*, 388 F.3d at 699 (finding the application of California’s emergency light bar regulation between law enforcement agencies to be the proper comparison for discerning whether California’s actions against the tribe under its Vehicle Code were discriminatory).

tribes.<sup>287</sup> Because of the Court's holding in *Cotton Petroleum*, the more likely comparison to be employed is to similarly situated purchasers.<sup>288</sup> If the Oneida Tribe were compared to other similarly situated purchasers, the restrictive covenant is clearly discriminatory towards Indians and implicates the rule in *Shelley v. Kraemer*.<sup>289</sup> A restrictive covenant that limits the ability of any group of people to purchase land or to occupy land on the basis of race is void if such covenant is enforced by the State or if the State is a party to the covenant itself.<sup>290</sup> Upholding a restrictive covenant, such as the one upheld by the Eastern District of Wisconsin in *Baylake Bank v. TCGC, LLC*,<sup>291</sup> allows any local municipality to enter into, and any state or federal court to enforce, a restrictive covenant prohibiting an Indian tribe from purchasing land. Thus, states would be granted free reign to discriminate against Indians as a group, notwithstanding clear precedent to the contrary.<sup>292</sup>

### C. The Restrictive Covenant Violates Equal Protection

The restrictive covenant is also likely void on equal protection grounds. In addition to being tribal citizens, the Oneida Tribes' members are citizens of Wisconsin and the United States;<sup>293</sup> therefore, Fourteenth Amendment protections apply with the same force as they would apply to all other state citizens.<sup>294</sup> Just as states may not deny access to voting or to public utility services,<sup>295</sup> states may not prohibit a tribe from purchasing land when it is available to be

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<sup>287</sup>*Prairie Band of Potawatomi Nation*, 476 F.3d at 823 (finding the traditional government function of vehicle titling and registration raises the issue of a sovereign's right to make regulations which are equally enforceable, equally respected, and free from discrimination).

<sup>288</sup>*See supra* Section IV.C.3.

<sup>289</sup>*See supra* Sections III.B, V.A.

<sup>290</sup>*Shelley v. Kraemer*, 334 U.S. 1, 18-23 (1948).

<sup>291</sup>*See supra* Section II.C.3.

<sup>292</sup>*See supra* Sections III.B, IV.A, IV.C.

<sup>293</sup>*See supra* notes 189-194 and accompanying text.

<sup>294</sup>*See supra* Section IV.B.

<sup>295</sup>*See supra* Section IV.B.

purchased by any other person or entity. To hold otherwise would sanction state discrimination against Indians as a group, something that is definitively outlawed for all other groups of persons.

Judicial enforcement of restrictive covenants such as the covenant in *Baylake Bank* makes little sense and is patently unfair. This is especially so when considered in light of the fact that a tribe who purchases land in fee will be subject to state and local taxes and regulations unless and until the land is placed into federal trust.<sup>296</sup> The trust process is often long and onerous, and states and local governments are given an opportunity to object.<sup>297</sup> Given that a tribal purchaser of fee land is subject to state and local taxes and that the local unit of government has the opportunity to participate in the federal trust application process, states have no legitimate reason, outside of an underlying discriminatory purpose, to make use of restrictive covenants limiting the ability of an Indian tribe to purchase land.

## VI. POLICY IMPLICATIONS

All is not lost for state and local governments whose tribal neighbors are seeking to repurchase portions of their historical land base that currently falls under state jurisdiction.<sup>298</sup> While revenue is a subject of ever increasing importance for state and local governments,<sup>299</sup> it is questionable how much these entities stand to lose in terms of revenue when tribal fee land is placed into federal trust.<sup>300</sup> Regardless of the economics of tax revenue issues, the reality is that Indian tribes are unlikely to assimilate into the dominant culture.<sup>301</sup> It makes much more sense for state and local governments to work with tribal governments rather than against them.<sup>302</sup>

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<sup>296</sup>See *supra* note 140 and accompanying text.

<sup>297</sup>See *supra* Section II.D.

<sup>298</sup>See *infra* Sections VI.A, VI.B.

<sup>299</sup>See *infra* notes 305-306 and accompanying text.

<sup>300</sup>See *infra* note 306.

<sup>301</sup>See *supra* Section I.

<sup>302</sup>See *infra* Section VI.B.



Many jurisdictions are already beginning to embrace this philosophy.<sup>303</sup> While there is no magic solution to address the entire myriad of issues that come up between state, local, and tribal governments, cooperation and government-to-government agreements are a more viable choice than adversarial actions that fuel historical mistrust and animosity.<sup>304</sup>

#### A. Loss of Revenue and Tax Base for Local Municipalities

Loss of revenue due to a shrinking tax base is a legitimate concern for local municipalities faced with a local tribe or tribes who are actively attempting to repurchase their land base. In this era of ever tightening budgets, local governments are often faced simultaneously with critical needs in their communities and the necessity of doing more with less.<sup>305</sup> Local governments can scarcely afford to lose any additional funding.<sup>306</sup> If a tribal purchaser successfully petitions the Secretary of the Interior to take the land into trust, the land will cease to be subject to taxation.<sup>307</sup> The revenue lost as a result of land purchased by a tribe and subsequently taken into trust could in reality mean a substantial loss of property tax revenue for the local government.<sup>308</sup>

However, if the land purchased is located outside the boundaries of the tribe's reservation any businesses or activities conducted on the land would remain subject to nondiscriminatory

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<sup>303</sup> See *infra* Section VI.B.

<sup>304</sup> See *infra* Section VI.B.

<sup>305</sup> See generally David Segal, *Cities Turn to Fees to Fill Budget Gaps*, N.Y. TIMES, Apr. 11, 2009, at A1; Jennifer Steinhauer, *California's Solution to \$24 Billion Budget Gap is Going to Bring some Pain*, N.Y. TIMES, June 22, 2009, at A12; Mark Hornbeck, *Michigan Economists Predict \$1.6B State Budget Shortfall*, DETROIT NEWS, Jan. 12, 2010, available at [http://detnews.com/article/20100112/METRO/1120363/Michigan-economists-predict-\\$1.6B-state-budget-shortfall](http://detnews.com/article/20100112/METRO/1120363/Michigan-economists-predict-$1.6B-state-budget-shortfall) (last visited Feb. 20, 2010). While Wisconsin considers itself to be in better shape budgetarily than many states, it is still facing a projected shortfall of \$220 million based solely on lost tax revenue. J.E. Espino & Pete Bach, *Wisconsin Governor Jim Doyle says State Budget is on Target*, OSHKOSH NORTHWESTERN, Jan. 28, 2010, available at <http://www.thenorthwestern.com/article/20100128/OSH0101/301280107/Wisconsin-Governor-Jim-Doyle-says-state-budget-is-on-target> (last visited Feb. 20, 2010).

<sup>306</sup> It is unclear how much it would actually cost local municipalities, if anything, when tribal fee land is taken into trust because federal and tribal programs supply the majority of public services to reservation Indians. COHEN'S HANDBOOK, *supra* note 11, at 914. On poor reservations in particular, the revenues that property taxes would produce is generally exceeded by the cost of the public services required by residents. *Id.*

<sup>307</sup> See *supra* note 140 and accompanying text.

<sup>308</sup> See *supra* notes 100-101 and accompanying text.

state regulation, including taxes.<sup>309</sup> Additionally, the trust process is a bureaucracy which can take years.<sup>310</sup> Thus, the threat of lost taxes and revenue tribal land purchases pose is not an immediate threat to the local government. Such potential loss of revenue certainly does not justify government actions, through the use of restrictive covenants, which are discriminatory and aimed at preventing Indian tribes from purchasing land altogether.<sup>311</sup>

## B. Cooperative Agreements Between Governments Could Mitigate Potential Losses for Local Municipalities

Local municipalities faced with the potential loss of local land and revenue as a result of tribal land purchases are not necessarily stuck in a zero sum game in which the local government automatically loses in the event of tribal land purchases. The process of taking land into federal trust for an Indian tribe can take years and applications are not always successful.<sup>312</sup> More importantly and exciting, however, is the shifting relationship between states and tribes.<sup>313</sup> Negotiation between tribes, states and even local governments is becoming more common place, especially as a result of legislation mandating state and tribal cooperation.<sup>314</sup>

Cooperation and government-to-government agreements cover a wide variety of governmental services and concerns.<sup>315</sup> The issues addressed in the area of law enforcement

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<sup>309</sup>Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973); *see supra* notes 213-217 and accompanying text.

<sup>310</sup>Oneida Tribe of Indians of Wisconsin Office of Land Management, Moving Land from Fee to Trust Status, <http://www.oneidationation.org/uploadedFiles/2010%20Jan-%2012.1.09Moving%20Land%20From%20Fee%20Status%20to%20Trust%20Status.pdf> (last visited Feb. 14, 2010) (noting that with a steady staff at the BIA and with Oneida's experienced staff the 230 parcels currently being worked on could be through the fee-to-trust process within approximately the next six years).

<sup>311</sup>*See supra* Part V.

<sup>312</sup>*See supra* Section II.D, note 310 and accompanying text.

<sup>313</sup>Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73-74 (2007-2008) (noting that the traditional tribal-state relationship of mutual animosity is beginning to shift increasingly to a more cooperative atmosphere, especially following the success of agreements between gaming tribes and states).

<sup>314</sup>Fletcher, *supra* note 313 at 82; *see also* Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2000); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000).

<sup>315</sup>Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 266 (1991); DAVID H. GETCHES ET AL., CASES & MATERIALS ON FEDERAL INDIAN LAW 593-95 (5th ed. 2005).

alone range from cross-deputization, intrajurisdictional enforcement of warrants and subpoenas, parole and probationary services, juvenile justice issues, enforcement of child custody and child support orders, domestic relations matters, restraining orders, cross recognition of civil judgments, mutual enforcement of traffic laws, and the sharing of records, reports, and resources.<sup>316</sup> Governmental agreements also deal with a range of issues outside of law enforcement such as land rights, zoning, development, environmental issues, waste management, taxation, infrastructure and economic development, hunting and fishing rights, and water rights.<sup>317</sup>

In addition, state legislatures and judicial organizations are trumpeting the virtues of tribal-state cooperation.<sup>318</sup> While many states have varying informal policies, a minority of states have formal written policies regarding tribal-state relationships.<sup>319</sup> Wisconsin is one of the states that has such a formal written policy on tribal-state relationships.<sup>320</sup> In addition to state acknowledgements, the Conference of Chief Justices has endorsed policies of communication, cooperation, and respect among state and tribal judicial systems.<sup>321</sup> The Conference started a project involving three states that in 1994 expanded into a national committee and in 1995 began seeking funding for a project to address how tribal-state jurisdictional issues could be addressed

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<sup>316</sup>GETCHES, *supra* note 315, at 593.

<sup>317</sup>*Id.*

<sup>318</sup>Pommersheim, *supra* note 315, at 261-64; GETCHES, *supra* note 315, at 593-95, 652-53.

<sup>319</sup>Pommersheim, *supra* note 315, at 261.

<sup>320</sup>*Id.* at 262. Wisconsin's policy was promulgated in 1983 via an Executive Order which directed the State's Agencies and Secretaries to:

Work in a spirit of cooperation with the goals and aspirations of American Indian tribal Governments, to seek out a mutual atmosphere of education, understanding and trust with the highest level of tribal governmental leaders. AND, FURTHERMORE, all State agencies shall recognize this unique relationship based on treaties and law and shall recognize the tribal judicial systems and their decisions and all those endeavors designed to elevate the social and political living conditions of their citizens to the benefit of all.

*Id.* at n.167 (quoting Wis. Exec. Order 31 (Oct. 13, 1981)).

<sup>321</sup>Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 155 (1995-1996).

using the adopted policies.<sup>322</sup> While tribes and states historically have had relationships characterized by mutual mistrust and animosity,<sup>323</sup> the current trend in cooperation clearly shows that tribal-state relationships are changing.

Local governments have viable options in negotiation and cooperation with neighboring tribal governments.<sup>324</sup> Abandoning the historical hostility in favor of entering good faith negotiations as equal partners with Indian tribes may prove to be a successful option for local governments to lessen the potential economic impact of tribal land purchases and trust applications. This, of course, assumes that tribes are willing participants at the negotiating table.<sup>325</sup> However, both sovereigns have similar goals such as providing essential government services to their residents and visitors. Thus, it is to the advantage of both local and tribal governments to examine areas of mutual concern in their respective communities. Dialogue and negotiation is a long term option that states and local governments should be pursuing in lieu of discriminatory action aimed at keeping down or edging out Indian tribes and specifically tribal land purchases.

#### CONCLUSION

An enormous amount of tribal land was lost through ineffective federal policies like allotment.<sup>326</sup> This land often ended up in private hands and under the jurisdiction of state and

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<sup>322</sup>*Id.* The underlying themes are to be carried out in the following manner:

The essential premise of all activities and future cooperative efforts is mutual respect. Differences and shortcomings are acknowledged, and ways of cooperating without characterizing either state or tribal courts as better or worse, more or less sophisticated, are being sought. Mutual respect is enhanced by acknowledging the strengths and weaknesses of the different systems, by recognizing what each has in common, and, most important, by learning from each other.

*Id.*

<sup>323</sup>Fletcher, *supra* note 313, at 73-74. *See also supra* notes 15-22 and accompanying text; Section II.C.

<sup>324</sup>*See supra* notes 314-323 and accompanying text.

<sup>325</sup>*See* Fletcher, *supra* note 313, at 81-83.

<sup>326</sup>*See supra* notes 40-48, 80-82 and accompanying text.

local governments.<sup>327</sup> Following the passage of the IRA, many Indian tribes began attempting to repurchase their reservation lands.<sup>328</sup> Some jurisdictions have fought against tribal efforts to repurchase land in general, especially when tribes intend to petition the Secretary of the Interior to take the land into federal trust.<sup>329</sup> Some local governments have resorted to the use of private restrictive covenants, and other means, to attempt to safeguard their tax base and what they regard as “their” land.<sup>330</sup> The use of such restrictive covenants is discriminatory and void on a number of grounds.<sup>331</sup>

Yet, such discriminatory actions are not the only way for local governments to work towards protecting their interests.<sup>332</sup> Some states and local governments are beginning to cooperate and negotiate with their tribal government neighbors.<sup>333</sup> This trend may be signaling a shift away from the traditional hostility and animosity that underlies tribal, state, and local government relationships.<sup>334</sup> States and local governments should abandon discriminatory actions in favor of increased dialogue and cooperation with tribal neighbors to lessen the potential negative impact of tribal land purchases and to address other intergovernmental needs.

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<sup>327</sup> See *supra* notes 40-48, 80-82 and accompanying text.

<sup>328</sup> See *supra* notes 49-53, 83-86 and accompanying text.

<sup>329</sup> See *supra* Section II.C, II.D.

<sup>330</sup> See *supra* Section II.C, II.D.

<sup>331</sup> See *supra* Part V.

<sup>332</sup> See *supra* Part VI.B.

<sup>333</sup> See *supra* Part VI.B.

<sup>334</sup> See *supra* Part VI.B.