Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians

Alex Tallchief Skibine*

INTRODUCTION

In the aftermath of the war with Iraq, it has become fashionable to talk about a new world order that rejects conquest as a legitimate tool for nations to use in acquiring sovereignty over other peoples and territories. As the history of this country unfortunately shows, this would indeed be a new world order. The United States acquired much of its territory from the original Indian nations inhabiting the North American continent either by force, threat, or coercion.

Although many years have passed since the United States “conquered” Indian tribes,¹ all three branches of the United States

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* Associate Professor of Law, University of Utah; Deputy Counsel for Indian Affairs, Committee on Interior and Insular Affairs, United States House of Representatives, 1981-89; J.D., 1976, Northwestern University; Member, Osage Indian Nation of Oklahoma. I would like to thank Lee Teitlebaum, George Skibine, Nell Newton, William Lockhart, Renard Strickland and Leslie Francis for their helpful comments during the writing of this Article.

¹ As Professor Nell Jessup Newton points out in the introduction to her article, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215, 1215 (1980), opinions differ about how or even whether Indians were conquered. Thus, Professor Newton juxtaposes Felix Cohen’s statement that although every American schoolboy is taught otherwise, “the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners,” id. (citing Felix S. Cohen, Original Indian Title, 32 Minn. L. Rev. 28, 35 (1947)), against Justice Reed’s statement eight years later in Tee-Hit-Ton Indians v. United States that “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty . . . it was not a sale but the conquerors’ will that deprived them of their land.” Id. (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955)).
government have traditionally recognized that Indian tribes have retained the right to self-determination and self-government over their reservations.\textsuperscript{2} The conquest thus did not result in the annihilation of tribal governments as political entities.


Judicial recognition of a tribal right to self-government as a theoretical foundation for excluding reservation Indians from the application of federal statutes has its origin in the 1832 Supreme Court decision of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), overruled by Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). In Worcester, the court deemed preservation of a right to self-government essential to the continuing recognition of the Cherokee tribe as a political entity not subject to state jurisdiction. See id. at 538, 556-61. The decision came a year after the Supreme Court had held in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), that Indian nations were not "foreign nations" but instead "domestic dependent nations." Id. at 17 (Marshall, C.J.).

Worcester addressed the issue of whether the state of Georgia could assert its jurisdiction over the Cherokee Nation. Worcester, 31 U.S. at 536, 538. Georgia argued that the Cherokees had lost the power of self-government. See id. at 559. After extensively analyzing the historical relationship between the tribes and the colonial powers, the Court found that the United States' relationship with the tribes was the same as that which the tribes had with England. Id. at 541-48. The court stated, "The king . . . never intruded into the interior of their affairs, nor interfered with their self-government." Id. at 546.

Having thus concluded that the tribes retained their powers of self-government, the Court addressed the remaining question of whether the Cherokees had given up this right in the treaty of Hopewell. Id. at 551-54. The Court concluded that they had not. Id. at 554. This conclusion implies that the Cherokees could only have been divested of the power of tribal self-government under two circumstances: either the United States acted as a conqueror and took these powers by an explicit and unilateral act of Congress, or the Cherokees explicitly surrendered these powers in the treaty.

Thus the Court concluded that:
Congress, however, is said to have plenary, meaning almost absolute, power over Indian affairs. The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. The very term “nation,” so generally applied to them, means “a people distinct from others.” The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

... [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection.

Id. at 559-61.

Although the law has not remained entirely static since Worcester, see Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (overruling Worcester and stating that the “conceptual clarity of ... Worcester ... has given way to more individual treatment” of federal and state jurisdiction over Indian tribes), the Supreme Court has continued to recognize that Indian tribes have retained sovereign powers essential to the exercise of their right to tribal self-government. See infra notes 21, 213-19 and accompanying text. The Supreme Court has, however, modified that right by holding that Indian tribes cannot exercise certain sovereign powers which are inconsistent with their status as domestic dependent nations. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).

3 See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (acknowledging Congress’s plenary authority to control Indian powers of self-government). The legal foundation for Congress’s plenary power over Indian tribes apparently emanates from three sources. First, Congress claims plenary power based on the various treaties that the tribes and the United States have signed. Second, Congress claims plenary power based on the Commerce Clause of the United States Constitution. The Commerce Clause authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Finally, Congress claims plenary power based on the trust relationship that exists between the United States and the tribes. Under this trust relationship, the United States acts as the trustee and the tribes are the beneficiaries. See United States v. Kagama, 118 U.S. 375, 382-84 (1886) (describing duty of federal government to protect Indian tribes); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing relationship between Cherokee Nation and United States as that of “a ward to his guardian”); see also Felix S. Cohen, Handbook of Federal Indian Law 220-
reservation Indians. Application of some of these laws to reservation Indians has interfered both with the power of Indian tribes to govern themselves and with tribal rights reserved under treaties.

This Article’s purpose is not to question the legitimacy of Congress’s plenary power over reservation Indians. Rather, this Article questions the methods courts have used to determine whether Congress has decided to exercise this plenary power. When courts make this determination, they ask whether Congress intends a particular law to apply to reservation Indians.

When a law specifically mentions Indian tribes, one may easily determine whether Congress intends the law to apply to Indians. This Article focuses on the more difficult situations in which both the law in question and its legislative history are silent⁴ as to whether the law applies to Indian tribes.

The United States Supreme Court held in 1978 that a law generally will not be interpreted to allow interference with tribal self-government unless Congress specifically intended to interfere in tribal affairs.⁵ The Court of Appeals for the Ninth Circuit, however, used different language in 1985 to ask whether Congress intended that a law apply to reservation Indians.⁶ Specifically, the Ninth Circuit asked whether the court should take silence as an expression of Congress’s intent to exclude tribal enterprises from the scope of a particular law.⁷

This 1985 Ninth Circuit language threatens tribal self-govern-

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⁴ When a law is “silent,” neither the statute itself, nor the committee reports, nor the floor statements of legislators during consideration of the legislation, contain any reference to Indians. One can conclude that Congress never actually considered the impact such a law would have on either the treaty rights of reservation Indians or their right to tribal self-government.

⁵ See Santa Clara Pueblo, 436 U.S. at 60 (stating that “a proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent”).

⁶ See Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).

⁷ “The issue raised on this appeal is whether Congress intended to exercise its plenary authority over Indian tribes. More precisely, it is whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of the Act to which they would otherwise be subject.” Id. The court ultimately held that the Occupational Safety and Health Act (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (1970)
ment, because at least in some cases, it will allow a law to be enforced on Indian reservations when Congress is silent regarding its intent to interfere. This is a more ambiguous, less stringent requirement than the specific congressional intent that the Supreme Court required in 1978. The Ninth Circuit's language thus increases opportunities for courts to decide that Congress intends to apply a law to reservation Indians. A court reading the Ninth Circuit's 1985 language could draw one of four meanings from it. The meaning a court drew would determine its approach to deciding whether a law applied to reservation Indians.

First, a court could interpret the Ninth Circuit's language to mean that a law of general application never applies to Indian tribes and reservation Indians unless Congress actually considered the law's effect on tribal rights before enacting the statute. The United States Supreme Court followed this rule in 1986 in *United States v. Dion*, a case involving Indian treaty hunting rights. This Article refers to this rule as the "actual consideration" test and argues that the *Dion* rule should be extended to all treaty situations and even to tribes that do not have treaties.

Second, as an alternative to the *Dion* rule, a court might interpret the Ninth Circuit's language to mean that Congress always intends to include Indian tribes in laws of general application. The Supreme Court's dicta in a 1960 case, *Federal Power Commission v. Tuscarora Indian Nation*, supports such a rule. A court followed this approach in 1961 in *Navajo Tribe v. National Labor Relations Board*, but it has since given way to a more flexible

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(codified as amended at 29 U.S.C. §§ 651-678 (1988)), applied to a tribal farm operating within an Indian reservation. *Id.* at 1116.

8 Although this Article uses the term "reservation Indians," the analysis applies to all Indians living on lands set aside for Indians. This includes all lands that the United States holds in trust or restricted status for the benefit of Indians or Indian tribes. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 111 S. Ct. 905, 910 (1991) (stating that test for whether land is Indian country is whether it has been "validly set apart for the use of Indians as such, under the superintendence of the government." (citations omitted)).


10 *See infra* notes 48-87 and accompanying text.


12 "[A] general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

13 288 F.2d 162 (D.C. Cir. 1961) (holding National Labor Relations Board could conduct union representation election in uranium concentrate mill within Navajo Reservation).
approach.

The Ninth Circuit initially adopted this third and more flexible approach in a 1980 decision, *United States v. Farris*. The *Farris* court set forth two basic principles for determining whether a federal law of general application applies to Indians. First, *Farris* said that actual congressional consideration must be found only when applying the law will interfere with specific treaty rights. Second, *Farris* established a rebuttable presumption that Congress intends laws of general applicability to apply to Indian tribes. *Farris* indicated that a tribe can rebut this presumption if the tribe can show that applying the law to the tribe would interfere with tribal self-government. This rebuttable presumption rule represented the *Farris* court’s attempt to reconcile Tuscarora’s assumption, that all laws apply to Indian tribes absent express congressional intent to the contrary, with cases like *Santa Clara Pueblo v. Martinez*, in which courts require specific congressional intent before they will apply a law in a way that interferes with tribal self-government.

This Article criticizes the *Farris* approach because the *Farris* court assumed that applying federal laws to Indian tribes without tribal consent does not necessarily interfere with tribal self-government. That assumption’s validity rests on the Ninth Circuit’s assertion that an entity seeking to apply a law to an Indian tribe must show specific congressional intent only when application of the law to reservation Indians interferes with treaty rights or with “strictly intramural matters” of tribal self-government.

This Article argues that this Ninth Circuit assertion is incorrect. The scope of tribal self-government extends beyond treaty rights

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14 624 F.2d 890 (9th Cir. 1980).
15 *Id.* at 893 (“[I]t is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians. But this rule applies only to subjects specifically covered in treaties, such as hunting rights; usually, general federal laws apply to Indians.” (citations omitted)).
16 *Id.*
17 See *id.* at 893-94 (absent specific language exempting Indians from statute governing matter not “purely intramural,” Indians can prove “by legislative history or other means” that Congress did not intend to apply statute to them).
19 See *infra* notes 149-67 and accompanying text.
and strictly intramural matters. The Supreme Court has recently held that in addition to powers necessary to control tribal internal relations, tribal self-government includes any powers essential to control activities that can endanger the political integrity, economic security, or health and welfare of the tribe.

Even if one were to extend the definition of tribal self-government to "all essential aspects," however, the Farris approach would remain problematic for two reasons. First, whether a law's application would interfere with essential powers of tribal self-government is a question more appropriately answered by the political process than by the judiciary. Second, when courts try to determine whether Congress intended a law to apply to reservation Indians, they should look to other indicia in addition to interference with tribal self-government.

This Article confronts the problems with the Farris approach and acknowledges that some courts may refuse to extend Dion beyond treaty rights. This Article therefore recommends a fourth approach to the problem of whether a silent federal law applies to Indian tribal affairs. To apply a silent law to an Indian nation on a matter not covered by a treaty, the entity seeking to apply the law should be required to show an overriding national interest in applying the law to Indians.

If reservation Indians are to retain their right to self-government, a clear approach to the issue of whether federal laws of general applicability apply to reservation Indians is needed for both practical and political reasons. In practical terms, Congress has already enacted a multitude of laws of general applicability. Under these laws, federal agencies have adopted comprehensive regulations that permeate every aspect of the regulated activity. The applicability of some of these laws, including the Age Dis-

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20 See infra notes 203-24 and accompanying text.
21 See Montana v. United States, 450 U.S. 544, 566 (1981) (discussing "inherent" tribal power to control activities that "threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"), discussed infra at notes 213-24 and accompanying text.
22 See infra note 227 and accompanying text.
23 See infra notes 244-55 and accompanying text.
24 See infra notes 250-55 and accompanying text. This Article does not concern itself with laws being applied on Indian reservations without objection by the tribes affected. This Article focuses only on laws being implemented over Indian tribes' objections that the laws interfere with either tribal self-government or treaty rights.
crimination in Employment Act of 1982 (ADEA),\textsuperscript{25} the Occupational Safety and Health Act of 1970 (OSHA),\textsuperscript{26} and the Employee Retirement Income Security Act of 1974 (ERISA),\textsuperscript{27} to reservation Indians has already been litigated.\textsuperscript{28} Applying these laws to reservation Indians has tremendous practical effects on both tribal self-government and tribal economic development.\textsuperscript{29}

In addition to the practical interference with self-government, the application of these laws reflects how the courts define Indian tribes' political rights to self-government. The manner in which Congress exercises its so-called plenary power over Indian affairs turns on the extent to which these laws apply to Indian tribes and Indian reservations. Although this Article's purpose is not to question the legal foundation or legitimacy of this plenary power, Congress's continued exercise of this power over Indian nations without tribal consent and in a manner that interferes with tribal self-government constitutes an ongoing act of conquest. In an age where many people challenge conquest as a legitimate tool to gain political control,\textsuperscript{30} the manner in which courts decide whether Congress has exercised this plenary power should be reexamined.

In addressing these concerns, Part I of this Article explains the \textit{Dion} case\textsuperscript{31} and argues that its approach should be extended beyond cases involving specific treaty rights to include both treaty cases involving a general grant of a right to self-government and non-treaty situations.\textsuperscript{32} Part II critiques the \textit{Tuscarora} approach to general laws.\textsuperscript{33} Part III examines the \textit{Farris} approach and the problems associated with it.\textsuperscript{34} Part IV outlines why interference with tribal self-government should not be the only criterion a court examines to infer that Congress intends to apply a general law to reservation Indians.\textsuperscript{35} Part V describes an alternative approach to \textit{Farris} for those courts who are unwilling to extend

\textsuperscript{25} See infra notes 48-59 and accompanying text.
\textsuperscript{26} See infra notes 62-68 and accompanying text.
\textsuperscript{27} See infra notes 168-97 and accompanying text.
\textsuperscript{28} See infra notes 48-59, 62-68, 168-97 and accompanying text.
\textsuperscript{29} See infra notes 203-17 and accompanying text.
\textsuperscript{30} See supra note 2 and accompanying text.
\textsuperscript{31} See infra notes 38-47 and accompanying text.
\textsuperscript{32} See infra notes 48-87 and accompanying text.
\textsuperscript{33} See infra notes 88-147 and accompanying text.
\textsuperscript{34} See supra notes 14-19 and accompanying text; infra notes 148-224 and accompanying text.
\textsuperscript{35} See infra notes 225-43 and accompanying text.
Dion to non-treaty situations. Under this alternative approach, a court must ask whether there is an overriding national interest in applying the law to reservation Indians. Part V suggests that this test is a better test than the existing approach in which courts ask whether or not application of the law would interfere with tribal self-government.

I. THE DION APPROACH AND ITS EXTENSION TO CASES NOT INVOLVING TREATY HUNTING AND FISHING RIGHTS

A. The Dion Test: An “Actual Consideration” Standard

United States v. Dion illustrates one approach the United States Supreme Court has used to determine whether general laws apply to Reservation Indians. Dion considered whether the Eagle Protection Act, the Endangered Species Act, and the Migratory Bird Treaty Act applied to reservation Indians so as to prohibit the hunting and selling of eagles.

The Court held that the Eagle Protection Act applied to reservation Indians because Congress had indicated a clear intent to abrogate certain treaty hunting rights. Justice Marshall, writing for a unanimous Court, established an “actual consideration” test. That is, the Court was willing to uphold the enforcement of the law against Indian tribes only if the United States could present clear evidence that Congress actually considered the conflict between the law and Indian treaty rights and chose to abro-

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36 See infra notes 244-97 and accompanying text.
37 See infra notes 244-97 and accompanying text.
38 476 U.S. 734 (1986).
42 476 U.S. at 736-38.
43 Id. at 740, 745-46. Because the Eagle Protection Act decided the issue, the court did not consider whether the Endangered Species Act or the Migratory Bird Treaty Act applied to reservation Indians.
44 Id. at 739-40. “What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty.” Id. (emphasis added).
gate the treaty.⁴⁵ Noting that the legislative history indicated that Congress had considered Indian treaty issues in passing the Eagle Protection Act, the Court determined that Congress intended to abrogate the treaty rights.⁴⁶ Although *Dion* establishes a clear rule covering specific treaty rights, the case leaves two questions unanswered. First, *Dion* does not address whether the actual consideration test⁴⁷ should be extended to all treaty situations, including those situations in which treaties reserve a general right of tribal self-government rather than the particular right in question. Second, *Dion* does not suggest whether courts should extend the application of the actual consideration test to non-treaty situations. Part B of this Section argues that the *Dion* actual consideration test should be applied in both of these circumstances.

**B. Extension of the Dion Actual Consideration Test to All Treaty Cases and All Non-Treaty Cases**

Some case law supports extending the *Dion* test to situations in which a specific treaty right is not at issue, but in which a treaty reserves to an Indian tribe a general right of self-government. The United States Court of Appeals for the Tenth Circuit used an approach similar to the *Dion* test to determine whether the Equal Employment Opportunity Commission (EEOC) had jurisdiction to investigate an age discrimination complaint against the Cherokee Nation pursuant to the Age Discrimination in Employment Act of 1967 (ADEA)⁴⁸ in *Equal Employment Opportunity Commission v. Cherokee Nation*.⁴⁹ The dispute in *Cherokee Nation* arose when the EEOC attempted to enforce an administrative subpoena duces tecum directing the Cherokee nation to produce documents of several former tribal employees.⁵⁰ The Cherokee Nation, claim-

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⁴⁵ See id.
⁴⁶ See id. at 740-45.
⁴⁹ 871 F.2d 937 (10th Cir. 1989).
⁵⁰ Id. at 937.
ing that it had sovereign immunity from suit absent specific congressional intent to bring tribes within ADEA coverage, refused to comply with the subpoena.\textsuperscript{51}

Holding that application of the ADEA would dilute the principles of tribal sovereignty and self-governance recognized in a treaty,\textsuperscript{52} the Tenth Circuit refused to extend the ADEA to the Cherokee Nation.\textsuperscript{53} Although it did not explicitly adopt Dion's actual consideration test,\textsuperscript{54} the Tenth Circuit adopted a very similar approach.

Citing Dion, the court began its analysis by stating, "Like the Supreme Court, we have been 'extremely reluctant to find congressional abrogation of treaty rights' absent explicit statutory language."\textsuperscript{55} The court then disagreed with the District Court's interpretation of the ADEA, remarking that in Indian cases, "'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'"\textsuperscript{56} The court said that the ADEA's silence regarding Indians made it ambiguous,\textsuperscript{57} and that Congress did not clearly indicate an intent to abrogate Indian sovereignty rights.\textsuperscript{58} The court therefore concluded that the EEOC did not demonstrate sufficient facts from which the court could infer that Congress intended to apply the ADEA to Indian tribes.\textsuperscript{59}

Why the Cherokee Nation court refused to apply the Dion actual consideration test outright remains uncertain. Although one

\textsuperscript{51} Id. at 938.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 938-39.
\textsuperscript{54} See supra notes 44-47 and accompanying text.
\textsuperscript{55} 871 F.2d at 938 (quoting Dion, 476 U.S. at 739 (quoting Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979))).
\textsuperscript{56} Id. at 939 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. However, in a cryptic opinion, the United States District Court of North Dakota summarily dismissed as being without merit a claim that the ADEA did not apply to a corporation that was 51% owned by the Devils Lake Sioux Tribe. See Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp 753, 754 (D.N.D. 1989).

In a footnote, the Myrick court attempted to distinguish Myrick from Cherokee Nation on the ground that the court in Cherokee Nation "did not consider the present situation of non-tribal reservation employees." Id. at 754 n.1. The Cherokee Nation court, however, seemed unconcerned with the
might attribute the *Cherokee Nation* court’s refusal to the fact that
the treaty clause at issue in *Cherokee Nation* did not reserve specific
hunting and fishing rights but only a general right to tribal self-
government,\(^{60}\) this is doubtful.

Perhaps the Tenth Circuit did not need to use the *Dion* test to
reach the desired result in *Cherokee Nation* because it could rely on
its own approach, devised in a pre-*Dion* case, *Donovan v. Navajo
Forest Products Industries.*\(^{61}\) *Navajo Forest Products* involved the appli-
cation of the Occupational Safety and Health Act of 1970 (OSHA)\(^{62}\) to a business that the Navajo Tribe owned and operated on the Navajo Reservation.\(^{63}\) The business conducted log-
ning operations, manufactured wood products, and ran a

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tribal membership of the employees in question. *See generally Cherokee Nation*,
871 F.2d at 937-39.

The *Cherokee Nation* court’s reliance on the treaty right exception rather
than the self-government exception might account for its failure to consider
the employment of a non-tribal member. The treaty provision in question, how-
ever, guaranteed to the Cherokees the right to self-government. *See supra*
note 52 and accompanying text. Therefore, as stated earlier, the same
analysis should apply to both exceptions. *See supra* notes 52-58 and
accompanying text. The *Myrick* court did not mention whether the Devil’s
Lake Sioux have a similar treaty right to self-government. *See generally
Myrick*, 718 F. Supp. at 753-55. Whether such treaty rights exist or not, the
*Myrick* court decided not to rely on them as a basis for distinguishing *Myrick*
from *Cherokee Nation*. *See id.* at 754 n.1.

\(^{60}\) *See Cherokee Nation*, 871 F.2d at 938. The Cherokee treaty at issue in
*Cherokee Nation* provided, in pertinent part, the following:

The United States hereby covenant and agree . . . [to] secure to
the Cherokee nation the right by their national councils to make
and carry into effect all such laws as they may deem necessary for
the government and protection of the persons and property
within their own country . . . .

*Id.* at n.2 (quoting Treaty of New Echota, December 29, 1835, U.S.-Chero-
kee Indians, art. 5, 7 Stat. 478, 481).

\(^{61}\) 692 F.2d 709 (10th Cir. 1982).


\(^{63}\) At issue was Section 8(a) of OSHA, 29 U.S.C. § 657(a), which
provides:

In order to carry out the purposes of this chapter, the Secretary,
on presenting appropriate credentials to the owner, operator,
or agent in charge, is authorized (1) to enter without delay and at
reasonable times any factory, plant, establishment, construction
site, or other area, workplace or environment where work is
performed by an employee of an employer.

*Id.* § 657(a).
The Tenth Circuit found that OSHA did not apply to the tribal enterprise for two reasons. First, OSHA authorizes federal inspectors to make on-site inspections. Application of OSHA to the tribal enterprise would therefore violate Article II of the 1868 Treaty signed between the United States and the Navajo Tribe. In that treaty, the Navajo Tribe had reserved the power to exclude any person from the reservation except those federal employees specifically authorized by law to enter upon Indian reservations.

Second, the Tenth Circuit found that applying OSHA would dilute the principles of tribal sovereignty and self-government contained in the treaty. The court stated, "Limitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances and legislative history." Because of the precedent established in Navajo Forest Products, the Tenth Circuit did not have to decide whether courts must apply the Dion test in situations involving general treaty rights of self-government rather than specific treaty rights, such as hunting and fishing. Although one can argue that courts should apply the Dion test in situations in which treaties reserve general rights of tribal self-government, the Ninth Circuit’s approach in a pre-Dion case, United States v. Farris, indicates that it is unlikely to apply a Dion-type test.

In Farris, a 1980 case, the Ninth Circuit considered whether the gambling provisions of the Organized Crime Control Act of 1970

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64 Navajo Forest Prods., 692 F.2d at 710.
65 Id. at 711.
66 Treaty with the Navajo Indians, June 1, 1868, U.S.-Navajo Indians, art. II, 15 Stat. 667, 668.
67 Article Two of the treaty states:
[T]he United States agrees that no persons . . . except such officers, soldiers, agents and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Id.

68 Navajo Forest Prods., 692 F.2d at 712.
69 See infra notes 86-87 and accompanying text.
70 624 F.2d 890 (1980).
71 See infra notes 76-85 and accompanying text.
applied to Indians operating a large scale gambling casino on the Puyallup Indian Reservation. The OCCA, which does not specifically refer to reservation Indians, made it illegal for anyone to operate gambling businesses in violation of state law. Although the Ninth Circuit acknowledged that specific references to Indians are necessary before a court finds congressional intent to abrogate rights guaranteed by treaties, the Ninth Circuit nevertheless held that the “specific reference” rule applied “only to subjects specifically covered in treaties, such as hunting rights.” Absent a specific provision exempting Indians from laws of general applicability, the Farris court found that general language granting self-government rights would not exempt the tribe from the gambling prohibition.

The Farris court did not give any reasons for evaluating treaty rights that recognize the tribe’s general right to self-government any differently than specific treaty rights such as hunting and fishing rights. However, one possible reason for evaluating different treaty rights differently might be that some treaty rights, such as hunting and fishing rights, are vested property rights. Congressional abrogation of treaty rights that are also vested property rights are compensable under the Takings Clause of the Fifth Amendment to the United States Constitution. But other treaty

73 Farris, 624 F.2d at 892.
75 Farris, 624 F.2d at 893. The court’s discussion continued:

[T]his rule applies only to subjects specifically covered in treaties, such as hunting rights.

To bring the special rule into play here, general treaty language such as that devoting land to a tribe’s “exclusive use” is not sufficient . . . ; there would have to be specific language permitting gambling or “purporting to exempt Indians from the laws of general applicability throughout the United States regardless of the situs of the act.”

Id. (quoting United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1976)).
76 See Farris, 624 F.2d at 893-94.
77 See id. at 893.
78 The Takings Clause provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V.
rights, such as general rights to tribal self-government, are not compensable.\textsuperscript{79}

The compensability of abrogated treaty rights, however, may not provide enough of a distinction to discriminate between treaty rights. For instance, in \textit{Dion}, it seems that the Court would have adopted the same actual consideration test even if a treaty had not protected hunting and fishing rights.

Yet, unlike treaty rights, the taking of aboriginal hunting and fishing rights has never been held to be compensable under the Fifth Amendment of the Constitution.\textsuperscript{80} In addition, although the Supreme Court held in \textit{Dion} that Congress had actually considered the impact of the federal laws on treaty rights,\textsuperscript{81} an analysis of the Court’s findings in \textit{Dion} reveals that Congress never considered the impact of these acts on treaty rights per se. Instead, Congress considered the impact these laws would have on the right of all Indians to hunt and fish on their reservations irrespective of whether they had a treaty.\textsuperscript{82} The Court, in a footnote, acknowledged this fact when it observed that all “Indian reservations

\textsuperscript{79} The issue of compensability for the abrogation of vested treaty rights did influence the Supreme Court in construing congressional intent in \textit{Menominee Tribe v. United States}, 391 U.S. 404 (1968). In holding that hunting and fishing rights had not been abrogated by the passage of the Menominee Termination Act, the \textit{Menominee} Court stated: “We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government’s financial obligations toward the Indians.” \textit{Id.} at 413.

\textsuperscript{80} See \textit{Tee-Hit-Ton Indians v. United States} 348 U.S. 272 (1955) (holding Tee-Hit-Ton Indians not entitled to compensation for U.S. taking timber from land occupied by Tribe); \textit{Sioux Tribe v. United States} 316 U.S. 317 (1942) (holding that executive order setting aside public land for Sioux use did not convey compensable interest when lands were later restored to public domain).

\textsuperscript{81} See \textit{supra} notes 38-46 and accompanying text.

\textsuperscript{82} An example of congressional consideration of the impact of federal laws regardless of treaty rights exists in the \textit{Dion} court’s explanation of the legislative history of these statutes. The Court remarks that the House of Representatives relied on a letter from Assistant Secretary of the Interior Frank Brigg. See \textit{Dion}, 476 U.S. at 741-42. This letter mentions the importance of eagles for religious ceremonies of “the Hopi, Zuni, and several of the Pueblo groups of Indians in the Southwest.” \textit{Id.} at 741. None of those tribes, however, have signed any treaties with the United States. In addition, the exemptions for native religious purposes, which Congress eventually adopted and incorporated into the Eagle Protection Act, do not
[whether] created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."  

The conclusion that Dion's actual consideration test also applies to non-treaty hunting and fishing situations could mean that the Court considered aboriginal hunting and fishing rights to be vested property rights, or that the Dion test should apply to non-treaty situations. In fact, both meanings make sense. Although it is contrary to the Supreme Court decision in Tee-Hit-Ton Indians v. United States, it is undoubtedly correct to conclude that aboriginal rights are vested property rights.

In addition, evaluating aboriginal (non-treaty) hunting and fishing rights differently than treaty-based hunting and fishing rights could lead to anomalous results. For instance, in the Dion case, suppose that the Court had not found that Congress actually considered the impact that operation of the laws would have on "treaty" rights to hunt and fish when it enacted the Eagle Protection Act. It would not be rational to conclude that the Navajos, who do have a treaty, could continue to hunt eagles while the Hopis, who do not have a treaty, could not. This example illustrates why the Dion test should apply in both treaty and non-treaty situations involving hunting rights. The reasoning applies equally to situations in which the application of the general federal law interferes with rights of tribal self-government, because all tribes possess general rights to tribal self-government whether or not they have signed treaties with the United States reserving such rights.

Good reasons exist for extending the Dion test not only to all situations involving treaty rights but also to non-treaty rights situ-

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83 Dion, 476 U.S. at 745 n.8. See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 n.21 (1983) (quoting the prohibition in 18 U.S.C. § 1162(b) against any state "depriv[ing] any Indian or any Indian tribe, board, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing ... "); United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) (stating that tribal claims to land need not be based on a "treaty, statute, or other formal government action").

84 348 U.S. 272 (1955). There is considerable weight to the argument that the Tee-Hit-Ton case was wrongly decided and that the taking of aboriginal Indian rights should be compensable under the Fifth Amendment of the United States Constitution. See Newton, supra note 1.
ations. Courts can apply the Dion test easily and it conforms to the fundamental rule of statutory interpretation in situations involving Indians: Ambiguous expression must be construed to the benefit of the Indians. Extending the Dion test as proposed would also comport with the current congressional policy of promoting and respecting tribal self-government. Finally, extension would be in keeping with the federal trust relationship under which the United States, as the guardian or protector of the tribes, is supposed to act for the benefit of the tribes. To be true to this trust relationship, the courts, if they are to err, should err on the side of the Indians. If the courts are wrong and Congress did in fact intend to include the Indians within the operation of a law of general application, Congress can always amend the law to expressly include Indians.

A strong possibility exists, however, that a court will conclude that Dion should strictly be limited to treaty rights or to compensable property rights. This Article will therefore examine the approaches other courts have developed to determine whether, in the absence of a treaty, a silent law of general application should apply to Indians.

II. THE TUSCARORA APPROACH: A PRESUMPTION OF APPLICABILITY

One finds an approach much less deferential to Indian self-government than Dion’s in Federal Power Commission v. Tuscarora Indian Nation, a 1960 decision. In Tuscarora, the Supreme Court, in dicta, observed that as a general rule “a general statute in terms applying to all persons includes Indians and their property interests.” Subsequent lower court decisions have seized upon this dicta to extend federal laws of general application to reservation Indians without inquiring about congressional intent or analyzing the impact that imposing the laws would have on tribal rights.

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85 See supra notes 43-46 and accompanying text.
86 See Cohen, supra note 3.
87 See supra notes 70-84 and accompanying text.
88 362 U.S. 99 (1960). Justice Black’s vigorous dissent (joined by Justices Douglas and Warren) made this 1960 Supreme Court decision famous. Exasperated at the majority’s conclusion allowing the United States to flood the lands of the Tuscaroras, Justice Black said, “Great nations, like great men, should keep their word.” Id. at 142 (Black, J., dissenting).
89 Id. at 116.
90 See infra notes 92-96 and accompanying text.
Other courts have used the dicta to create a presumption that Congress always intends a law of general application to include reservation Indians when the law is totally silent on that subject.91

For instance, in Navajo Tribe v. National Labor Relations Board92 the Court of Appeals for the District of Columbia Circuit held that the National Labor Relations Act (NLRA)93 applied inside the Navajo Indian reservation.94 The opinion did not discuss congressional intent to include reservation Indians within the NLRA, nor did it analyze the impact that extending the NLRA to reservation Indians would have on tribal rights.95 Instead, the court limited its analysis to a citation of Tuscarora in a footnote.96

The Tenth Circuit also cited the Tuscarora general rule with approval in Phillips Petroleum Co. v. United States Environmental Protection Agency,97 a 1986 decision. After the court concluded that the Safe Drinking Water Act of 1974 (SDWA)98 applied to Indian lands, the Tenth Circuit stated that this conclusion was consistent with the presumption that Congress intends that general laws applying to "all persons" also apply to Indians.99

The Phillips Petroleum court did not, however, rely on the Tuscarora principle for its primary argument as to why the SDWA applied to Indian lands. Rather, Phillips Petroleum used the Tuscarora principle only to support its initial finding that the legislative

91 See infra notes 97-102 and accompanying text.
92 288 F.2d 162 (D.C. Cir. 1961).
94 See Navajo Tribe, 288 F.2d at 165.
95 See id. at 164-65.
96 See id. at 165 n.4 (stating that general statutes, including the NLRA, cover Indians and their property interests, and that the NLRA's jurisdictional provisions and definitions have a "broad and comprehensive scope").
97 803 F.2d 545 (10th Cir. 1986).
99 Phillips Petroleum, 803 F.2d at 556. Specifically, the court stated:

The conclusion that the SDWA empowered the EPA to prescribe regulations for Indian lands is also consistent with the presumption that Congress intends a general statute applying to all persons to include Indians and their property interests. Although this rule of construction can be rescinded where a tribe raises a specific right under a treaty or statute which is in conflict with the general law to be applied, no such right under statute or treaty has been demonstrated.

Id. (citations omitted).
history of the SDWA showed that Congress intended to include Indian lands under the SDWA.\textsuperscript{100} In addition, in Phillips Petroleum the Osage Tribe wanted the SDWA to apply to its reservation.\textsuperscript{101} Only Phillips Petroleum, a non-Indian entity, argued that the SDWA did not apply to the reservation.\textsuperscript{102} Thus, although it relied on Tuscarora, the Phillips Petroleum court in fact followed an approach closer to Dion's actual consideration test than the blanket presumption about congressional intent Tuscarora's language would mandate.

Reliance by the Phillips Petroleum court, or any other court, on the Tuscarora principle would be misplaced. First and foremost, such reliance would amount to an abdication of the judicial responsibility to search for congressional intent.\textsuperscript{103} Abdicating judicial responsibility without compelling reasons does not conform to the role the Constitution has given the judicial branch. Second, Supreme Court precedent does not support the existence of a general rule mandating that a presumption of congres-

\textsuperscript{100} The House Report on the SDWA contained one of the most convincing aspects of legislative history cited by the court:

The Indian Health Service . . . operates a direct construction program to provide sanitation facilities to Indian and Alaskan natives. However, in the Committee's view these grant programs to construct drinking water supply systems are not necessarily adequate to assure that safe drinking water will be available [to Indians], even from those systems which are construed with such aid.

\textit{Id.} at 555 (quoting H.R. Rep. No. 1185, 93d Cong., 2d Sess. 9 (1974)).

In addition, the court remarked that the definitions section of the SDWA refers directly to Indian tribal organizations in defining "municipality," which in turn is included in the term "person." \textit{Id.} at 554. "Persons" are subject to the provisions of the SDWA. \textit{Id.}

\textsuperscript{101} \textit{Id.} at 556.

\textsuperscript{102} \textit{Id.} at 551. The court must have considered the parties' relative desires regarding the application of the SDWA on the reservation. As explained later in this Article, see infra notes 279-97 and accompanying text unless one follows the Dion test, there are only two other ways to exempt Indian reservations from a law of general application: (1) Argue that applying the law would interfere with tribal self-government; or (2) argue that there is an overriding national interest in applying the law inside Indian reservations. The first approach is obviously inappropriate when the tribe itself wants the law to apply to the tribe and to non-Indians. The second approach would lead to the same result in this situation, because the national interest must override the tribal right of self-government itself in order for the law to apply on the reservation.

\textsuperscript{103} See infra notes 146-47 and accompanying text.
sional intent should be made for all laws that are silent as to their application to reservation Indians. An analysis of the Tuscaraora case and the precedents on which it relies shows that the dicta, while valid in the context of the case, is nevertheless completely inapposite to a case involving reservation Indians.104

Tuscaraora considered whether the Federal Power Act (FPA)105 applied to non-reservation lands that the Tuscaraora Tribe owned in fee simple.106 If the court determined that the FPA applied to the lands, the Federal Power Commission could take the lands to build a hydroelectric power project.107 The Court concluded that Congress intended these Indian fee lands to be available for the power project.108 The Court reached this result because although the FPA exempted Indian lands within Indian reservations, the Tuscaraora lands were owned in fee and were not part of any "reservation" as that term was defined in the FPA.109

Thus, the only issue the Tuscaraora Court had to decide was whether laws of general application could be applied to lands Indians owned in fee outside an Indian reservation. The Court had no problem concluding that in such cases, laws of general application applied to everyone, including Indians.110 Tuscaraora involved neither Indians within an Indian reservation nor a general law that was silent with respect to its application to Indians. Congress

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104 See infra notes 103-113 and accompanying text.
106 Tuscaraora, 362 U.S. at 100.
107 Id.
108 See id. at 118 (stating that the FPA "gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any persons, including Indians").
109 Id. at 110-15 (citing FPA, 16 U.S.C. §§ 796(2), 797(e)). Section 797(e) provides that the Commission can only issue a license if it "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e). Section 796(2), however, defines "reservations" in the following terms:

"[R]eservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

110 Tuscaraora, 362 U.S. at 120-24.
had specifically carved out an exemption for Indian reservations in the FPA.\textsuperscript{111}

While the \textit{Tuscarora} Court stated that the principle of applicability of general federal laws was supported by "many decisions of this Court,"\textsuperscript{112} Justice Black's dissent distinguished the cases to which the majority referred. Justice Black pointed out that those cases all either involved laws whose legislative history showed congressional intent to include Indian lands within their operation, or applied federal tax laws to individual Indians.\textsuperscript{113}

Although Justice Black did not elaborate on his reasons for distinguishing tax cases, an obvious reason to presume congressional intent to include reservation Indians in tax legislation is the use of all-inclusive language in the tax laws. Tax laws apply anywhere within the exterior boundaries of the United States and apply to income from whatever source.\textsuperscript{114} Another reason to distinguish tax cases is the longstanding principle against any tax exemptions by implication.\textsuperscript{115} The pattern of congressional treatment of both Indians and exemptions in the field of taxation thus militates for a presumption that when Congress enacts general

\textsuperscript{111} See id. at 123-24. This Article's purpose is not to dispute the actual merits of the \textit{Tuscarora} decision. Nevertheless, it is significant that the court decided \textit{Tuscarora} in 1960, during the congressional policy of termination. The policy of termination is the antithesis of the current policy of tribal self-government. While the courts do not automatically consider current congressional policy in deciding their cases, it would be ludicrous to argue that this policy does not influence them.

The policy of termination was embodied in House Resolution 108 which was passed in 1953. \textit{H.R. Res. 108, 83d Cong., 1st Sess.} (1953). It advocated terminating the trust relationship between the Indian tribes and the United States, a government-to-government relationship between the Indian tribes and the United States, and terminating federal supervision over Indians and Indian affairs. The termination policy's stated goal was to make Indians subject to the same laws as everyone else. Congress abandoned its policy of termination, generally considered a failure, in 1962. For a good account of its history and implications, see Charles F. Wilkinson \& Eric R. Biggs, \textit{The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139} (1977).

\textsuperscript{112} \textit{Tuscarora}, 362 U.S. at 116.

\textsuperscript{113} \textit{Id.} at 132 ("Many of those cases deal with taxation—federal and state... Other cases relied on by the court all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians' lands..." (citations omitted)).

\textsuperscript{114} See \textit{U.S. Const. amend. XVI}.

\textsuperscript{115} See \textit{United States Trust Co. v. Helvering, 307 U.S. 57, 60} (1939) ("Exemptions from taxation do not rest on implication.").
tax legislation, it intends to include reservation Indians.\textsuperscript{116}

The history of the application of federal taxation to Indians within Indian reservations also supports Justice Black's distinction. Until 1870, it was assumed that federal tax laws could not reach Indians within Indian reservations.\textsuperscript{117} The exemption originated in Article I, Section 3, Clause 3 of the United States Constitution. This clause provides for apportionment among the states according to population for the dual purpose of determining representation in the U.S. Congress and of levying direct federal taxes. In counting the population, Article I of the Constitution took into account all "free Persons . . . excluding Indians not taxed."\textsuperscript{118}

Although the Supreme Court as early as 1831 had described Indian nations as domestic dependent nations,\textsuperscript{119} the United States government apparently did not consider Indians or Indian tribes to be part of the political system of the United States until 1871. Until 1871, the United States and Indian nations were still signing treaties, which are international agreements between two sovereign states,\textsuperscript{120} and most Indians were not United States citizens.\textsuperscript{121}

This consensus began to change in 1870. Between 1871 and 1928, congressional policy towards Indians shifted dramatically from recognizing the independent and separate status of the tribes to advocating assimilation and incorporation into the

\textsuperscript{116} In Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 606 (1943), the Supreme Court stated,

This Court has repeatedly said that tax exemptions are not granted by implication. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "[i]f the exemption had been intended, it would doubtless have been expressed."

\textit{Id.} at 606-07 (citation omitted)(quoting \textit{Cherokee Tobacco}, 78 U.S. (11 Wall.) 616, 620 (1870)).

\textsuperscript{117} Indians Not Taxed—Interpretation of Constitutional Provision, Solicitor's Op., 57 Interior Dec. 195 (November 7, 1940).

\textsuperscript{118} U.S. CONST. art. I, § 2, cl. 3.

\textsuperscript{119} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

\textsuperscript{120} See 2 \textsc{Charles J. Kappler}, \textsc{Indian Affairs: Laws and Treaties} (1904) (reprinting treaties between the United States and various Indian tribes). The last treaties appear to have been made in 1868. \textit{See id.} at 990-1025.

\textsuperscript{121} \textit{See infra} note 125 and accompanying text.
American mainstream. Some of the milestones of this policy shift included an 1871 Act of Congress that put an end to treaty-making between Indian tribes and the United States, the 1887 General Allotment Act, commonly referred to as the Dawes Act, which resulted in the allotment and subsequent loss of millions of acres of tribal lands, and the Indian Citizenship Act of 1924, which officially and finally granted United States citizenship to all Indians, including those who did not want it. By 1940, the Solicitor for the Department of the Interior could confidently state that there are “no longer Indians not subject to taxation” within the meaning of that phrase as it was used in the Constitution.

Another important factor distinguishing these tax laws and the court decisions applying them to reservation Indians is that both the laws and the earlier decisions were issued at a time when congressional policy was one of assimilation, not one of encouraging tribal self-government. This policy lasted from 1870 until about 1934. In Chouteau v. Burnet, a 1931 decision, the Supreme Court opined that any determination about the applicability of federal tax laws to reservation Indians had to be made by reference to the prevailing congressional policy of the time. That policy involved emancipating and assimilating the Indians into the rest of society so that they could assume the full responsibility of United States citizens.

For the last twenty years, however, Congress has adopted a policy of fostering tribal self-government, encouraging Indian self-

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122 See infra notes 123-30 and accompanying text for description of assimilation policy.
123 Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (“[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”).
126 Solicitor’s Op., supra note 117, at 207.
128 283 U.S. 691 (1931).
129 See id. at 694 (stating that determination of Indians’ tax exempt status “requires a reference to the policy of the government with respect to Indians”).
130 Id.
determination, and developing reservation economies.\textsuperscript{131} A Tuscarora type rule would contradict and undermine these congressional policies.

Besides tax cases,\textsuperscript{132} the only other federal laws that courts have uniformly applied to reservation Indians have been federal criminal laws.\textsuperscript{133} Because of this, the Supreme Court concluded in a note in \textit{United States v. Wheeler}\textsuperscript{134} that federal jurisdiction extends to all crimes over which there is federal criminal jurisdiction,\textsuperscript{135} even if the crime occurs in Indian country and involves Indians.\textsuperscript{136}

Although in certain areas, such as tax law and criminal law, courts have held that federal laws apply to reservation Indians, this does not mean that courts should presume that Congress always intends a general federal law to apply to reservation Indians. Courts, after all, have the duty to determine congressional intent for each law. Precedents applying general federal laws to reservation Indians may validly inform a judicial determination about congressional intent only in the specific legal areas they involve, such as tax. The precedents should not create a presumption about congressional intent in other areas.

The Tenth Circuit questioned the continuing validity of the Tuscarora presumption in \textit{Donovan v. Navajo Forest Products Industries}.\textsuperscript{137} The Navajo Forest Products court, relying on the Supreme Court decision of \textit{Merrion v. Jicarilla Apache Tribe},\textsuperscript{138} held that the

\begin{itemize}
\item[\textsuperscript{131}] See supra note 2.
\item[\textsuperscript{132}] For more recent applications of federal tax laws to reservation Indians by lower courts see Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878 (9th Cir. 1982) (federal excise taxes); Fry v. United States, 557 F.2d 646 (9th Cir. 1977) (income from logging on reservation land subject to federal income tax).
\item[\textsuperscript{133}] See United States v. Burns, 529 F.2d 114 (9th Cir. 1976) (Indian convicted of unlawful possession of firearm, assault with dangerous weapon, etc.); Walks on Top v. United States, 372 F.2d 422 (9th Cir. 1967) (Indian convicted of assault with dangerous weapon, resisting federal officer, etc.); Head v. Hunter, 141 F.2d 449 (10th Cir. 1944) (Indian convicted of fraud, forgery, etc.).
\item[\textsuperscript{134}] 435 U.S. 313 (1978).
\item[\textsuperscript{135}] \textit{Id.} at 330 n.30 ("Federal jurisdiction also extends . . . to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer." (citations omitted)).
\item[\textsuperscript{136}] See \textit{id.}
\item[\textsuperscript{137}] 692 F.2d 709 (10th Cir. 1982).
\item[\textsuperscript{138}] 455 U.S. 130 (1982).
\end{itemize}
Jicarilla decision limits, or by implication, overrules, Tuscarora.\textsuperscript{139} Jicarilla had decided whether the Jicarilla Apache Tribe had the inherent power to impose a severance tax on non-Indians engaged in oil and gas production on tribal lands within the reservation.\textsuperscript{140} The non-Indian corporation in Jicarilla argued that the power to impose a tax had been implicitly taken away by previous acts of Congress.\textsuperscript{141}

Early in its opinion in Navajo Forest Products, the Ninth Circuit stated that the Tuscarora line of cases did not apply to Navajo Forest Products because Tuscarora did not involve an Indian treaty.\textsuperscript{142} This attempt to distinguish treaty situations from non-treaty situations for the purpose of applying Tuscarora is puzzling, because later in the opinion the court relied on Jicarilla to find Tuscarora overruled.\textsuperscript{143} Yet, Jicarilla did not involve a tribe that had signed a treaty.\textsuperscript{144} Thus the Navajo Forest Products court arguably found that the Tuscarora presumption did not apply in either treaty or non-treaty situations.

Tuscarora's statement, that a "general rule" exists under which laws of general application include reservation Indians, is thus inaccurate. Even if a presumption that Congress intends to include Indians may be valid in connection with tax or criminal matters, such a presumption should not extend to other areas of law. In addition, the early decisions upon which Tuscarora relied interpreted legislation enacted when Congress had policies of termination\textsuperscript{145} or assimilation.\textsuperscript{146} A similar analysis is no longer

\textsuperscript{139} Navajo Forest Prods., 692 F.2d at 713.
\textsuperscript{140} Jicarilla, 455 U.S. at 149.
\textsuperscript{141} Id.
\textsuperscript{142} Navajo Forest Prods., 692 F.2d at 711.
\textsuperscript{143} Id. at 713.
\textsuperscript{144} See Jicarilla, 455 U.S. at 135 (case involved mineral leases encompassing reservation land).
\textsuperscript{145} See supra note 111. The policy of termination was embodied in House Concurrent Resolution 108, passed in 1953. See supra note 111. This Resolution called for the termination of federal supervision and control over Indian tribes by congressional legislation. The policy consisted of "terminating" the political relationship between the Indian tribes and the United States so that Indians could be more easily assimilated into the rest of the United States population. In "terminating" the political relationship with Indian tribal governments, the United States would stop recognizing Indians as Indians because of their membership in Indian tribes. The policy lasted from the early 1940s to the early 1960s. See generally Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, American Indian Law 155 (3d ed. 1991).
valid when congressional policy has shifted to emphasize tribal self-determination and self-government. Finally, adoption of such a general rule abdicates the judiciary's responsibility to interpret laws.

Courts have not expressly followed the Tuscarora approach since 1961. Rather, courts have generally followed a Ninth Circuit case, United States v. Farris. The Farris approach incorporated Tuscarora's general rule, but indicated exceptions to the general rule that provide a more flexible, but still flawed, approach to determining whether silent laws apply to Indian tribes and reservation Indians.

III. The Farris Approach

A. The Leading Cases

Although good reasons exist to extend Dion to non-treaty circumstances, courts have not done so. In the absence of any controlling Supreme Court decisions in non-treaty cases, a majority of courts today are following the lead of the Ninth Circuit in Farris.

Farris considered the applicability of the Organized Crime Control Act (OCCA) to a gambling operation within the Puyallup Indian reservation. Because the case dealt with the application of a federal criminal law, the court followed the general rule that, in the absence of specific congressional intent, "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." Farris acknowledged an exception to this general rule: When a treaty right is being abrogated, a court must find specific congressional intent to abrogate the right. The Farris court also found another exception to its

146 See supra notes 122-30 and accompanying text.
147 624 F.2d 890 (9th Cir. 1980).
148 See supra notes 48-86 and accompanying text.
150 See supra notes 72-73 and accompanying text.
151 Farris, 624 F.2d at 893.
152 Id.
The court indicated that reservation Indians may have the right to govern themselves in "purely intramural matters" unless Congress explicitly takes those rights away from Indians. The court found that the OCCA applied to reservation Indians even though specific congressional intent to apply the law to such Indians could not be found. The court concluded without any discussion that the self-governance exception did not apply. The court simply said that the extensive gambling on the Puyallup Indian Reservation was neither "profoundly intramural . . . nor essential to self-government." The Ninth Circuit followed this precedent and further refined its approach in 1985 in Donovan v. Coeur d"Alene Tribal Farm. Coeur d"Alene considered whether OSHA applied to the Coeur d"Alene Farm, a commercial enterprise wholly owned and operated by the Coeur D"Alene Indian Tribe. OSHA is a comprehensive law designed to "'assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'" The Tribe, however, contended that its inherent sovereign right to regulate the health and safety of workers in tribal

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153 Id.
154 Id.
155 Specifically, the court stated:

[Reservation Indians may well have exclusive rights of self-government in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians. Or to put it another way, "Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation."

Id. (citations omitted) (quoting Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 684 (9th Cir. 1969)).

156 The Farris court did in fact search for a mythical congressional intent. Id. at 893-94. The court expected that because Indian casinos would flourish as Las Vegas casinos had flourished, Indian casinos would endanger two federal interests: protecting interstate commerce and preventing organized crime from taking over gambling operations. Id. at 894. Thus the court concluded that it "'defies reason to suppose that Congress intended' such exemption. . . . We find that Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbade to all other citizens." Id. (citation omitted).

157 Id. at 893.
158 751 F.2d 1113 (9th Cir. 1985).
159 See supra notes 62-68 and accompanying text.
160 Coeur d'Alene, 751 F.2d at 1114.
161 Id. at 1115 (quoting 29 U.S.C. § 651(b)).
enterprises barred application of OSHA to the Coeur d’Alene Tribal Farm.\footnote{162}{Id. ("The Farm . . . contends that its inherent sovereign powers bar application of the Act to its activities absent an express congressional decision to that effect.").}

The Ninth Circuit restated its previous holding that, as a general rule, a law of general application includes reservation Indians.\footnote{163}{Id. (quoting Farris, 624 F.2d at 893).} Employing the approach developed in Farris, the Coeur d’Alene court found that none of the exceptions to the general rule applied in this case.\footnote{164}{See id. at 1116-18 (finding the Coeur d’Alene Tribal Farm did not fall under any of three exceptions to general rule: the law did not touch “exclusive rights of self-governance in purely intramural matters,” nor would it “abrogate rights guaranteed by Indian treaties,” and no legislative history showed that Congress intended to exclude Indians from the statute).} The court ruled that the tribal self-government exception applied only to purely intramural matters.\footnote{165}{The Coeur d’Alene court stated: “We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.” Id. at 1116.}

In further defining the meaning of the term “purely intramural,” however, the court apparently held that the mere existence or involvement of a non-Indian person or interest can transform the issue into a non-intramural issue.\footnote{166}{The court said,

The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal farming enterprise, we believe that its operation free of federal health and safety regulations is “neither profoundly intramural . . . nor essential to self-government.”

Id. at 1116 (emphasis added) (quoting Farris, 624 F.2d at 893).} Merely because the Coeur d’Alene farm sold products on the open market in interstate commerce, and employed non-Indians, the court concluded that the operation of the farm was neither profoundly intramural nor essential to self-government.\footnote{167}{Id.} The Ninth Circuit’s conclusion seems to place all economic activities on the reservation outside of the exception, because most reservations have non-members either visiting, living, or working on them. Therefore
most economic activities on reservations will involve non tribal members in some way.

B. Problems in Implementing the Ninth Circuit Approach

In addition to the difficulty resulting from the narrow definition the Coeur d'Alene court applied to Farris's intramural matters rule, other difficulties arise from the Ninth Circuit's approach. This section will highlight the practical difficulty in implementing the Ninth Circuit approach by contrasting the results that different courts following the Farris approach have reached in determining the applicability of the same law. To illustrate the point, this Article will examine application of the Employee Retirement Income Security Act of 1974 (ERISA).\(^{168}\)

In Smart v. State Farm Insurance Co.,\(^{169}\) the Seventh Circuit decided whether ERISA could be construed to apply to an employment benefit plan established and maintained by an Indian tribal employer, the Bad River Band of the Chippewa Tribe, for the benefit of Indian employees working on an Indian reservation.\(^{170}\) In this 1989 case, a member of the Chippewa Tribe contended that application of ERISA would interfere with the Tribe's exclusive right of self-government because ERISA would formally prescribe the relationship between the tribal employer and its employees.\(^{171}\)

The Seventh Circuit noted in Smart that "ERISA is a comprehensive and reticulated statute regulating, among other things, employee welfare benefit plans."\(^{172}\) The court also pointed out that ERISA applies to any employee benefit plan established or

\(^{168}\) 29 U.S.C. §§ 1001-1461. Section 2(b) of ERISA, 29 U.S.C. § 1001(b) states the purpose of the Act as follows:

It is hereby declared to be the policy of this [Act] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.


\(^{169}\) 868 F.2d 929 (7th Cir. 1989).

\(^{170}\) Id. at 932.

\(^{171}\) Id. at 935.

\(^{172}\) Id. at 933 (citations omitted) (citing 29 U.S.C. § 1002(1)).
maintained by an employer engaged in commerce and preempts state laws regulating or governing employee benefit plans. In addition, ERISA provides the exclusive remedy for putative beneficiaries seeking to recover under a covered plan.

The court did recognize that "[a]ny federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government." The court held, however, that the test is not whether applying the law will interfere with tribal self-government generally, but whether it will interfere with tribal self-governance "in intramural matters." Following this rule, the court could not find that application of ERISA would impossibly interfere, because ERISA only imposed beneficiary protection standards and did not interfere with intramural matters.

The United States District Court for the Eastern District of California reached the opposite result in 1990 when it considered the application of ERISA to a tribally owned lumber mill in Lumber Industries Pension Fund v. Warm Springs Forest Products Industries. Warm Springs Forest Products Industries (WSFPI), a tribally owned and operated lumber mill, was located within the Warm

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173 Id. (citing 29 U.S.C. § 1003(a)(1)).
175 Id.
176 Id. at 935.
177 Id. at 934.
178 In reaching this result, the court said, ERISA does not broadly and completely define the employment relationship . . . . It is only applied to an employment relationship if the employer decides to offer an employee benefit plan. Even then, ERISA merely requires reporting and accounting standards for the protection of the employees. Moreover, the activity underlying this challenge to ERISA is the Tribe's subscription of services and pooling of risks with State Farm, an outside, non-Indian agent. ERISA is instructive on how a covered health insurance plan operates vis-a-vis the beneficiaries and the trustee, not between the Chippewa Health Center and Smart. . . . ERISA merely imposes beneficiary protection while in no way limiting the way in which the Tribe governs intramural matters.
179 Id. at 935-36 (footnote omitted).
Springs Indian Reservation in Oregon. WSFPI had signed a collective bargaining agreement that required it to make pension contributions to the plaintiff, Lumber Industry Pension Fund, the administrator of a multi-employer pension plan established pursuant to the Labor Management Relations Act of 1974 (LMRA) and ERISA. The pension plan required employers who had entered into collective bargaining agreements with local unions to contribute funds on behalf of each employee hired under the agreement.

WSFPI, however, ceased to make contributions for its tribal employees after the tribe passed an ordinance mandating that all employees who were also tribal members receive at least the same level of benefits under any pension plan as they would under the tribal plan. According to WSFPI, the payments of such contributions would have violated the tribal ordinance since the benefits under the pension plan would not have been the same as the benefits received under the tribal plan.

Relying on *Santa Clara Pueblo v. Martinez*, the district court emphasized that Indian tribes remain "distinct, independent political communities retaining their natural rights in matters of local self government." Given the nature of Indian sovereignty, the district court asked whether Congress "intended, by its silence, to exclude WSFPI from the scope of ERISA." The court recited the exceptions to the "general rule" as phrased in *Farris* and *Coeur D’Alene*, but concluded that ERISA did not apply to the defendants because its application touched "exclusive rights of self-governance." The court attempted to add more substance and specificity to the definition of the expression "intramural matter of self-governance" by stating that the Ninth Circuit looks at "those affairs which, by their nature, are of a central and peculiar concern to a tribal government attempting to...

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180 Id. at 326.
182 *Warm Springs*, 730 F. Supp. at 325.
183 Id. at 325-26.
184 Id. at 326.
185 Id.
188 Id.
189 Id. at 327 (quoting *Coeur d’Alene*, 751 F.2d at 1116 (quoting *Farris*, 624 F.2d at 893)).
manage the interest of its people."¹⁹⁰ In Warm Springs, because the tribe had instituted its own comprehensive pension plan to insure the financial security of the tribal members beyond their working years, the court concluded that "the formulation and operation of a tribal pension plan [must be] a purely intramural matter of self-government . . . for the tribal self-government exception to be of any value beyond beads and trinkets . . . ."¹⁹¹

The Warm Springs court distinguished the Coeur D'Alene decision applying OSHA to a tribal farm on the ground that OSHA primarily regulates the commercial enterprise itself, but ERISA regulates employee welfare benefit plans.¹⁹² OSHA could be applied in conjunction with the tribe's effort to maintain a safe place of employment, but the implementation of ERISA could directly contravene the tribal program.¹⁹³

The Warm Springs court also distinguished the Seventh Circuit's holding in Smart, in which ERISA had applied to the Tribe. Smart involved "the Tribe's subscription of services and pooling of risks with State Farm, an outside, non-Indian agent."¹⁹⁴ In addition, the tribe in Smart, unlike the tribe in Warm Springs, probably had not established a pension plan of its own.¹⁹⁵ Applying ERISA to WSFPI "would force the tribal council to comply with an arraignment [sic] that it deemed contrary to the best interest of its tribal members."¹⁹⁶ The Warm Springs court also stated, however, that "[t]o whatever extent the court in Smart premised its decision on a finding that ERISA does not touch exclusive concerns of self-government, this court respectfully disagrees."¹⁹⁷

As has been shown, the Farris approach asks the courts to find meaningful distinctions by splitting hairs. Inconsistent and

¹⁹⁰ Id. at 328. The decision also contains a very perceptive footnote on the elusive nature of the "self-governance in intramural matters" test:
[W]hen presented with the sort of unclear line drawing effected by the tribal self-government exception, there will necessarily exist federal statutes which rest somewhere close to either side of the distinction. In such instances, an attention to such subtlety is crucial for the exception to have any significance at all.

Id. at 328 n.5.
¹⁹¹ Id. at 329.
¹⁹² Id. at 327-28.
¹⁹³ Id. at 328.
¹⁹⁴ Id. (quoting Smart, 868 F.2d at 936).
¹⁹⁵ Id.
¹⁹⁶ Id.
¹⁹⁷ Id.
unpredictable outcomes naturally result when courts apply the Farris approach.

C. The Fallacy of the Ninth Circuit Approach

1. The Ninth Circuit’s Two Misconceptions

In addition to difficulty of application, the Ninth Circuit approach is flawed insofar as it uses only one criterion to determine whether a general federal law applies to reservation Indians: whether the law interferes with strictly intramural aspects of tribal self-government.\textsuperscript{198} This single-criterion approach is based on two erroneous legal premises. First, the premise that there is a general rule that “a general statute in terms applying to all persons includes Indians and their property interests”\textsuperscript{199} is erroneous. Second, the premise that tribal self-government is limited to strictly intramural matters is erroneous.\textsuperscript{200}

Although the Ninth Circuit undercuts Tuscarora by finding an exception for tribal self-governance, the court’s persistence in recognizing a general rule is important because it creates a presumption that when Congress enacts a law of general applicability, Congress intends that the law apply to Indian tribes and reservation Indians notwithstanding congressional silence on that issue.\textsuperscript{201} This general rule places on the tribes the burden to rebut the presumption and show that Congress did \textit{not} intend the law to apply to them.\textsuperscript{202} Since the laws in which questions arise are by definition silent as to congressional intent, the tribes can only meet this burden by affirmatively demonstrating that application of the law to them would impermissibly interfere with their right to tribal self-government. This burden is difficult to carry out because of the court’s second erroneous premise: the limitation of tribal rights to self-government to strictly intramural matters. The next section will demonstrate the fallacy of the Ninth Circuit’s reasoning by showing that tribal self-government involves more than strictly intramural matters.

\textsuperscript{198} See supra notes 154-67 and accompanying text.

\textsuperscript{199} Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (quoting Federal Power Comm’n v. Tuscarora Indian Nation, 363 U.S. 99, 116 (1960)).

\textsuperscript{200} See supra notes 19-20, infra notes 203-24 and accompanying text.

\textsuperscript{201} See supra notes 15-18, 75-76, 88-147 and accompanying text.

\textsuperscript{202} See supra notes 15-18, 75-76, 88-147 and accompanying text.
2. The Correct Scope of Tribal Self-Government

This Article challenges the Ninth Circuit’s approach in Farris because, in the absence of a specific treaty right, this approach permits courts to apply a federal law of general application to reservation Indians without finding specific congressional intent, as long as such application does not infringe on strictly intramural aspects of tribal self-government. Although the Farris court’s statement makes reference to both purely intramural matters and essential powers of self-government, Donovan v. Coeur d’Alene Tribal Farm has interpreted essential powers to mean powers over purely intramural matters only. Following this approach, the Coeur d’Alene court as well as other courts have taken the position that whenever a non-Indian person or interest is implicated, the self-government exception does not apply because the matter is not strictly intramural. Such a narrow scope of tribal self-government does not, however, conform with Supreme Court precedents on this issue. These precedents indicate that although the Court has limited tribal powers of self-government to essential powers of self-government, that limitation does not restrict such powers to strictly intramural matters.

The Ninth Circuit in Farris cited Santa Clara Pueblo v. Martinez for the proposition that tribal self-government should be limited to strictly intramural matters. The Court in Santa Clara Pueblo stated that tribes “have the power to make their own substantive law in internal matters . . . and to enforce that law in their own forums.” The court then mentioned three categories of internal subject matters: membership, inheritance rules, and domestic relations. These categories, however, give only some of the subject matters in which Congress has historically refused to

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203 Farris, 624 F.2d at 893.
204 Id.
205 Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).
206 See also Smart v. State Farm, 868 F.2d 929 (7th Cir. 1989) (holding ERISA does not affect tribal self-governance because employee benefit plan is not purely intramural matter).
207 See infra notes 213-24 and accompanying text.
209 Farris, 624 F.2d at 893.
210 Santa Clara Pueblo, 436 U.S. at 55-56 (citations omitted).
211 Id. (citing cases involving membership, inheritance rules, and domestic relations).
interfere with tribal power; they are not the only areas in which tribes have governmental powers.\(^{212}\)

One year after _Farris_, in 1981, the Supreme Court decisively recognized that tribal self-government encompasses more than strictly intramural matters in _Montana v. United States_.\(^ {213}\) _Montana_ determined whether Indian tribes could regulate fishing by non-Indians on non-Indian fee lands located within the Crow Indian reservation.\(^ {214}\) The Supreme Court stated that the tribes could not exercise any sovereign powers that were not necessary to protect tribal self-government or to control internal relations.\(^ {215}\)

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\(^{212}\) In _Santa Clara Pueblo_, the Supreme Court had to decide whether Congress, in enacting the Indian Civil Rights Act of 1968, Act of April 11, 1968, Pub. L. No. 90.284, tit. II, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301-1341 (1988 & Supp. I 1989)), had waived the Santa Clara Pueblo Tribe’s sovereign immunity from suit so as to allow a tribal member to appeal to a federal district court a tribal decision to deny her children membership in the Tribe. While the Act provided for federal court appeal in habeas corpus cases, it was silent regarding civil cases not involving habeas corpus.

Although the Court acknowledged that “Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess,” _Santa Clara Pueblo_, 436 U.S. at 56, it went on to say that “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” _Id._ at 58 (citations omitted). The Court concluded, “[I]t is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” _Id._ (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

Tribal officers, however, were not protected by the tribe’s immunity from suit. In discussing whether a cause of action, although not expressly authorized by the statute, could nevertheless be implied from the Indian Civil Rights Act against these officials, the Court recognized that providing a federal forum would constitute an interference with tribal autonomy and self-government because it would undermine the authority of the tribal courts. _Id._ at 59. Therefore, the Court stated that “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.” _Id._ at 60 (citations omitted). The Court also stated that the law must be read “with the considerations of Indian sovereignty . . . [as] a backdrop.” _Id._ (quoting McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 172 (1973)). In concluding that Congress did not intend to allow a cause of action, the Court also found persuasive the congressional policy of preserving tribal self-government embodied in the Indian Civil Rights Act. _Id._ at 61.


\(^{214}\) _Id._ at 547.

\(^{215}\) _Id._ at 564.
However, the Court recognized that tribes could exercise sovereign powers over non-Indians even while on non-Indian fee lands located within the reservations, albeit with some restrictions.\textsuperscript{216} For example, the Court indicated that the tribe could use taxes, licensing, or other means to control activities of non-members who have commercial dealings with the tribe or its members. The tribe also retained civil authority over the activities of non-Indians on Indian lands when those activities affected "the political integrity, the economic security, or the health or welfare of the tribe."\textsuperscript{217}

The Supreme Court in \textit{Montana} plainly differentiated between powers necessary to protect tribal self-government and those powers necessary to control internal relations. The \textit{Montana} Court recognized that tribes need to control more than internal relations to preserve tribal self-government.\textsuperscript{218} What is essential to tribal self-government thus amounts to more than control over purely intramural matters. In effect there are thus two types of tribal powers of self-government: first, the strictly intramural ones, i.e., those necessary to control internal relations, and second, those that are not strictly intramural but are still essential to protect tribal self-government.\textsuperscript{219} Four Supreme Court justices apparently questioned the continuing validity of \textit{Montana}'s two exceptions to the confinement of tribal self-government to internal relations\textsuperscript{220} in \textit{Brendale v. Confederated Tribes and Bands of the

\textsuperscript{216} \textit{Id.} at 565-66.
\textsuperscript{217} The court noted,

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

\textit{Id.} at 565-66 (citations omitted).
\textsuperscript{218} \textit{Id.} at 564.
\textsuperscript{219} See \textit{Id.} at 563-66.
\textsuperscript{220} The two exceptions in \textit{Montana} arise (1) when non-Indians have entered into consensual relations with the tribe or its members through commercial dealings, contracts or otherwise, and (2) when tribal jurisdiction
Yakima Indian Nation\textsuperscript{221} when they took the position that tribes did not have any zoning jurisdiction over non-Indian fee land within the reservation.\textsuperscript{222}

In Duro v. Reina,\textsuperscript{223} however, the Supreme Court apparently upheld the continuing validity of the Montana principle. Justice Kennedy, speaking for seven members of the Court, stated that Supreme Court precedent established that civil authority may be present in areas such as zoning, where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination.\textsuperscript{224} Thus the application of a strictly intramural

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is necessary because the conduct of non-Indians threatens the political integrity, economic security, or health or welfare of the tribe. \textit{Id.} at 565-66.  
\textsuperscript{221} 492 U.S. 408, 428-30 (1989).

\textsuperscript{222} \textit{Id.} Brendale addressed the issue of whether the tribe had the power to zone lands located within the reservation but belonging to non-members. \textit{Id.} at 414. Four justices held that tribes could never have any sovereign powers over the activity of non-Indians on non-Indian fee lands because this would be an exercise of external sovereignty and therefore automatically inconsistent with tribal status. \textit{Id.} at 425-26. Instead, according to these four justices, the only protectable interest that tribes have under federal law is to prevent non-members from acting in a way that would seriously imperil the political integrity, economic security, or health and welfare of the tribe. \textit{Id.} at 431. The only way the tribe can protect this interest, however, is to file a lawsuit in federal court. In other words, asserting jurisdiction over these non-Indian activities would do little to protect this interest.

\textsuperscript{223} 110 S. Ct. 2053 (1990).

\textsuperscript{224} \textit{Id.} at 2061. Duro determined whether Indian tribes had retained criminal jurisdiction over non-member Indians. \textit{Id.} at 2056. The Court found that the rationale of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1977), applied equally to non-tribal members. It held that just as tribes had lost criminal jurisdiction over non-Indians, they had also lost such jurisdiction over non-member Indians because it was inconsistent with the tribes' status as domestic dependent nations. \textit{Duro}, 110 S. Ct. at 2061.

Justice Kennedy wrote:

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It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving non-members, including non-Indians. Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

\textit{Id.} (citations omitted) (quoting \textit{Montana}, 450 U.S. at 565).
\end{quote}
affairs standard improperly limits tribal rights to self-government and self-determination.

IV. The Inappropriateness of Using Interference With Tribal Self-Government as the Sole Indicator to Determine Congressional Intent

Even if one rejects the Tuscarora rule and refuses to restrict tribal self-government to strictly intramural matters, one might argue that the courts should still adopt a modified Farris approach. Such an approach would not restrict tribal self-government to strictly intramural matters. Rather, it would allow applicability of a silent federal law to reservation Indians as long as operation of the statute did not interfere with essential powers of tribal self-government, or in the words of the Montana court, if the law does not threaten or directly affect the political integrity, economic security, or health and welfare of the tribe.

Although a modified Farris approach can be supported by Montana, such an analysis would still be inappropriate in determining whether a silent general law applies to reservation Indians for two fundamental reasons. First, the determination of what is or is not essential to tribal self-government is ultimately a political decision that only the tribes can legitimately make. Second, reliance on Montana is inappropriate because the Montana decision represents an unprincipled extension of past Supreme Court precedent which had previously defined the conditions for finding an implicit divestiture of tribal sovereign powers. This Section will address both of the problems with an "interference with self-government" standard for determining the applicability of silent federal laws to Indian tribes.

A. The Political Nature of the Montana Test

The application of the Montana test in the Montana decision itself provides a good example of the interference with self-government test's political subjectivity. The Court held that tribal self-government on reservations extended to some activities of non-members, "even on non-Indian fee lands." However, the

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225 See Farris, 624 F.2d at 893.
226 Montana, 450 U.S. at 566.
227 See infra notes 229-30 and accompanying text.
228 See infra notes 231-43 and accompanying text.
229 450 U.S. at 565.
Court also concluded that the tribes had lost the right to regulate fishing by non-Indians on non-Indian fee land within the Crow Reservation on the Big Horn River. The Court found that such fishing does not compromise the political integrity, economic security, or health and welfare of the tribe. Therefore, the Court said, the State of Montana could regulate fishing on non-Indian fee lands within the Crow Reservation.\footnote{230} This finding could lead one to ask a rhetorical question that one must surely answer “no”: Would a state judge (in California, for instance) ever hold that the political integrity or economic security of California was not compromised if another state (Utah, for instance) had assumed jurisdiction over fee land located in California but owned by Utah residents?

This rhetorical question and its answer demonstrate why a \textit{Montana} approach, focusing solely on interference with tribal self-government, is inappropriate. It allows a court to apply a law to reservation Indians by claiming that applying the law does not interfere with tribal self-government, when in fact it does interfere. Like Utah in the rhetorical question, a court can use its subjective political judgment to decide what interferes with tribal self-government without objectively considering, much less deferring to, the tribe’s view of what is essential to self-government.

\textbf{B. The Montana Court’s Inappropriate Extension of the Oliphant\footnote{231} Principle}

In addition to allowing a court to make a political decision about what interferes with tribal self-government, reliance on a \textit{Montana} approach is inappropriate for a second reason. Although the \textit{Montana} decision recognized that powers of tribal self-government extend beyond strictly intramural matters, the decision was an unprincipled extension of a Supreme Court precedent, \textit{Oliphant v. Suquamish Indian Tribes}, which had defined the parameters of Indian sovereign powers.\footnote{232}

Until \textit{Montana}, the governing principle limiting the tribes’ powers of self-government was stated in \textit{Oliphant}: Indian tribes

\footnote{230} \textit{Id.} at 566.

\footnote{231} Oliphant \textit{v.} Suquamish Indian Tribes, 435 U.S. 191 (1978).

\footnote{232} A correct analysis of \textit{Oliphant} would lead to the adoption of an alternative approach in determining the applicability of a general federal statute to reservation Indians. See infra notes 244-55 and accompanying text.
retained all of their original sovereign powers unless (1) they had surrendered the powers in treaties, (2) Congress had taken the powers away by specific acts, or (3) the exercise of the powers was inconsistent with the tribes' status as domestic dependent nations. The only powers inconsistent with such status were the power to make treaties with foreign nations, the power to sell tribal lands without United States approval, and the power to prosecute non-Indian defendants in tribal courts.

In Montana, the Court extended Oliphant's "inconsistent with their status" doctrine to cover all powers that are "not necessary to protect tribal self-government or to control internal relations." The manner by which the court reached its conclusion is, however, highly questionable. At issue in Oliphant was whether Indian tribes had been divested of the inherent sovereign power to criminally prosecute non-Indians. The Oliphant Court held that Indian tribes could be divested of certain sovereign powers if the continued exercise of such powers was inconsistent with their status as domestic dependent nations.

The Oliphant Court attempted to further define what is inconsistent with tribal status. It held that any exercise of sovereign power that conflicts with an overriding interest of the national government is inconsistent. The Oliphant Court concluded that

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233 See Oliphant, 435 U.S. at 208.
234 See id. at 209-10 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 547 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831)).
235 Montana, 450 U.S. at 564.
236 Oliphant, 435 U.S. at 195.
237 Id. at 208.
238 See id. at 209. In reaching its conclusion, the Court relied on its finding that throughout history all three branches of the government have shared a presumption that Indian tribes did not have criminal jurisdiction over non-Indians. Nevertheless, the Oliphant decision radically departed from the prevailing understanding concerning the law of divestiture of Indian sovereignty. Perhaps the most succinct and yet comprehensive pre-Oliphant statement on Indian sovereignty was made by Felix Cohen, an author still regarded as the leading authority on federal Indian law.

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses . . . all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, . . . but does not by itself affect the internal powers of sovereignty of the tribe, i.e., its powers of local self-government. (3) These
because of the United States Constitution's emphasis on personal liberty, and because tribal governments do not have to afford defendants all the protections guaranteed by the United States Constitution, it would be an unwarranted intrusion on the personal liberty of United States citizens to allow a tribe to criminally prosecute them.\textsuperscript{239} The Court therefore held that assertion of such criminal jurisdiction by Indian tribes conflicted with an overriding federal interest and thus was inconsistent with the tribes' status as domestic dependent nations.\textsuperscript{240}

The \textit{Oliphant} court reached this conclusion only after finding that the three branches of the federal government shared a presumption that tribal courts did not have any criminal jurisdiction over non-Indians.\textsuperscript{241} At least one Supreme Court decision since \textit{Montana} has interpreted \textit{Oliphant} to be based on congressional action, stating that the \textit{Oliphant} holding "adopted the reasoning of early opinions of two United States Attorneys General, and concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction."\textsuperscript{242} Thus \textit{Oliphant} really stood for an overriding federal interest approach.

Had the \textit{Montana} Court been faithful to the \textit{Oliphant} analysis, it could have concluded that the tribes had lost jurisdiction over non-Indian fishing on non-Indian fee land under only one condition. It would have had to find that the exercise of such jurisdiction conflicted with an overriding interest of the federal government. Either congressional legislation would have to reflect the interest, or allowing Indian jurisdiction over the matter would have to constitute an unwarranted intrusion on important constitutional rights.

Since a conflict with an overriding federal interest could hardly

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\textit{Cohen, supra} note 3, at 123 (footnotes omitted).
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\textsuperscript{239} \textit{Oliphant}, 435 U.S. at 210.
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.} at 206 ("While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight.").
be argued, the Montana Court had to resort to another test. In devising a test based on the Court's view of what is or is not essential to tribal self-government, the Montana Court transformed Oliphant's already quasi-political test into a completely political one. Montana's extension of Oliphant was therefore unprincipled. If courts are to continue to use an interference with tribal self-government standard to determine whether a general federal law applies to reservation Indians, they should at least adopt an Oliphant-type analysis. Under this analysis, they would hold that a general federal law applies to reservation Indians only if an overriding national interest requires application.

This Article acknowledges that the Supreme Court's interpretation of Oliphant in Montana controls determinations of implicit divestiture of tribal powers. The Court's true approach in Oliphant, however, can still be used to determine the applicability of federal laws of general application to reservation Indians. This is especially appropriate since, as will be shown in Section V, that approach is much more consistent with the judicial task of determining congressional intent and better serves the current congressional policy of encouraging tribal self-government.

V. INFERRING CONGRESSIONAL INTENT FROM THE EXISTENCE OF AN OVERRIDING NATIONAL INTEREST

A. The Finding of an Overriding National Interest

The use of an Oliphant-type approach to determine whether a general federal law applies to reservation Indians does not mean that a finding of specific congressional intent is not necessary in those cases in which application of the general statute interferes with strictly internal or intramural affairs. In this respect, one must remember that because Oliphant involved tribal criminal jurisdiction over non-Indians, the Oliphant test only applies to limit tribal sovereign powers that are not strictly intramural. The

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243 In order to conclude that any exercise of powers beyond what is necessary to protect tribal self-government is inconsistent with tribal status, the Court had to equate exercise of such powers with the exercise of external sovereignty. Yet the only support for this proposition seems to be a statement of Justice Johnson in Fletcher v. Peck that Indians have jurisdiction only over their own members. See Montana, 450 U.S. at 565 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810)).

244 The term "strictly internal or intramural affairs" refers to affairs in which no non-Indians or non-Indian interests are involved.
\textit{Oliphant} test has not to this date been applied to limit tribal powers that are strictly intramural or only concern internal relations. Therefore specific congressional intent is still necessary before tribes can be divested of strictly internal powers of tribal self-government.

This result would be similar to the result under the \textit{Farris} approach. If a non-Indian interest were involved, however, unlike the \textit{Farris} approach, the \textit{Oliphant} approach would not automatically apply the law. Under \textit{Oliphant}, the law would apply only if there was an overriding national interest in its application. Adoption of such an approach is more consistent with the judicial role of applying a general federal law to reservation Indians based on an inference or presumption about congressional intent. One can rationally conclude that Congress would have wanted the law to apply to reservation Indians if there were an overriding national interest in its application.

Support for an \textit{Oliphant} approach can also be found in a 1982 Tenth Circuit decision, \textit{Donovan v. Navajo Forest Products Industries}.\textsuperscript{245} In \textit{Navajo Forest Products}, the court concluded that the Occupational Safety and Health Act (OSHA) did not apply to an Indian tribal business operating within the Navajo Indian reservation. The court found that applying OSHA would infringe on the tribe's treaty-protected right to tribal self-government.\textsuperscript{246} After making this decision, the court observed that the Supreme Court in \textit{Washington v. Confederated Tribes of the Colville Reservation}\textsuperscript{247} had held that "[f]ederal limitations on tribal sovereignty can . . . occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests."\textsuperscript{248} However, the \textit{Navajo Forest Products} court had concluded that "[t]here has been no such overriding interest of the national Government advanced in the case at bar which would justify application of OSHA . . . ."\textsuperscript{249}

\textsuperscript{245} 692 F.2d 709 (10th Cir. 1982).
\textsuperscript{246} See discussion at notes 61-68 supra.
\textsuperscript{247} 447 U.S. 134 (1980).
\textsuperscript{248} 692 F.2d at 713.
\textsuperscript{249} Id. at 714. Although \textit{Navajo Forest Prods.} involved a treaty right, this fact should not matter to the analysis when the treaty right in question concerns one of those powers of tribal self-government that all tribes possess regardless of whether they have signed treaties with the United States. In such cases, the overriding national interest is a potential limitation on those powers of tribal self-government that are not strictly intramural, irrespective of whether the power has been reserved in a treaty.
Although the Colville Reservation court relied on Oliphant for its statement, neither case elaborated on the circumstances giving rise to the finding of an overriding national interest. To be consistent with the trust relationship between the United States and the various Indian tribes and with the canon of statutory construction in Indian Law under which laws are to be liberally construed in favor of the tribes and ambiguities resolved in their favor, the burden of showing an overriding national interest should be placed on the party seeking application of the law of general application to the tribes and reservation Indians.

Furthermore, Congress has adopted a policy of encouraging tribal self-government. For this reason, a court deciding that failure to apply a general federal law to Indian reservations conflicts with an overriding national interest must carefully balance the tribal interest in self-government against the federal interest in applying the federal law to Indian tribes and reservation Indians.

The court in Navajo Forest Prods. made this point clear when, relying on Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), it stated:

The breadth and scope of the power of Indian tribes to exclude non-Indians from territory reserved for the tribe was spelled out definitively by the Supreme Court in the case of Merrion v. Jicarilla Apache Tribe. The Court observed that an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management. Significantly, the Court did not limit this power to those cases where the Indian Reservation is occupied under exclusive language similar to that contained in Article II of the Navajo Treaty. In fact, Merrion dealt with an Indian Reservation created by executive order which simply set apart the reservation lands "for the use and occupation of the Jicarilla Apache Tribe."

Id. at 712-13 (citations omitted) (quoting Jicarilla, 455 U.S. at 134 n.3).


To be consistent with Montana’s definition of the important tribal interests that merit protection,\(^{252}\) the tribal interest will be measured by the effect that imposing the law will have on the political integrity, economic security, and health and welfare of the tribe. In determining whether the federal interests embodied in a federal law of general application override the tribal interests in tribal self-government and economic development, the courts should look at the extent to which enforcement of the law inside the reservations is essential to Congress’s goals, purposes, and policies in enacting the law. The importance of the federal interest will depend on whether implementation of the law outside the reservation will be negatively impacted by not enforcing the law inside the reservation.

Coincidently, this approach is similar to the first Supreme Court case that applied a law of general application to reservation Indians, *Cherokee Tobacco*.\(^{253}\) This 1870 case decided that a federal tax on liquor and tobacco applied to Cherokee Indians within the Cherokee Reservation.\(^{254}\) In holding that the tax applied, the Supreme Court relied on the potential impact an Indian exemption from the tax laws would have on the general implementation of such tax laws on non-Indians living outside the reservation. In construing congressional intent, the Court found that not to apply these tax laws to reservation Indians would defeat the purpose of the law because “[n]owhere would frauds to an enormous extent as to these articles (liquor and tobacco) be more likely to be perpetrated .... Crowds, it is believed, would be lured thither by the prospect of illicit gain. This consideration doubtless had great weight with those by whom the law was framed.”\(^{255}\) Thus, *Cherokee Tobacco* established an overriding federal interest in applying the laws, although it is not suggested that the case was

\(^{252}\) See *supra* notes 215-19 and accompanying text.

\(^{253}\) 78 U.S. (11 Wall.) 616 (1870). Although *Cherokee Tobacco* was decided in 1870, and is therefore the ultimate precedent for all subsequent cases which have applied general tax statutes to reservations Indians, its validity as precedent was discredited in an 1883 Supreme Court decision, United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491 (1883). The *Forty-Three Gallons* Court stated that *Cherokee Tobacco* “cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four.” *Id.* at 497-98.

\(^{254}\) *Cherokee Tobacco*, 78 U.S. at 620.

\(^{255}\) *Id.*
rightly decided under the "overriding national interest test" devised in this Article.

B. A Practical Analogy to Cases That Have Determined Whether State Laws Apply Within Indian Reservations

The nature of the inquiry into overriding federal interests is similar to the inquiry courts have undertaken in determining whether state laws should apply within Indian reservations. Looking at the approach developed by the courts in determining applicability of state law inside Indian reservations is especially appropriate, because the Court in Montana relied on precedents that had considered the amount of allowable state jurisdiction within Indian reservations. Montana relied on these state law cases in concluding that a tribe could not exercise tribal powers in excess of what was necessary to protect tribal self-government and remain consistent with tribal status.256

Justice Marshall provided what is perhaps the most concise and clear expression of the current test that courts use to determine whether state laws should apply within Indian reservations in White Mountain Apache Tribe v. Bracker.257 Justice Marshall indicated two barriers to the application of state law in Indian reservations. First, he noted that federal law may preempt state authority within reservations.258 Second, he said, exercise of state authority might infringe the reservation Indians' rights to make and be ruled by their own laws.259 Either of these two barriers standing alone would provide a sufficient basis to hold the state law inapplicable to the tribe.260

The tradition of sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. . . . At the same time any applicable regulatory interest of the state must be given weight . . . .

This inquiry is not dependent upon mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and

258 Id. at 142.
259 Id.
260 Id. at 143.
tribal interest at stake...\textsuperscript{261}

Although Justice Marshall asserted that there are two barriers to state jurisdiction, federal preemption and infringement on tribal self-government, these two barriers seem to come down to the same issue. Under both tests, the Court will perform a particularized inquiry into the nature of the interests at stake. This inquiry amounts to balancing the tribal interests in self-government against the asserted state interests.

Applying this analysis to the applicability of general federal laws to Indian tribes and reservations, the question becomes whether the federal law has been preempted by the tribal interest in self-government as recognized in federal law. To be consistent with \textit{Oliphant}'s analysis determining that the parameters of tribal powers of self-government are constrained by overriding national interests, federal interests will not be preempted if they override tribal interests.

Many Supreme Court cases refused to apply state laws based upon the comprehensiveness of the federal regulations.\textsuperscript{262} The

\textsuperscript{261} \textit{Id.} at 143-45 (citations omitted).

\textsuperscript{262} In \textit{White Mountain}, the Supreme Court denied the State of Arizona the power to impose a motor carrier license tax on a non-Indian contractor hired by the tribe to transport timber harvested by a tribal corporation. The Court began its preemption analysis by stating, “At the outset we observe that the Federal Government’s regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.” \textit{Id.} at 145. The Court concluded that “[i]n these circumstances it agree[d] with petitioners that the federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in this case.” \textit{Id.} at 148.

In \textit{Central Machinery Co. v. Arizona State Tax Comm’n}, 448 U.S. 160 (1980), the Court denied the application of a transaction privilege tax to a non-Indian corporation which had sold some tractors to the Gila River Farms, a tribal enterprise. The Court gave its rationale:

In 1970, Congress passed a statute regulating the licensing of Indian traders. Ever since that time, the Federal government has comprehensively regulated trade with Indians. . . . [T]hese regulations and statutes are “in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.”

\textit{Id.} at 163-64 (citation omitted) (quoting \textit{Warren Trading Post Co. v. Arizona Tax Comm’n}, 380 U.S. 685, 690 (1965)).

In \textit{Ramah Navajo School Bd., Inc. v. Bureau of Revenue}, 458 U.S. 832 (1982), New Mexico wanted to impose a gross receipts tax on a non-Indian
Court has, however, developed some general principles concerning the requisite amount of state interest needed to override a federal/tribal interest in tribal self-government and economic development in the absence of comprehensive federal regulations.

For example, the court allowed state taxation of cigarettes sold to non-tribal members because the manufacturing of cigarettes was not a value generated on the reservation by activities involving the tribes in *Washington v. Confederated Tribes of the Colville Indian Reservation.*263 Furthermore, the non-member taxpayers did not receive significant tribal services.264 The court concluded that the principles of federal Indian law did not authorize the Indian tribes to market an exemption from state taxation to persons who would normally do their business outside the reservation.265

In *California v. Cabazon Band of Mission Indians,*266 however, the Supreme Court rejected the state’s argument that *Colville Reservation* controlled. *Cabazon Band* involved the application of state laws regulating gambling establishments located on an Indian reservation. The *Cabazon Band* court stated that the tribes in that case

are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons . . . . [T]he Cabazon and Morongo Bands are generating value on the reservation through activities in which they have a substantial interest.267

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contractor who had been granted a contract to build a school on the Navajo reservation. In denying the state the power to tax, the Court stated:

Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive . . . .

Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations respecting 'school construction' . . . .

The direction and supervision provided by the Federal Government for the construction of Indian schools leaves no room for the additional burden sought to be imposed by the State through its taxation . . . .

*Id.* at 839-42.


264 *Id.* at 157.

265 *See id.*


267 *Id.* at 219-20.
The Court denied state jurisdiction. Even though the state had asserted a legitimate interest, preventing the infiltration of organized crime on the reservations, there was no proof of any actual infiltration by organized crime and the state regulations would infringe on tribal self-government. This state interest was not sufficient to overcome the congressional goal of Indian self-government including Congress's overriding goal of encouraging tribal self-sufficiency and economic development.\(^{268}\)

Although the Court has held that state laws generally do not extend to tribal members within their own reservations absent express congressional authorization, there are some exceptions to this rule. For instance in *Puyallup Tribe v. Department of Game of the State of Washington*,\(^{269}\) more popularly known as *Puyallup III*, the Supreme Court held that the state could regulate on-reservation hunting and fishing by both Indians and non-Indians if the regulation was both reasonable and essential to conserve an important natural resource.\(^{270}\) In that case, the state was successful in persuading the court that without state regulation, the continued survival of a certain species of fish outside the reservation would have been endangered.\(^{271}\)

That same argument was absent in *New Mexico v. Mescalero Apache Tribe*.\(^{272}\) Although the case involved a state's attempt to impose hunting and fishing regulations exclusively on non-members within the Mescalero Apache reservation, the Court concluded that concurrent state jurisdiction over non-Indians should not be allowed.\(^{273}\) The Court said that imposing state regulations would substantially disturb the comprehensive tribal and federal regulatory scheme and "would also threaten Congress's overriding objective of encouraging tribal self-government and economic development."\(^{274}\) Moreover, even though the Court stated that "a State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention,"\(^{275}\) this was not a case in which the state's regula-

\(^{268}\) *Id.* at 216.


\(^{270}\) *Id.* at 175.

\(^{271}\) *Id.* at 175-76.


\(^{273}\) *Id.* at 343-44.

\(^{274}\) *Id.* at 341.

\(^{275}\) *Id.* at 336.
tions were vital in conserving a scarce common resource.\textsuperscript{276} The fish and wildlife resources were either native to the reservation or were created by the joint effort of the Tribe and the federal government.\textsuperscript{277}

To apply the alternative approach this Article recommends to federal laws regulating natural resources, a court would have to determine if the tribe was already regulating such resources. An overriding national interest would be deemed to exist only if it were shown that tribal regulations were insufficient to protect the resource. In that situation, application of the federal law to reservation Indians would be essential to conserve the natural resource. In addition, if granting a tribal exception from application of the law would result in detrimental effects outside the reservation, the federal law would apply. Thus federal laws such as the Safe Drinking Water Act, the applicability of which was at issue in the \textit{Phillips Petroleum}\textsuperscript{278} case, would still apply within Indian reservations.

Applying the principles developed by the Supreme Court in determining whether state laws should apply within Indian reservations to federal legislation such as OSHA, the NLRA, or ERISA, a court would first have to determine the nature of the federal interest. Next, a court would decide whether the federal interest could be protected without applying the law to reservation Indians. Because the major factor in making that decision would be the off-reservation impact of not applying the law inside the reservation, these Acts would not, in all probability, be applied to reservation Indians under the alternative approach. A court would then have to find that Congress actually considered the impact these Acts would have on tribal rights before the acts could be applied to reservation Indians.

\textit{C. The Role of an Overriding National Interest Test in Treaty Cases}

The formulation of an overriding national interest test to determine if an act of Congress should apply to non-treaty situations leads one to ask whether the existence of an overriding national interest has any role to play in treaty cases. In other words, one might ask whether there should be an exception to the \textit{Dion} actual

\textsuperscript{276} \textit{Id.} at 339.

\textsuperscript{277} \textit{Id.} at 342.

\textsuperscript{278} See supra notes 97-102 and accompanying text.
consideration test when the continued exercise of treaty-guaranteed rights directly conflicts with an overriding national interest.

The United States District Court for the District of Minnesota recently addressed this issue, although it phrased the question in different terms, in *United States v. Bresette*.

Bresette considered whether the Migratory Bird Treaty Act applied to enrolled members of the Red Cliff Band of Lake Superior Chippewa Indians and the Fond du Lac Band of Lake Superior Chippewas.

The Act made it illegal to kill migratory birds except as permitted by regulations issued pursuant to the Act. Following a *Dion* analysis, the court held that the Act did not apply to the Chippewas. In the course of its discussion, however, the court had to respond to the government’s contention that the Migratory Bird Treaty Act is a permissible nondiscriminatory conservation measure under *Puyallup Tribe v. Department of Game of Washington (Puyallup III)*.

In *Puyallup III*, the Supreme Court had held that the State of Washington could regulate the exercise of treaty rights when it was necessary for the purpose of conservation. The government in *Bresette* was in effect suggesting that under a *Puyallup III*-type analysis, a statute of general applicability may limit Indian treaty rights even if Congress had not considered those treaty rights when it acted on the legislation.

The *Bresette* court distinguished *Puyallup III*. It noted that the *Puyallup III* court interpreted Indian fishing rights “to be in common with other groups.” Thus, the *Bresette* court said, the State of Washington’s conservation measures in *Puyallup III* did not exceed the Indians’ understanding of the treaty. It found that to the extent other courts had read *Puyallup III* otherwise, it disagreed. “If one reads *Puyallup III* as broadly as the government does, one must conclude that *Dion* overruled a portion of the *Puyallup III* ruling *sub silentio*.”

The *Bresette* court, however, did not have to confront squarely the issue of whether an overriding national interest would limit an unabrogated treaty right. This was because it also found that

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281 *Bresette*, 18 Indian L. Rep. at 3070.
283 *Id.* at 398.
284 *Bresette*, 18 Indian L. Rep. at 3073.
285 *Id.*
286 *Id.*
even if Puyallup III stood for the proposition that, under certain conditions, an act of Congress could apply, the state conservation law that was found to apply in Puyallup III existed to prevent Indians from fishing a species to extinction. In Bresette none of the migratory birds to which the Act applied were faced with extinction.287

Another District Court case that also considered the interrelationship between Dion and Puyallup is United States v. Billie.288 At issue in Billie was whether the Endangered Species Act289 applied to a Seminole Indian who had killed a Florida panther on the Seminole Indian Reservation.290 The Billie court concluded that when Congress passed the Endangered Species Act, it did in fact “actually consider” the conflict between the Act and Indian treaty rights and chose to resolve that conflict by abrogating the treaty rights.291 Earlier language in the opinion, however, indicates that even if the court had not found “actual consideration,” it might still have concluded that the Act applied to Indians.292 The court concluded that when an on-reservation species like the Florida panther is in danger of extinction, treaty hunting rights are not absolute.293 The court further found that the government had shown sufficient evidence of congressional intent to abrogate a treaty right.294

287 Id.
290 Billie, 667 F. Supp. at 1487. Although the Seminoles did not have a treaty right to hunt on their Florida reservation, the Court acknowledged that aboriginal hunting rights should be treated the same as treaty hunting rights for the purpose of determining congressional intent to abrogate these rights through legislation. See id. at 1488.
291 Id. at 1490 (“[The Endangered Species Act’s] general comprehensiveness, its nonexclusion of Indians, and the limited exceptions for certain Alaskan natives, demonstrate that Congress considered Indian interests, balanced them against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife” (citations omitted)).
292 See id. at 1489 (noting that “Indian treaty rights do not extend to the point of extinction” (citations omitted)).
293 Id. at 1492.
294 See id.

When Congress passed “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” and empowered the Secretary of the Interior to classify a species as “in danger of extinction,” it could not have intended
Although the court paid lip service to the Dion test by concluding that Congress had actually considered the Act's impact on Indians, the evidence the Billie court used to show actual consideration is far from persuasive. Instead, the court seemed to infer congressional intent from an analysis similar to the overriding national interest analysis proposed in this Article.

The actual consideration test is necessary to abrogate treaty rights like hunting and fishing because they are vested property rights. By extension, as stated in Bresette, the same test applies to non-treaty rights situations that, in spite of the Tee-Hit-Ton case, involve aboriginal but vested property rights. It is also possible, however, that the greater the overriding national interest the federal government could show, the less evidence a court would require to establish actual consideration. In other words, the greater the overriding national interest, the more likely it is that a court would be willing to find actual consideration in spite of scant evidence.

That some courts are in fact using an overriding national interest test to influence their findings of actual consideration explains the different results in Bresette and Billie. This Article furnishes a theoretical explanation for what courts are in fact already doing. The recognition that some courts are in fact allowing the existence of an overriding national interest to influence their determination of actual consideration will allow the courts to adopt a more clear and honest analysis.

But the unacknowledged use of an overriding national interest to find actual consideration, as occurred in Billie, could reduce Dion's actual consideration test to a standard as vague and politically subjective as the interference with tribal self government

that the Indians would have the unfettered right to kill the last handful of Florida panthers.

Id. (citations omitted).

295 Except for some very dubious legislative history, the court’s principal argument showing actual consideration seems to be that the Act contained an exception for Alaskan Indians. Therefore, according to the court, Congress must have considered the matter and decided to provide an exception for Alaskan Indians only. This argument does not, however, take into account the fact that Alaskan Indians do not have treaties and, except for Annette Island, they do not have reservations. Therefore it could easily be concluded that Congress provided an exception for the Alaskan Indians because it thought that they were the only Indians that needed it, since the Indians who had treaties and reservations were already exempted.

296 See supra notes 279-86 and accompanying text.
standard. Indian tribes, more than anyone else, do not want one of their members to hunt the last Florida panther or the last California condor. The danger with cases like *Billie*, however, is that they refuse to acknowledge that they are allowing the presence of an overriding national interest to influence their findings of actual consideration. They are thus modifying, without explanation or justification, the quantum of evidence necessary to find actual consideration under *Dion*.

If other courts, considering cases not involving overriding national interests, were to rely on the amount of evidence required in *Billie* to find "actual consideration," they could water down the *Dion* evidentiary standard considerably. This could have drastic consequences for tribal self-government in the future.

**Conclusion**

Indian tribes were once recognized to possess the full attributes of sovereignty. Tribal members did not have to abide by any law except the laws of their own tribe. The United States Constitution clearly treated Indian tribes as outside the political system of the United States and the Constitution itself was held not to apply to Indian tribal governments.²⁹⁷

For almost one hundred years after adoption of the Constitution, Indians generally remained outside the political system of the United States. Starting in the 1870s, Congress adopted a policy of assimilating Indians into the general society. Although not as brutal and genocidal as earlier policies involving removal or military intervention, this assimilation policy may have been, to use a currently popular expression, a "gentler and kinder" type of genocide. During this policy, which resurfaced temporarily during the 1950s termination era, the Supreme Court interpreted certain general acts of Congress as being applicable to reservation Indians. Not much thought was given to the impact such acts would have on tribal self-government; nor was any specific congressional intent required on the issue. In effect, there was then an assumption that Congress intended all acts to apply to reservation Indians because it was thought the tribes themselves were not going to survive the tide of assimilation.

More recently, Congress adopted a policy of Indian self-deter-

²⁹⁷ *See* Talton v. Mayes, 163 U.S. 376 (1896).
mination and economic development for Indian reservations. Therefore, the presumption that laws of general application should include reservation Indians is no longer valid. Application of most federal laws to reservation Indians interferes with tribal self-government and tribal economic development and thus defeats the stated congressional policy toward the Indians.

This Article has condemned the approach developed in Tuscarora because it amounts to an abdication of judicial responsibility to determine congressional intent and it also ignores tribal rights.\(^{298}\) The Article has also criticized the approach developed by the Ninth Circuit in Farris and Coeur D'Alene because it is based on incorrect legal assumptions about the scope of tribal self-government.\(^{299}\) However, even if these legal assumptions were correct, the Montana test defining the extent of tribal self-government is too political in nature to be used in any objective manner by the judicial branch.\(^{300}\) Therefore, an assumption about congressional intent should not be based on whether the law interferes with "essential" powers of tribal self-government.

Although this Article takes the position that the better approach is to extend the Dion actual consideration test to all cases, it also recognizes that some courts may refuse to do so.\(^{301}\) Therefore, as an alternative to the Farris approach, this Article suggests and develops an approach that infers congressional intent to apply general federal laws from the existence of an overriding national interest in applying the law to reservation Indians.\(^{302}\) Whether such federal interest is overriding will depend on a careful balancing of the federal and tribal interests at stake. In balancing such interests, the fact that Congress has adopted a policy of tribal self-determination which encourages tribal self-government and economic self-sufficiency for Indian reservations must be considered.

This proposed approach is not free from political subjectivity. To a large extent, the fairness of the approach relies on the willingness of the courts to follow the recommended methodology for determining when a federal interest is truly overriding. Although not free from subjective political judgments, and less

\(^{298}\) See supra notes 88-146 and accompanying text.
\(^{299}\) See supra notes 203-24 and accompanying text.
\(^{300}\) See supra notes 229-30 and accompanying text.
\(^{301}\) See supra note 87 and accompanying text.
\(^{302}\) See supra notes 244-97 and accompanying text.
preferable than an outright extension of the Dion methodology to all cases, the recommended approach at least requires the courts to focus on the nature of the interests at stake as determined by the law of Indian sovereignty, statutory interpretation, and relevant congressional policies. The approach gives courts an opportunity to avoid any subjective determinations of what is an essential power of tribal self-government based on no established criteria but the courts' own political agenda.