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Constitutional Law - Title VII - Indian Hiring Preference Does Not Contravene Fourteenth Amendment Equal Protection Clause

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NOTES

CONSTITUTIONAL LAW—TITLE VII—INDIAN HIRING PREFERENCE DOES NOT CONTRAVENE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE. *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 100 S. Ct. 147 (1979).

INTRODUCTION

A prime objective of Title VII legislation is to eliminate discrimination in employment by removing barriers to equal employment opportunities.[1] Indians are excluded from the mandate of Title VII by section 2000e-2(i) of the Civil Rights Act of 1964 which creates a hiring preference for Indians with respect to certain jobs on or near an Indian reservation.[2] A recent Tenth Circuit deci-

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1. "The purpose of Title VII of the Civil Rights Act is to eliminate discrimination in employment based on race, color, religion, sex or national origin." Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977). The intent of Congress in enacting Title VII was to bring the entire scope of the working environment within the protective ambit of the Act. Thus, liberal interpretation of Title VII by the courts is required to effectuate this congressional intent. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).

It should be noted that courts will construe Title VII liberally to eliminate employment policies which subvert the underlying purposes of Title VII even though there is not a conventional employer-employee relationship. *See* Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), where the court was faced with the question of whether a hospital that allegedly refused to refer a male private duty nurse's name to female patients who had requested private nursing services was an employer within the meaning of Title VII. The court said:

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

In Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974), a driver-trainer of harness horses sued the regulatory agency which was responsible for horse racing activity in New Hampshire and the New Hampshire Trotting and Breeding Association, Inc., which conducts harness racing activities. The plaintiiff claimed the defendants had deprived him of employment opportunities because of his Italian national origin. The court held that the defendants were employers within the contemplation of the equal employment provisions of Title VII because they controlled the licensing of and stall space for driver-trainers; in so holding the court said the statutory language in Title VII is broad and should not be construed narrowly.

2. 42 U.S.C. § 2000e-2(i) (1976). This section provides:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

This section is also known as section 703(i) of Title VII, but will be referred to in this Casenote as either section 2000e-2(i) or the Indian preference exception.

sion relied on this Indian preference exception to Title VII as a basis for thwarting a fourteenth amendment claim of racial discrimination.[3]

LITIGATION

Paul and Sara Livingston, a non-Indian couple, challenged state[4] and municipal[5] policies which allow only Indians to sell arts and

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3. Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), *cert. denied,* 100 S. Ct. 147 (1979).

4. The state policy as adopted by the Museum Board of Regents reads in part:

1. Other than during annually scheduled markets, no person nor group of persons will be permitted to display or sell merchandise on the grounds belonging to the Museum of New Mexico with the sole exception that the area under the portal in front of the Palace of the Governors may be used by Indians to display and sell arts and crafts produced by hand by Indian artists and craftsmen.
2. Permission to use the area under the portal is granted to the Indians with the express understanding that the Indians themselves are solely responsible for the fair and orderly regulation of the use of that space. In the event that the Indians fail to maintain a fair and orderly market under the portal, the Regents will withdraw the permission granted herein and no display or sale of goods whatsoever will be permitted on any grounds belonging to the Museum.
3. The Museum hereby withdraws all permissions heretofore granted to display or sell any merchandise on any other grounds belonging to the Museum.
4. The Director of the Museum shall have the authority to request the assistance of municipal law-enforcement officers to enforce the policy set forth herein.
5. This statement of policy precedes all previous statement [sic] of policy concerning the display and sale of merchandise on the grounds of the Museum of New Mexico.

Museum Bd. of Regents, Public Policy on Sales on Museum Grounds (Feb. 18, 1976).

5. The relevant municipal policy is stated by the Santa Fe City Council in Resolution No. 1975-23, § 4:

Street Vendors: Permit for sales activity on public streets may be approved by the City Manager provided that:

(a) Use of no parking zones, loading zones, and metered parking spaces shall be prohibited beyond the allowable parking time in that space.

(b) Vendors shall not be permitted to locate adjacent to City parks during events scheduled by the City of Santa Fe Recreation Department, or on the Plaza during scheduled annual events.

(c) Loudspeakers and other undue noise such as yelling shall be prohibited.

(d) Sales shall be prohibited within 500 feet of any established business offering for sale the type of wares offered by the street vendor.

(e) In any calendar year, no more than five (5) vendors selling food or drink items and five (5) vendors selling non-food or drink items shall be permitted.

(f) Other than in conjunction with the Plaza uses in Section 5 below, no street vendors shall be permitted on the Plaza.

Santa Fe, N.M., Res. 1975-23, § 4.

There is no specific reference in the resolution concerning the portal Indians. Yet the portal Indians are not only allowed to sell under the portal on the Plaza as an apparent exception to this policy, but also do not have to obtain a license. Non-Indian licensees, however, may not sell on the Plaza. Their licenses are stamped with the words "This Excludes Plaza Area."

crafts under the Museum portal of the Palace of the Governors in Santa Fe, New Mexico.[6] The Livingstons alleged that those policies created an unjustified racial classification which contravened the equal protection clause of the fourteenth amendment.[7] The district court granted summary judgment for the state, holding that the state and municipal policies were based on a cultural classification that did not violate the Livingston's right to equal protection.[8] The district court said a trust relationship existed between the state and the Indians.[9]

On appeal, the Tenth Circuit affirmed the district court's grant of

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Although the Livingstons violated this resolution and the Museum policy, they were never charged with those violations. Instead, Paul Livingston was arrested for assault—"impugning the delicacy or honor" of an Indian. N.M. Stat. Ann. § 30-3-1(C) (1978). The charge was eventually dropped.

One should also note that the relevant municipal policy is a resolution and not an ordinance. Thus, it is unlikely that criminal sanctions could have been imposed on the Livingstons if they had been arrested for this reason.

6. The historic Palace of the Governors in Santa Fe is said to be the oldest public building in the United States. The Museum was established in 1909, and is under the control of the Museum Board of Regents. The portal is the patio portion of the Palace of the Governors and is thus under the control of the Regents. When the Museum was created, it was dedicated to the presentation and preservation of New Mexico's multicultural traditions.

The history of the Museum, which is described in the district court opinion, is interesting. The Palace of the Governors has historically been visited by tourists and used for various purposes by several cultural groups. The Pueblo Indians occupied the Palace after the Pueblo Revolt of 1680-1693, and after the Reconquest by the Spaniards, the Indians sought justice from the governors who lived there in disputes over land, water, and personal rights. In addition, the Indians traveled to the Palace to sell food and miscellaneous wares. The plaza area was used as a market place by both Hispanics and Pueblo Indians after the Spanish conquest; later, white traders and businessmen established shops in the Plaza. Sometime prior to 1853, several ethnic groups began to use the portal as a public market place. By 1909, the non-Indian groups had largely abandoned the portal and only the Indian market remained. In 1935, the Museum began to permit only Indians to use the space in the portal for the sale of their arts and crafts. At that time, by agreement with the Museum, the New Mexico Association of Indian Affairs sponsored an Indian Market under the portal. It was discontinued during World War II, but immediately thereafter the Museum permitted exclusive year-round use of the portal by the Indians. This practice has been in effect since that time, but was only formalized as Museum policy by the Regents in 1972. In February, 1976, a written policy statement was issued to insure that no vendors except the Indians would be allowed to sell on Museum property. Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978).

7. The Livingstons predicated their argument on the equal protection clause of the fourteenth amendment. They contended that the Museum policy discriminated against them because they are non-Indians. They also argued that their rights of free expression and assembly under the first and fourteenth amendments were abridged. Neither the district court nor the Tenth Circuit considered the first amendment argument in their opinions.

8. Livingston v. Ewing, 455 F. Supp. 825, 830, 832 (D.N.M. 1978).

9. *Id.* at 832. *See also* text accompanying note 10 *infra*. The "trust relationship" referred to in the district court opinion refers to the unique relationship the Indian tribes have with the federal government. They are independent political communities which retain their original natural rights in matters of local self-government. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)). A tribe is a distinct people

summary judgment, but did not adopt its reasoning.[10] The court of

having the power to regulate its internal and social relations. United States v. Kagama, 118 U.S. 375 (1886).

Although they no longer possess full sovereignty, tribes have a semi-independent status. States are also regarded as semi-independent entities, but a tribe's relationship with the federal government is not analogous to that of a state's with the federal government. The relationship between Indian tribes and the federal government is not one of contract, where each party is capable of protecting his own interests, but rather one of guardian and ward, with the Indians existing in a state of dependency and pupilage under the federal government's care and protection. United States v. Rickert, 188 U.S. 432, 437 (1903). Although Indian tribes have this special relationship with the federal government, Antoine v. Washington, 420 U.S. 194 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), they are subject to the paramount authority of the United States. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The federal government's plenary power has preempted most of the field of Indian affairs and has precluded state interference with the relationship between tribes and the federal government. State laws concerning Indians, which are enacted under the explicit federal legislative authority, are, however, deemed to be valid expressions of the federal trust responsibility.

With this background in mind, the district court used Indian equal protection analysis to decide the case. Under Indian equal protection law, legislation that confers preferential treatment to Indian tribes is upheld if it fulfills the obligations owed by the federal government to Indian tribes or if it furthers Indian self-government. Morton v. Mancari, 417 U.S. 535 (1974). Such cases are not analyzed under the strict scrutiny test required in cases involving racial classifications. The strict scrutiny doctrine is avoided by characterizing Indian/non-Indian classifications as political or cultural rather than racial, and by according the federal government special deference in the area of Indian legislation. *Id.* Under the equal protection analysis applicable to tribal Indians, the court first examines the legislation to ascertain if it is intended to benefit the federal government's trust relationship with Indian tribes: if so, the court then decides whether the legislation is rationally tied to the fulfillment of the government's obligation toward them. The standard of review employed is far less stringent than the strict scrutiny standard, but somewhat greater than minimal scrutiny. Using this analysis, the district court concluded that the Livingstons had failed to establish that any fundamental right was violated by the Museum policy. For a more in-depth analysis of Indian equal protection, see Johnson & Crystal, *Indians and Equal Protection,* 54 Wash. L. Rev. 587 (1979).

10. There is a good reason why the Tenth Circuit did not follow the district court's reasoning. Neither Congress nor the Supreme Court has recognized a trust relationship between Indians and *states.* However, the district court opinion specifically recognized the existence of a trust relationship between Indians and states, inferred from the existence of the special relationship of the Indians with the federal government.

> The uncontroverted facts in this case show a direct link between the portal policy and the economic survival of several pueblos. Indian self-determination is meaningless if opportunities for self-support are destroyed. Therefore, it is clear that the policy is intimately and directly related to this one very legitimate, racially neutral state interest. If, as *Mancari* holds, such an interest is legitimate, and a preference for Indians is constitutional for the federal government through the BIA, *then the same must be true of a state government* through one of its state owned museums.

455 F. Supp. at 832 (emphasis added). By avoiding the equal protection claim, the Tenth Circuit circumvented a host of complex problems that would flow from a holding recognizing a state/Indian trust relationship. Specifically, is a trust relationship between tribes and states valid? Do any treaties or federal laws apply in this situation? If not, then perhaps a standard equal protection analysis should apply. What role should the state play in the relationship between the federal government and tribes, and to what extent do state constitutions and laws apply to Indians?

appeals decided the case under section 2000e-2(i) of the Civil Rights Act of 1964,[11] classifying it as an employment case under Title VII to which the Indian preference exception fully applied.[12] Interestingly, the state never argued that the Indian preference exception to Title VII applied,[13] and the Livingstons maintained that this was not an employment case.[14] The Title VII exception was brought to the court's attention by three individual portal Indians who intervened and argued that the Indian preference provision in Title VII was dispositive of the case.[15] This argument became the cornerstone of the Tenth Circuit's opinion.

HOW THE COURT APPLIED TITLE VII

The court of appeals took two steps before applying the Indian preference exception to Title VII. First, the court recast the legal theory on which the Livingstons' case was based. The Livingstons alleged that, in violation of their equal protection rights under the

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11. 42 U.S.C. § 2000e-2(i) (1976). This provision was specially drafted and inserted into 2000e to protect the Indians by exempting them from the operation of Title VII. Senator Mundt's statement illustrates the purposes behind the enactment of this provision.

> Mr. President, in the Civil Rights bill as presently before us, it has been brought to my attention that one aspect of the legislation which has not been adequately defined, could, in fact, cause this bill to work a new hardship and economic discrimination against our American Indians.
>
> Thus, unless this phase of the legislation is corrected, the segment of our American economy now meriting the most assistance and having the greatest needs will receive another setback instead of receiving favorable consideration.
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> . . . .
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> . . . This program can succeed only by giving our Indians a special employment status and opportunity on these on-reservation economic ventures.

110 Cong. Rec. 9615 (1964).

Morton v. Mancari, 417 U.S. 535 (1974) is the most forceful judicial recognition of special policies favoring Indian tribes. In *Mancari,* non-Indian Bureau of Indian Affairs (BIA) employees asked the Supreme Court to affirm a lower court holding that the Equal Employment Opportunity Act of 1972 implicitly repealed the Indian preference statutes. The plea was denied. Instead, the Court used Indian equal protection analysis to sustain the constitutional validity of the preference system.

12. Livingston v. Ewing, 601 F.2d 1110, 1115 (10th Cir.), *cert. denied,* 100 S. Ct. 147 (1979).

13. The state admitted that the classification established by the Museum policy was racial, but asserted that such a classification was not unconstitutional. Brief of Appellees at 2, 7, 10, 13, 14, 15 & 17, 601 F.2d 1110 (10th Cir.), *cert. denied,* 100 S. Ct. 147 (1979). It is noteworthy that the Supreme Court, in a 1974 decision, had characterized a BIA preference for Indians as "political, not racial." Morton v. Mancari, 417 U.S. at 553, n.24. Had a racial classification been found, the charge that it was inherently unreasonable and constitutionally invalid would have been infinitely more difficult to rebut.

14. Brief of Appellant at 36, 37 & 51 and Reply Brief of Appellants at 18-21, 601 F.2d 1110 (10th Cir.), *cert. denied,* 100 S. Ct. 147 (1979).

15. Answer Brief of Intervenors-Appellees at 17-26, 601 F.2d 1110 (10th Cir.), *cert. denied,* 100 S. Ct. 147 (1979).

fourteenth amendment, they were refused permission to sell under the portal because they were non-Indians. The district court decided the case on this theory. The Tenth Circuit, however, characterized the Livingstons' theory as an equal employment opportunity claim.[16] Second, the court found that an "employment relationship" existed between the Museum and the Indians. Once the court found that such an "employment relationship" existed, the Indian preference exception to Title VII could be applied.[17]

Three conditions must be met before the Indian preference exception can be applied.[18] First, the employer must be a business or enterprise on or near an Indian reservation. The Santa Fe Museum portal area, though not on a reservation, is less than ten miles away from an Indian pueblo and therefore meets the requirement of the provision.[19] Second, the Indian must live "on or near" a reservation.[20] This requirement is designed to bring unassimilated Indians who maintain close economic, social, and cultural ties to a reservation within the protection of the provision.[21] The majority of portal Indians come from nearby pueblos.[22] Finally, an employment practice which gives preference to Indians must exist. An employment practice presupposes the existence of an employer-employee nexus.[23] There need not be a conventional employer-employee relationship for Title VII to apply, but some type of employment relationship must exist because the practices addressed by Title VII arise in the employment setting.[24]

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16. It is not unusual for a court to decide a case on a legal theory other than the one propounded in the complaint. The main purpose of pleadings is to give notice to the other party that the complaining party has a grievance against him. The Tenth Circuit had good reason to adopt another legal theory. *See* note 10 *supra*. It should be noted that the Tenth Circuit, in dictum, said that if it were to consider the case as a possible reverse discrimination violation, it would conclude that no violation had been demonstrated.

17. The court properly applied the Title VII exception in this case because the 1972 amendments to Title VII bring state action within the mandate of the statute. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1976). Note too that the Indian preference exception to Title VII has been held by the Supreme Court to be constitutional. Morton v. Mancari, 417 U.S. 535 (1975).

18. The three conditions are contained in the provision. 42 U.S.C. § 2000e-2(i) (1976).

19. Livingston v. Ewing, 601 F.2d at 1115.

20. The BIA has frequently indicated in hearings before Congress that living "on or near" a reservation equates with living "on" it for purposes of welfare service eligibility. Morton v. Ruiz, 415 U.S. 199, 213-30 (1974).

21. *Id.* Congress intended to include Indians who maintain close ties with a reservation community within the Title VII exemption provision. *See generally* 110 Cong. Rec. 9615 (1964).

22. The record clearly shows that most of the Indian sellers are from nearby pueblos. *See* Answer Brief of Intervenors-Appellees at 21.

23. *See* Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974).

24. Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979).
Throughout the Act and the applicable federal regulations, an intent to deal with

The Tenth Circuit concluded that there was a sufficient employment relationship between the Museum and the Indians to invoke Section 2000e-2(i).[25] Three leading cases indicate that the term "employer," as used in Title VII, will apply to any party who significantly affects the access of any individual to employment opportunities or job markets, regardless of whether that party technically may be described as an "employer" as defined at common law.[26] Viewed in this manner, the policy granting permission to the Indians to use the portal area seems to involve the Museum sufficiently in the total employment process so that it may be considered an employer for purposes of Title VII.

On the other hand, there were facts which indicated that an employment relationship did not exist. The portal Indians were not paid a salary by the Museum. They could come and go as they wished. There was no contract or other arrangement between them, and the Museum did not keep a list of names and addresses of persons selling under the portal.[27] When asked what an Indian must do to obtain the privilege of selling under the portal, the director of the Museum replied, "Arrive."[28] These facts indicate that the portal selling privilage is not a means of controlling access to a job market, but rather a conditional grant of power to the Indians to control employment under the portal with a reversionary interest in the Museum should "the Indians fail to maintain a fair and orderly market under the portal."[29] Furthermore, the selling privilege is not limited to New Mexico Indians.[30] Conceivably all Indians selling under the portal could be from another state without violating the Museum policy, a condition which may, however, violate the "on or near a reservation" condition required for the Indian preference exception.[31]

> more than the conventional employer-employee situation is indicated. This intent is demonstrated by the specific prohibition against discrimination by employment agencies and labor organizations, and by the prohibition of discrimination against *individuals* . . . .

Id. at 694.

25. The Tenth Circuit did not fully explain why it found that an employment practice existed. The court merely recognized that the Museum-Indian arrangement was not a conventional employer-employee relationship, noted that the concept is broadly construed, and then concluded that one existed in the case at bar. 601 F.2d at 1114.

26. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Curran v. Portland Superintending School Comm'n, 435 F. Supp. 1063 (D. Me. 1977); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974).

27. Deposition of George Ewing at 13-14, 455 F. Supp. 825 (D.N.M. 1978).

28. *Id.* at 14.

29. *See* note 4 *supra*, at ¶ 2.

30. There is no such restriction in the Museum policy. *See* note 4 *supra*.

31. *See* text accompanying notes 19-21 *supra*.

The Museum may not be an employer within the meaning of Title VII. *Sibley*[32] *Memorial Hospital v. Wilson* and *Puntolillo*[33] *v. New Hampshire Racing Commission* cases were cited by the Tenth Circuit in support of its holding.[34] Those cases, however, involved proprietary or private functions,[35] whereas in *Livingston* the Museum policy serves to regulate access to what is essentially a public accommodation. Courts have held that governmental bodies are not employers within the meaning of Title VII when exercising other types of regulatory functions.[36]

In addition, applying only Title VII to the *Livingston* case may create a conflict with the public accommodation laws of Title II, 42 *U.S.C.* § 2000a, which guarantees all people equal access to any public accommodation without regard to race.[37] The Museum meets the definition of a public accommodation under § 2000a(b)(3).[38] Unlike the Title VII exception, there is no provision in Title II which grants Indians a special exemption. It can therefore be argued that Title VII should not control a case such as *Livingston* where the employment opportunity also involves access to a public accommodation.

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32. 488 F.2d 1338 (D.C. Cir. 1973).

33. 375 F. Supp. 1089 (D.N.H. 1974).

34. 601 F.2d at 1114-15.

35. Lavender-Cabellero v. Dep't of Consumer Affairs, 458 F. Supp. 213, 215 (S.D.N.Y. 1978) (citing Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973)); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974). *See* note 1 *supra.*

For example, in *Puntolillo* an employment relationship was found even though one defendant was a state regulatory agency. That agency, however, along with the other defendant, asserted direct control over day-to-day actions of the driver-trainers to the extent that it controlled the driver-trainers' ability to earn a living. The Museum does not have that degree of control over the Indians; it cannot prohibit them from selling their arts and crafts elsewhere.

36. Lavender-Cabellero v. Dep't of Consumer Affairs, 458 F. Supp. 213 (S.D.N.Y. 1978). *See* Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976); Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211 (E.D. Va. 1976); *aff'd,* 598 F.2d 1345 (4th Cir. 1979).

37. 42 U.S.C. § 2000a(a) (1976) says: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

38. 42 U.S.C. § 2000a(b) (1976) provides:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
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> . . . .
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other *place of exhibition* or entertainment . . . .

(Emphasis added.)

IMPLICATIONS

The Tenth Circuit opinion, by relying on Title VII, sidestepped the issue of whether a trust relationship exists between states and Indians.[39] Although the court wisely avoided a thorny issue, its extension of the Indian preference exception to Title VII also leaves some questions unanswered.[40]

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39. *See* notes 9-10 *supra.*

40. One question which arises is how far may an Indian be from a reservation and still be considered "on or near" a reservation? *See* Morton v. Ruiz, 415 U.S. 199, 213-30 (1974).

In the author's opinion, this case illustrates the inherent irony of Title VII legislation. An important objective of Title VII is to eliminate prejudice against *any* employee, including Indians; yet, section 2000e-2(i) of the Civil Rights Act of 1964 specifically exempts the Indians from the mandate of the Act. While the Title VII preference is intended to be used by Indians to protect their employment opportunities "on or near" a reservation, it may not have been the framers' intent that Indians be allowed to use the preference to deny other individuals a share in that same opportunity.

According to the testimony of Museum Director George Ewing there are a variety of spaces that go unused under the portal for most of the year. Deposition of George Ewing at 15-16. Ideally some peaceful arrangement could be worked out among the parties where non-Indians may sell in the unused spaces under the portal while the Museum continues to further the important interest of preserving and encouraging the sale of traditional Indian arts and crafts.