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A PROPOSAL FOR EXTENSION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT TO INDIAN-OWNED BUSINESSES ON RESERVATIONS

In 1970, Congress passed the Occupational Safety and Health Act\(^1\) to protect the health of American workers. The Act is a general statute\(^2\) that does not explicitly state that it applies to Indian-owned businesses on reservations. In *Donovan v. Coeur d'Alene Tribal Farm*\(^3\) the Ninth Circuit held that the Act applies to Indian businesses, but in *Donovan v. Navajo Forest Products Industries*\(^4\) the Tenth Circuit held that the Act does not apply to tribal businesses.

In *Coeur d'Alene*, the Ninth Circuit decided that the Act covers a commercial farm\(^5\) the Indians operate on their 350,000-acre reservation in northern Idaho. The court based its decision on the *Tuscarora* rule, a common—but improper—interpretation of dictum in *Federal Power Commission v. Tuscarora Indian Nation*,\(^6\) suggesting that general statutes apply to Indian tribes. The Ninth Circuit, without analyzing the basis of the *Tuscarora* rule, declared that it would follow the rule as it had done in

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Section 655 gives the Secretary of Labor the authority to promulgate occupational safety and health standards, and § 654 imposes a duty upon employers to comply with them. Section 657 authorizes the Secretary to inspect workplaces to assure compliance with the standards. If an inspection reveals a violation, § 658 allows the Secretary to issue the employer a citation, and § 666 authorizes the Secretary to assess a penalty against him. Under § 659(c), an employer who contests a citation can have a hearing before the Occupational Safety and Health Commission. Section 660 authorizes judicial review of the result of such a hearing.

2. For the purposes of this Note, a general statute is an act that appears on its face applicable to all Americans, yet does not specifically purport to cover Indians, reservations, or tribes.

3. 751 F.2d 1113 (9th Cir. 1985).

4. 692 F.2d 709 (10th Cir. 1982).

5. In 1978 a compliance officer from the Occupational Safety and Health Administration (OSHA) inspected two of the farm's grain elevators, issued citations for 21 alleged violations, and proposed a penalty of $185. 751 F.2d at 1114.

6. 362 U.S. 99, 116 (1960); see *infra* notes 88-125 and accompanying text.
interpreting broad federal criminal statutes,\textsuperscript{7} federal tax laws,\textsuperscript{8} and the Eagle Protection Act.\textsuperscript{9} The court recognized three exceptions to the \textit{Tuscarora} rule, but concluded that the Act did not fall within any of them. The only exception pertinent to the current analysis is "aspects of tribal self-government."\textsuperscript{10} The Ninth Circuit gave a very limited reading to this exception, concluding that it preserved tribal control of "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations," but that "the right to conduct commercial enterprises free of federal regulation" was not "an aspect of tribal self-government."\textsuperscript{11} The court declined to acknowledge a tribe's power to make health and safety laws, or to exclude outsiders, such as federal inspectors, as attributes of self-government.

While the Ninth Circuit has unblinkingly accepted the \textit{Tuscarora} rule, the Tenth Circuit has been more circumspect. In \textit{Donovan v. Navajo Forest Products Industries} the Tenth Circuit held that the Navajo Treaty's guarantee of tribal sovereignty negates any suggestion that the Act implicitly authorizes federal officials to inspect Navajo Forest Products Industries.\textsuperscript{12} Article II of the treaty between the United States and the Navajos\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{7} See United States v. Farris, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981); United States v. Burns, 529 F.2d 114 (9th Cir. 1975).
\item \textsuperscript{8} See Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878 (9th Cir. 1982) (holding that federal excise taxes applied to the operation of a tribal sawmill because neither the tax code, nor its regulations, nor its legislative history granted an exemption for tribes), cert. denied, 460 U.S. 1040 (1983); Fry v. United States, 557 F.2d 646 (9th Cir. 1977) (holding that federal income taxes applied to Indians who earned income from logging on a reservation), cert. denied, 434 U.S. 1011 (1978).
\item \textsuperscript{10} 751 F.2d at 1116-17.
\item "Treaty rights" is the Ninth Circuit's second exception to the \textit{Tuscarora} rule. The exception states that a statute cannot implicitly abrogate a treaty right. The exception does not apply in this case because the Coeur d'Alene Tribe does not have a treaty with the United States. \textit{Id.} at 1117-18.
\item "Other indications" is the Ninth Circuit's third exception to the \textit{Tuscarora} rule. According to the Ninth Circuit, this exception is inapplicable to Coeur d'Alene Tribal Farm because neither the legislative history of the Act, nor its surrounding circumstances, indicate that Congress intended to exclude tribes from the Act's coverage. \textit{Id.} at 1118.
\item \textsuperscript{11} \textit{Id.} at 1116.
\item \textsuperscript{12} The Navajo Tribe owns Navajo Forest Products Industries (NFPI) and operates it on the Navajo Reservation in Navajo, New Mexico. After inspection of NFPI, the Secretary of Labor cited it for one serious and 53 other-than-serious violations. The proposed penalty was $4,040. 692 F.2d at 710.
\item \textsuperscript{13} Treaty of Fort Sumner, June 1, 1868, 15 Stat. 667 (Navajo). The treaty states in pertinent part:
gives the Indians the power to exclude people from their land. The Tenth Circuit declared that the treaty prevents federal personnel from entering the reservation absent specific government authorization.\(^ {14}\) According to the court’s interpretation of the importance the Supreme Court has given to a tribe’s power to exclude outsiders,\(^ {15}\) such power is an inherent sovereign right, existing despite the absence of a treaty recognizing such a right.\(^ {16}\) This reasoning suggests that, given jurisdiction, the Tenth Circuit would rule that the Act does not apply to the Coeur d’Alene Tribe either, despite that tribe’s lack of a treaty right to exclude outsiders.\(^ {17}\)

Resolution of the question of whether the Act applies to Indian businesses is important because of the growth of tribal enterprises in a variety of areas such as agribusiness,\(^ {18}\) logging,\(^ {19}\)

\[\text{T}he\text{ United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.}\]

Id. at 668.

14. 692 F.2d at 712.

In 1871 Congress stopped making treaties with the Indians. A major reason for this new policy was that some government officials believed tribes were not sovereigns, and therefore lacked authority to negotiate treaties with the United States. The federal government, however, continued to make agreements with Indians that were similar to treaties. F. COHEN, \textit{HANDBOOK OF FEDERAL INDIAN LAW} 105-08 (1982 ed.).


17. Not surprisingly, the Ninth Circuit has attempted to read narrowly the holding of \textit{Donovan v. Navajo Forest Prods. Indus.} to fit within its “treaty rights” exception to Federal Power Comm’n \textit{v.} Tuscarora Indian Nation, 362 U.S. 99 (1960). \textit{See} 751 F.2d at 1117 (stressing the Tenth Circuit’s reliance on the Navajo’s treaty right to exclude outsiders).

18. The Bureau of Indian Affairs has collected statistics on agribusiness:

The Gila River Indian Community in Arizona . . . has 63,000 acres of irrigated farm land, which averages about $17 million in annual gross sales . . . . The Passamaquoddy Tribe of Maine used $2.1 million dollars from a land claims settlement to purchase a 5,800-acre blueberry farm. In the three years the tribe has owned the land, it has harvested a $4.3 million dollar return from the berries sold . . . . The Colorado River Indian Tribes in Arizona operate a 6,200-acre farm enterprise which grosses about $3 million annual income. Crops include cotton, alfalfa, hay and grain.


19. For example, the Lac Courte Oreilles Band of Chippewa Indians in Wisconsin has a forest products business. Id. at 40.
and oil and gas production. Although tribal businesses are not the only businesses on reservations, this Note considers the jurisdiction of the Act over Indian-owned businesses only, whether owned by tribes or individual Indians.

This Note argues that the Act does not apply to Indian businesses because it does not specifically mention them. While sensitive to the desirability of providing certain kinds of federal protections to all Americans, this Note takes the position that the sovereignty of Indian tribes should not be abrogable except by considered and express congressional action. Concluding nonetheless that the workplace protection the Occupational Safety and Health Act provides should be extended to Indians on reservations, the Note proposes amendment of the Act: to extend its protection; to permit tribal enforcement; and to authorize the federal government to help financially troubled Indian businesses pay for the costs of compliance. Part I describes the

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20. [The Comanche Tribe of Oklahoma] formed the Comanche Energy Resource Company (CERCO), an independent oil and gas producing company owned by tribal members.

... The Jicarilla Apache Tribe of New Mexico was the first tribe to produce its own oil and gas. In 1981 the tribe bought out the interests of a commercial oil company on the reservation, formed the Jicarilla Energy Company and began to operate and manage its own developed oil and gas properties on tribal lands...

Id. at 41-42.

21. In response to the desires of Indians and the Reagan administration for economic self-sufficiency on reservations, as well as to the interest of private companies in the coal, uranium, gas, oil, and timber on Indian land, private businesses have started enterprises on reservations such as joint ventures with tribes and other nonlease agreements. President Reagan has expressed his administration's desire for reservation economic development by stating:

Both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations...

President's American Indian Policy Statement, 19 WEEKLY COMP. PRES. DOC. 98, 100-01 (Jan. 24, 1983).

President Reagan, in accordance with his Indian policy, created a Presidential Commission on Indian Reservation Economies to “advise the President both on steps to lessen tribal dependence on federal monies and programs, and ways to strengthen private sector investments on the reservations.” BUREAU OF INDIAN AFFAIRS, supra note 18, at 33. The government is also encouraging Indian economic self-sufficiency through statutes such as the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08 (1982), which gives tribes new flexibility in developing and selling their mineral resources.

historical relationship of Indians to the United States. Part II explains the two conflicting views on whether general federal statutes implicitly apply to Indian tribes. Interpreting the Act in light of the proper rule, Part II concludes that the Act does not apply to Indian businesses on reservations. Part III argues that Indians on reservations nevertheless need the Act’s protection, and should receive it through congressional amendment. Part III stresses that Congress should respect Indian sovereignty by soliciting Indian ideas about the nature of the amendment, and by granting the Act’s enforcement power to the tribes themselves.

I. THE RELATIONSHIP BETWEEN INDIANS AND THE UNITED STATES

Indians have a peculiar relationship with the United States. Tribes possess attributes of autonomy, as well as of dependency. The inevitable tension between these two attributes has resulted in an inherent instability in the trust relationship that circumscribes the role of the federal government towards Indians. Properly interpreted, the federal-Indian trust relationship places its highest value on Indian sovereignty.

A. Indian Sovereignty

One of the judiciary’s earliest recognitions of Indian sovereignty was the Supreme Court’s declaration in Worcester v. Georgia that tribes are “distinct, independent political commu-

23. See, e.g., United States v. Kagama, 118 U.S. 375 (1886), in which the Court stated:
[Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside.
Id. at 381-82.
24. See, e.g., Winton v. Amos, 255 U.S. 373, 391-92 (1910) (“It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency . . . .”).
25. See infra notes 67-84 and accompanying text.
nities.” The reserved rights doctrine’s explanation of treaties and Indian sovereignty helps to clarify the nature of such sovereignty. The doctrine declares that treaties “[are] not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”

From the 1960's to the present, the federal government has favored Indian sovereignty. The government’s current Indian policy “stresses the right of Indians and tribes to decide whether they will maintain their tribal government and culture and to what degree they will assimilate into non-Indian society.” The Indian Self-Determination and Educational Assistance Act, which authorizes tribes to administer many federal programs for their people, enacts this policy of support for Indian autonomy into law. Other examples of present-day Indian sovereignty include tribal legislative power, tribal authority to exclude outsiders from reservations, and tribal maintenance of autonomous criminal justice systems. In light of the government’s

27. Id. at 559.
29. Id.

President Reagan has expressed his Administration’s Indian policy by stating, “This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.” President’s American Indian Policy Statement, supra note 21, at 101.
31. Note, supra note 30, at 1181 n.1.
33. In the Indian Self-Determination and Educational Assistance Act, Congress recognized

the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

Id. § 450a(a).

34. “Tribes have the power to make substantive criminal and civil laws in internal matters.” F. COHEN, supra note 16, at 248.
35. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (“[T]he dissent correctly notes that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands . . . .”); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) (“[I]ntrinsic in the sovereignty of an Indian tribe is the power to exclude trespassers from the reservation.”).
36. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).
historical vacillation in Indian policy, however, the current self-determination policy may not be permanent.

Despite the government's many changes in Indian policy, the importance of tribal sovereignty has generally guided judicial interpretation of Indian rights. The courts have developed canons of construction to secure the protection of tribal sovereignty. Canons of treaty construction state, "[A]mbiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians." Another canon of construction states that statutes abrogating treaty rights are to be narrowly construed. The rights of Indians secured in treaties are usually those of self-government. Hence, judicial respect for treaty rights implicitly recognizes the government's responsibility to protect sovereignty. For example, in Menominee Tribe

37. From approximately 1787 to 1871, the government sought to keep Indians on reservations and convince them to accept non-Indian culture. By 1871, however, the government had decided to assimilate Indians into white culture and force them to become land-owning farmers. Note, supra note 30, at 1197.

In 1934, as a reaction against the assimilation policy, Congress passed the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982)). The statute encouraged Indian economic development on reservations, and gave tribal governments a chance to reorganize themselves by adopting constitutions and bylaws.

In the 1950's the government again changed its method of treating Indians and adopted the termination policy. Congressional passage of individual termination acts ended federal recognition of many tribes, caused the sale of some of their former reservations, and thereby forced their members to relocate. Note, supra note 30, at 1186-89.

In the 1960's, in reaction to the termination policy's disastrous economic and cultural effects on Indians, the government again reversed its position and adopted its current policy of favoring Indian self-determination. Id. at 1190-92.


40. Id. at 617 (footnotes omitted).

41. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (holding that a treaty did not prohibit the improvement of a stream so that it could transport timber products; stating that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."); United States v. 43 Gallons of Whiskey, 108 U.S. 491, 496 (1883) (holding that a treaty barred the introduction and sale of liquor in certain Indian country; stating that "the laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language."); Wilkinson & Volkman, supra note 39, at 602 ("Indian treaty rights should be abrogated only by express legislative action stating both the specific promises about to be broken and the intent of Congress to break them.").

42. United States v. White, 508 F.2d 453, 455 (8th Cir. 1974).
of Indians v. United States, the Supreme Court held that a termination statute did not deprive the Menominee Tribe of their treaty rights to hunt and fish because the statute did not expressly abrogate them. The rights to hunt and fish were part of the Indians' right to maintain their traditional way of life on a reservation.

In resolving questions other than treaty construction, such as the extent of the jurisdiction of tribal courts, the judiciary has generally expressed its respect for Indian sovereignty. Preservation of this principle of respect for sovereignty remains essential to fair dealing with Indians, and should continue to inform judicial opinion on the applicability to Indians of federal statutes.

There are at least two compelling policy reasons for the judiciary's respect for Indian sovereignty, and for the current position of the other two branches of government favoring it. The first reason is that the maintenance of tribal autonomy promotes cultural pluralism, an important American value. Many Indian cultural beliefs make it impossible for Indian culture to survive apart from the tribe in America's capitalistic society. For example, Indians value their role as members of tribal communities more than their existence as individuals. Also, Indians believe

43. 391 U.S. 404 (1968).
44. Id. at 406.
45. Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that a non-Indian store owner could sue Indians in tribal, but not state court, for debt collection; stating that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations."); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 92 (8th Cir. 1956) (holding that tribal court had jurisdiction to try Indians for adultery, and that the tribe had the authority to tax Indians for the right to graze stock on reservation land; stating that "[i]t would seem clear that the Constitution, as construed by the Supreme Court . . . recognizes the existence of Indian tribes as quasi-sovereign entities possessing all the inherent rights of sovereignty excepting where restrictions have been placed thereon by the United States itself.").
46. The search for cultural freedom, especially in the area of religion, led diverse groups of people to found America and to help it grow. Clinton, supra note 38, at 1060. The Constitution supports cultural pluralism by protecting rights such as freedom of religion, speech, and association. U.S. Const. amend. I. For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court recognized the importance of cultural pluralism in holding that the Amish did not violate Wisconsin's compulsory school attendance law by forbidding their children, in accordance with Amish religious beliefs, to attend high school. In striking down the state law, the Court noted that it had presented "a very real threat of undermining the Amish community and religious practice as they exist today," and condemned as evil the likely result of such legislation—that the Amish "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." Id. at 218 (emphasis added, footnote omitted).
47. Clinton, supra note 38, at 1023 ("Indian culture is built around a closely integrated tribal society and spiritual world, and the Indian derives identity from his role and relationship within that society and spiritual world.") (footnote omitted).
that land is not “property” to be held for personal gain, but something that exists for the good of the community.\textsuperscript{48} Congress has enacted laws, such as the American Indian Religious Freedom Act,\textsuperscript{49} to protect Indian cultural values. In accordance with America’s history of cultural pluralism, and out of respect for the value of Indian culture for its own sake, the United States should foster tribal independence. Apart from pure cultural enrichment, a benefit to the country of autonomous tribes is that they provide mainstream American society with a benchmark against which to test its own values.\textsuperscript{50}

A second policy reason for the government to protect Indian sovereignty is for belated, if slight, compensation for the diminishment of their sovereignty that has occurred from the time of the European discovery of North America. Through conquest, or treaties made under coercive conditions in a language unfamiliar to Indians,\textsuperscript{51} tribes lost much of their land and autonomy. Even the sovereign rights the federal government guaranteed tribes in treaties have not always been respected.\textsuperscript{52} The government’s policies of trying to force Indians to assimilate into white culture, and later terminating several tribes,\textsuperscript{53} are other examples of federal encroachments upon tribal independence. To prevent further abuses of Indian sovereignty, and to express regret for past wrongs against tribes, the government should foster Indian autonomy.

B. Federal Authority Over Indians

Over the years, the courts have interpreted “an amalgam of the several specific constitutional provisions”\textsuperscript{54} to give Congress plenary power over Indians.\textsuperscript{55} The Constitution explicitly refers

\textsuperscript{48} Id. at 1024-25.
\textsuperscript{50} Clinton, supra note 38, at 1063 (noting Americans have recently begun to appreciate the Indian value of protection of the environment).
\textsuperscript{52} F. COHEN, supra note 16, at 64.
\textsuperscript{53} See supra note 37.
\textsuperscript{54} F. COHEN, supra note 16, at 211.
\textsuperscript{55} But see Note, Constitutional Law: Congressional Plenary Power Over Indian Affairs—A Doctrine Rooted In Prejudice, 10 Am. Ind. L. Rev. 117, 119 (1982) (“A search for the source of plenary power essentially establishes that the Court’s interpretation of Indian conditions from a prejudicial point of view dictated the Court’s discriminatory response: Indians, being a race inferior to white Americans, need protection and pupilage. And there being the obligation, there is the power.”).
to Indians only three times. The commerce clause states that Congress can regulate trade with the Indian tribes, and article I and the fourteenth amendment exempt Indians from taxation. Courts have interpreted the treaty clause, the property clause, the necessary and proper clause, and the supremacy clause as other sources of federal power over Indian affairs. In Lone Wolf v. Hitchcock, the Supreme Court recognized the power of the government over Indians by stating that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." The Court held that Congress could unilaterally abrogate Indian treaties.

C. The Federal-Indian Trust Relationship

Although Congress has plenary authority over Indians, due respect for Indian sovereignty often has dissuaded Congress from exercising such authority. In addition, the trust relationship that Chief Justice Marshall recognized in Cherokee Nation v. Georgia and Worcester v. Georgia requires that Congress exercise its power in accordance with the "best interests" of the Indians. In Cherokee Nation, the Chief Justice declared that Indians "look to our government for protection," and described the relationship of the Indians to the United States as "[t]hat of a ward to his guardian." Chief Justice Marshall did not elaborate upon the meaning of that relationship. In Worcester, Marshall again recognized the trust relationship in concluding that

56. U. S. Const. art. I, § 8, cl. 3.
57. Id. § 2, cl. 3.
58. Id. amend. XIV, § 2.
59. See also Wilkinson & Volkman, supra note 39, at 614 n.66 (stating that the Constitution mentions Indians only three times, but those references implicitly give Congress the power to regulate Indians).
60. U.S. Const. art II, § 2, cl. 2.
61. Id. art. IV, § 3, cl. 2.
62. Id. art. I, § 8, cl. 18.
63. Id. art. VI, cl. 2.
64. F. Cohen, supra note 16, at 207-12.
65. 187 U.S. 553 (1903).
66. Id. at 565; see also United States v. Wheeler, 435 U.S. 313, 327 (1978) ("It is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control.").
68. 30 U.S. (5 Pet.) 1 (1831).
69. 31 U.S. (6 Pet.) 515 (1832).
70. 30 U.S. (5 Pet.) at 17.
treaties were contracts of mutual obligations. The federal government's trust obligation stems from America's promises to defend Indians and their autonomy. Some of America's early promises became legally binding in treaties, while others remain simply moral obligations.

Two conflicting interpretations of the "best interests" of Indians are possible. Under one view, the federal government should treat Indians as dependent peoples who need the United States to manage their affairs. This view would permit the conclusion that any general federal statute should apply fully to Indian reservations. The competing position suggests that the government ought to perceive Indians as members of tribes whose best interests are protected by government preservation of tribal sovereignty. Under this view, recognition of the continuing importance of Indian sovereign rights would prevent any federal statute, even though benevolent social legislation, from restricting Indian autonomy in the absence of express congressional intent.

A canon of statutory construction adopted by the courts to implement the trust relationship illustrates judicial uncertainty about which view of Indian "best interests" to adopt. The canon interprets federal statutes that explicitly mention Indians to favor Indian interests, without specifying the nature of those interests. Extension of that canon to general federal statutes that do not mention Indians would not resolve the question of whether the Occupational Safety and Health Act applies to Indian businesses. Application of the Act to Indian businesses on reservations would benefit Indian workers, yet harm tribes by infringing upon their sovereignty.

72. Note, supra note 51, at 683-84.
73. See generally id. at 683-87.
74. Id. at 687 ("Judicial decisions, for example, have employed the ward-guardian model to give Congress great discretion in regulating all aspects of Indian life.").
75. See supra notes 26-36 and accompanying text.
76. For a discussion of the canons of construction courts have used in Indian law, see generally Note, supra note 51.
77. The uncertainty may be a result of the government's historical vacillation in Indian policy. See supra note 37.
78. United States v. 2,005.32 Acres of Land, 160 F. Supp. 193, 201 (D.S.D. 1958) ("[S]tatutes concerning the rights of Indians are to be liberally construed in their favor."); Comment, The Indian Battle for Self-Determination, 58 CALIF. L. REV. 445, 468 (1970) ("The cardinal rule of construction for Indian legislation: that all acts are to be interpreted in favor of the Indians."); Note, supra note 51, at 690 ("Legislation favoring Indian interests is . . . construed broadly, while legislation impairing Indian interests is construed narrowly.").
79. See supra notes 26-53 and accompanying text.
For the reasons advanced in section A above, the proper interpretation of the federal-Indian trust relationship would protect sovereignty foremost, at least with regard to the applicability of statutes that fail to mention Indians. The "best interests" of Indians may sometimes be advanced by congressional legislation aimed at eradicating widespread social evils. But because of the value Americans place on cultural pluralism, and because of historical mistreatment of Indians, the judiciary must respect tribal sovereignty if it is to protect Indian interests. Applying general federal statutes to Indian tribes fails to force Congress to weigh the potential benefits of its legislation against the certain cost of further undermining Indian autonomy. Because of the necessary importance of Indian sovereignty, courts should adopt a rule of construction that forces Congress to undertake this task.

II. WHETHER THE ACT APPLIES TO INDIAN BUSINESSES ON RESERVATIONS

The Supreme Court has recently recognized in dictum the importance of tribal sovereignty, and indicated that general federal statutes not referring to tribes do not govern them. Earlier, however, the Court enunciated what some lower courts have

80. Congress's trust responsibility may require it to pass some protective legislation for Indians, though. See supra note 74 and accompanying text.
81. See infra notes 101-11 and accompanying text.
82. See supra note 46 and accompanying text.
83. See supra notes 51-53 and accompanying text.
84. See infra notes 101-25 and accompanying text. Although Congress's general Indian policy is self-determination, it does not always explicitly consider the effect of general statutes on tribal sovereignty.

Occasionally, though, Congress has weighed the cost of legislation to Indian autonomy. For example, in passing the Surface Mining Reclamation Act, Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1982)), Congress appears to have considered the impact the statute would have on tribal sovereignty, and formulated the law to minimize interference with Indian autonomy:

The Secretary is directed to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this chapter and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands.

Id. § 1300.
taken to be a contrary position. These courts have mistakenly extended the Court’s earlier position beyond its intended and proper scope. Reconciled with a due respect for Indian sovereignty, proper interpretation of the Supreme Court’s recent dictum compels the conclusion that general federal statutes failing to mention Indians do not govern them.

A. The Tuscarora Rule: Applicability of General Federal Statutes to Indian Tribes

In Federal Power Commission v. Tuscarora Indian Nation, the Supreme Court stated that “it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.” The Court enunciated the dictum while deciding that the Federal Power Act allowed the Power Authority of New York, under a license from the Federal Power Commission, to take Tuscarora Nation land for just compensation. The holding did not announce implicit congressional authority over tribal land, because section 4(e) of the statute explicitly specified the procedures the Federal Power Commission had to undergo before taking reservations, thus indicating that the statute authorized takings of such land. Although the Tuscarora Nation land was not within the statute’s technical definition of a reservation,

86. Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960); see infra notes 96-98 and accompanying text.
87. See supra notes 26-53 and accompanying text.
89. Id. at 116.
90. 16 U.S.C. §§ 791-828c (1982). The Court referred to the Federal Power Act as “a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission, and utilization of electric power.” 362 U.S. at 118.
91. 16 U.S.C. § 797(a) (1982). This section requires the Federal Power Commission, before issuing a license for the taking of all or part of a reservation, to find “that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.” Id.
92. F. COHEN, supra note 16, at 284 (“[I]n passing the Federal Power Act Congress had specifically dealt with Indian reservation lands and thus clearly intended to apply the Act as a whole to Indians and tribes.”).
93. Section 3(2) of the Federal Power Act, 16 U.S.C. § 796(2) (1982), defines reservations as “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 public land laws.” The Tuscarora Nation’s land did not fall within the Federal Power Act’s definition of a reservation because the government did not own it. The Tuscarora Nation held the land in fee simple.
the Court reasonably inferred that congressional intent to au-
thorize takings of reservation land showed intent to authorize
takings of tribal land generally, regardless of the precise defini-
tion of such land. The holding made no more than a reasonable
construction of already express congressional intent. It was
hardly remarkable that the Court found that an announced in-
tention to reach Indian reservation land authorized reaching In-
dian nonreservation land.

Some lower courts have erroneously interpreted the dictum in
Tuscarora to declare that statutes not mentioning tribes, unlike
the statute at issue in Tuscarora, nevertheless apply to them.
This reading of the dictum is often called the Tuscarora rule, a
principle that minimizes the importance of tribal sovereignty.
Relying on the Tuscarora rule, these courts have found general
statutes applicable to Indian tribes, even when such applications
impinge upon tribal sovereignty.

The Tuscarora dictum correctly read, however, does not state
that general statutes apply to tribes. The dictum says no more
than that general laws apply to individual Indians living away
from their tribes, a subject tangential to the holding that laws
specifically referring to tribes apply to them. This interpreta-
tion is correct for two reasons. First, the dictum expressly relied
upon three tax cases that held general statutes applicable to
individual Indians separated from their tribes. The Tuscarora
rule's expansive reading of the original case's dictum is unjusti-
ified because tribal sovereignty was not at issue in the cases on

A general, nonstatutory definition of a reservation is "land set aside under federal pro-
tection for the residence of tribal Indians, regardless of origin." F. Cohen, supra note 16,
at 34.

94. 362 U.S. at 118. The statute's infringement on tribal sovereignty is the same,
regardless of the classification of the tribe's land. In either case the government can take
Indian land.

95. The Supreme Court's holding that the Tuscarora Nation's land was not within
the statute's definition of a reservation denied Indians the special protection of § 797(e),
which prohibited the Federal Power Commission from issuing a license for the taking of
a reservation if such taking would interfere with the reservation's purpose. The Court's
express acknowledgement that Congress had intended to reach reservations, though with
special protection, justified the conclusion that Congress would also have wanted to
reach Indian lands that were not technically reservations, and thus not specially pro-
tected by the statute. Because Congress had impliedly recognized that the most pro-
tected Indian lands were reservation lands, by giving them more protection than the land
of non-Indians, the Court was also justified in assuming that tribal sovereignty would
receive less protection off a reservation.

96. See supra note 95.

97. Oklahoma Tax Comm'r v. United States, 319 U.S. 598 (1943); Superintendent of
Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935); Choteau v. Burnet, 283 U.S.
691 (1931).
which the dictum is based. Second, the dictum’s assertion that the term “persons,” in a statute, applies to Indians strongly suggests that those Indians are individuals, not tribes. The Tuscarora rule fails to acknowledge that the special status of tribes generally excludes them from the statutory definition of “persons.”

Those courts relying upon the Tuscarora rule have used it in one of two ways. One way is to simply cite Tuscarora and thus infer that a general statute covers tribes. More commonly, courts go beyond a mere reference to Tuscarora, but nevertheless reach the same result. These courts take it upon themselves to affirmatively decide that Congress intended a particular policy to override sovereignty, even though such intent is not explicit. Examination of these few cases reveals that, except in the area of criminal law, they are wrongly decided to the extent they rely upon the Tuscarora “rule.”

1. Federal criminal statutes— In accordance with the Tuscarora rule, courts have usually held that general, federal criminal statutes give the government jurisdiction over reservation Indians. The courts have explained their interpretation of the effect of federal criminal statutes on reservation Indians either by merely citing Tuscarora, or by simply assuming that a federal criminal statute applies to Indians unless it explicitly ex-

98. Brief for the Respondent Coeur d’Alene Tribal Farm at 15-16, Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985); F. COHEN, supra note 16, at 283. Cohen states:

Where retained tribal sovereignty in Indian country is not invaded and no other particular Indian right is infringed, individual Indians and their property are normally subject to the same federal laws as other persons. Most general federal statutes using the term “persons” to define their scope include private groups such as corporations and associations; however, an intent to include Indian tribes within such definitions must be clearly shown since tribes are “unique aggregations” and exercise governmental powers.

Id. (footnotes omitted).

99. See infra note 102 and accompanying text.

100. See infra notes 112-23 and accompanying text.


For a discussion of the complex scheme of criminal statutes governing Indians, see Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503 (1976).

102. See, e.g., United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1975).
empt them. The decisions holding that general, federal criminal laws apply to reservation Indians usually do not even discuss the possible infringement by such laws of tribes' power to pass and enforce their own laws.

In presuming that general criminal laws apply to tribes, without even mentioning the effect of such laws on sovereignty, courts suggest that it is obvious that Congress intends criminal laws to apply to everyone. Such a presumption is reasonable because one of the most basic duties of a government is to protect its citizens and their property from harmful criminal activity. The interests of efficient and uniform law enforcement validate the judicial assumption that criminal law exempts no one from its reach. An exemption for tribal Indians might leave some citizens unprotected from criminal activity on reservations, shock the public sensibility, and run counter to fundamental fairness.

Because Congress ordinarily gives substantial weight to protecting all citizens from crime, it is not surprising that a court would presume this congressional policy to embody an intent to reach Indian reservations. In areas other than criminal law, courts have struggled to determine Congress's intent with regard to Indian sovereignty as shown by their discussions of the effect on sovereignty of general laws in areas such as labor organiza-

103. See, e.g., Head v. Hunter, 141 F.2d 449, 451 (10th Cir. 1944).
104. But see United States v. Farris, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981). The court suggested that the jurisdiction of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1982), over reservation Indians did not infringe upon tribal sovereignty. The Ninth Circuit stated, "But even a general federal law suffices to proscribe the large-scale professional gambling involved here; such gambling is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government." 624 F.2d at 893.
105. Although Indians tribes can make and enforce their own criminal laws, see supra note 34, their scope may not be comprehensive. In United States v. Farris, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981), the court expressed a concern for the welfare of non-Indians on reservations. The court, while holding that the Organized Crime Control Act, 18 U.S.C. § 1955 (1982), applied to reservations, noted that the clientele of the reservation's casinos "included many non-Indians and some out-of-staters." 624 F.2d at 893.
106. Courts may be reluctant to exclude Indians from the jurisdiction of general criminal laws because such an exclusion might deny equal protection to criminal suspects who committed crimes off reservations. See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that unequal application of a criminal law to people in similar circumstances violated equal protection).
tion, conservation, and occupational safety. Application to tribes of general criminal laws, in the absence of any detailed judicial discussion of their impact on tribal sovereignty, indicates the ease with which courts conclude that Congress intends the overwhelming importance of uniform application of criminal laws to override that of tribal sovereignty. The reasonableness of this reading of congressional intent in the area of criminal law makes this the only area in which use of the Tuscarora rule is appropriate.

2. The National Labor Relations Act— In Navajo Tribe v. NLRB, the District of Columbia Circuit looked at the policy of the National Labor Relations Act (NLRA), as courts have looked to the implicit policy of federal criminal law, to determine whether the statute authorized the Board to order a representation election in a private reservation business employing Indian and non-Indian workers. In accordance with the Tuscarora rule, the court held that the statute applied to such businesses. The court cited Tuscarora, but based its holding on analysis of the policy of the NLRA, rather than on blind adherence to the Tuscarora rule. The analysis comports with the spirit of the Tuscarora rule because it presumes that a court can find in a statute implicit congressional intent to abrogate tribal sovereignty. The court reasoned that the NLRA embodied a national labor policy that superseded any possible tribal right to

108. See Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir. 1961), cert. denied, 366 U.S. 928 (1961); see infra notes 112-17 and accompanying text.
109. See United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), cert. denied, 449 U.S. 1004 (1980); see infra notes 118-23 and accompanying text.
110. Compare Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) with Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982); see supra notes 3-17 and accompanying text.
111. In addition to the reasonableness of discerning congressional intent to apply criminal laws to tribes, limiting Tuscarora to criminal laws that fail to mention Indians has the added advantage of providing courts with a bright-line rule.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.
114. 288 F.2d at 163.
115. Id. at 165.
116. Id. at 165 n.4.
control internal labor disputes.\textsuperscript{117} The decision was incorrect because the court took it upon itself to determine that Congress would give more weight to the policy of the NLRA than to that of supporting tribal sovereignty.

Courts can easily determine that Congress would give more importance to the government's basic obligation to protect all citizens from crime than to prevent infringement of tribal sovereignty, but the balance Congress would strike between the economic values of the NLRA and maintaining tribal autonomy is unclear. The values of worker organization and the uninterrupted flow of interstate commerce that the NLRA protects are important, but not as basic to society as the protection of all of its members from criminal harm. Hence, the court should not have presumed that Congress intended the NLRA to override aspects of tribal sovereignty.

3. The Eagle Protection Act— In \textit{United States v. Fryberg}\textsuperscript{118} the Ninth Circuit took it upon itself to determine which of two interests, tribal sovereignty or preservation of the national bird, Congress impliedly had intended to prevail. The court decided that the "broad purpose of the [Eagle Protection] Act to protect the bald eagle and prevent its extinction"\textsuperscript{119} showed that Congress had intended the statute to apply to tribes. Reasoning that the Eagle Protection Act would be ineffective unless it applied to everyone, especially to Indians who have traditionally hunted eagles, the court decided that Congress had intended the statute to cover reservations.\textsuperscript{120}

In relying on "national policy" to extend \textit{Tuscarora}, the Ninth Circuit needlessly made itself an arbiter of whether a national conservation policy is sufficiently strong to override tribal sover-

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 164. A bright-line rule favoring tribal sovereignty in such cases would eliminate such judicial guesswork. Although courts are ill-equipped to engage in this sort of policy balancing, it may be argued that they should adopt the contrary bright-line rule and assume that congressional silence about Indians indicates a willingness to abrogate tribal sovereignty. This argument rests on the view of the federal-Indian trust relationship that finds Indian "best interests" more in protection than in sovereignty. On this view, application of the Act to Indian businesses would further the government's trust responsibility to protect its Indian wards. The federal-Indian trust relationship, properly viewed, however, defers to tribal sovereignty when it conflicts with an arguable obligation to protect. Therefore, the best way for the government to fulfill its trust obligation to Indians is for Congress to consider carefully the effects of protective legislation on Indian sovereignty. Courts should abrogate such sovereignty only when Congress indicates that it has undertaken this inquiry by explicitly stating that a statute applies to tribes.

\item \textsuperscript{118} 622 F.2d 1010 (9th Cir.), \textit{cert. denied}, 449 U.S. 1004 (1980).


\item \textsuperscript{120} 622 F.2d at 1015-16.
\end{itemize}
eignty. A 1962 amendment to section 668a of the Eagle Protection Act\textsuperscript{121} explicitly refers to Indians, thus evincing congressional intent that the statute apply to them. The amendment authorizes the Secretary of the Interior to permit the taking of eagles for "the religious purposes of Indian tribes."\textsuperscript{122} Through the amendment, Congress clearly showed an intent to prohibit Indians from hunting eagles, except for religious purposes.\textsuperscript{123} Hence, \textit{Fryberg} is decided correctly, but wrongly relies upon \textit{Tuscarora}.

The importance of sovereignty, as evident in the government's policy of protecting Indian autonomy\textsuperscript{124} and the judicial tradition of construing treaties to protect Indian rights of self-government,\textsuperscript{125} dictate that courts should find congressional diminishment of tribal sovereignty only if a statute clearly states that it applies to tribes. The one exception to the preceding rule is criminal law. The fundamental obligation of government to protect its citizens from criminal harm creates the presumption that criminal statutes apply to everyone. Thus, courts can reasonably infer that general criminal statutes apply to reservation Indians. In areas other than criminal law, such as labor organization and wildlife conservation, it is unclear how Congress would weigh various policies against tribal sovereignty. Hence, except in interpreting criminal laws, courts cannot reasonably follow the \textit{Tuscarora} rule and decide that Congress intends general laws to apply to tribal Indians.

\textbf{B. The Merrion Rule: Inapplicability of General Federal Statutes to Tribes}

Dictum in \textit{Merrion v. Jicarilla Apache Tribe}\textsuperscript{126} gives additional support to the view that the \textit{Tuscarora} rule is an incorrect

\begin{itemize}
\item \textsuperscript{121} Pub. L. No. 87-884, 76 Stat. 1246 (1962) (codified at 16 U.S.C. § 668a (1982)).
\item \textsuperscript{122} Id. § 668a.
\item \textsuperscript{123} But see United States v. White, 508 F.2d 453 (8th Cir. 1974), in which the court stated:
\begin{quote}
16 U.S.C. § 668 . . . permit[s] the taking of eagles "for the religious purposes of Indian tribes . . . ." Theoretically non-Indians could be thus permitted by the Secretary to take the eagles, on or off reservations, as long as it was for the "religious purposes of Indian tribes." It is difficult to understand, then, how this exception could be interpreted to show an express intent of Congress to abrogate treaty rights of Indians to hunt on their own reservation.
\end{quote}
\item \textsuperscript{124} See supra notes 30-36 and accompanying text.
\item \textsuperscript{125} See supra notes 39-44 and accompanying text.
\item \textsuperscript{126} 455 U.S. 130, 149, 152 (1982).
\end{itemize}
interpretation of *Tuscarora*’s dictum. In *Merrion*, the Supreme Court suggested a rule of statutory construction more favorable to Indian sovereignty than the *Tuscarora* rule and consistent with the proper interpretation of the *Tuscarora* dictum. The *Merrion* rule is that general federal statutes do not apply to tribes unless they are explicitly mentioned.

The holding of *Merrion* respects tribal autonomy by describing tribes as sovereigns capable of levying taxes to pay for the services they provide, and capable of controlling their territory by excluding outsiders. The dictum in *Merrion* suggests broader application of this principle of sovereignty, indicating that general statutes do not apply to Indians unless mentioned. The Court formulated the dictum in response to the argument of lessees, with long-term leases to extract oil and gas from the reservation, that Congress had implicitly removed the tribe’s

127. The dictum of *Merrion* that favors Indian sovereignty in the construction of general statutes is:

*We reiterate here our admonition in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978): “a proper respect 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.”*

... We find no “clear indications” that Congress has implicitly deprived the Tribe of its power to impose the severance tax. In any event, if there was ambiguity on this point, the doubt would benefit the Tribe, for “[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”


455 U.S. at 149-52.

See also *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982), in which the court stated:

*Merrion*, in our view, limits or, by implication, overrules *Tuscarora* ... at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora* that “it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.”

*Id.* at 713 (citing Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960)).

128. See supra notes 96-98 and accompanying text.

129. An early Supreme Court declaration of the principle that Congress abrogates Indian rights only if it does so expressly was in *Elk v. Wilkins*, 112 U.S. 94 (1884). The Supreme Court stated, “Under the Constitution of the United States as originally established ... [g]eneral acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.” *Id.* at 99-100. In Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), though, the Court indicated that the rule of that case had superseded that of *Elk*. *Id.* at 116.

130. 455 U.S. at 137-44.

131. *Id.*

132. *Id.* at 144-48.

133. *Id.* at 149-52.
right to impose a severance tax through two statutes and the national energy policy. The Court showed its disapproval of the lessees' view that Congress could implicitly abrogate Indian sovereignty by stating, "[W]e reiterate here [that a] proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of a clear indication of legislative intent." The Court deferred to Indian sovereignty by declaring that if it had been uncertain about whether Congress had implicitly removed the tribal power of taxation, "the doubt would benefit the Tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'"

The Court's reliance on specific statutes and national policy to determine whether they implicitly overrode a tribe's right to tax fell short of deciding whether general federal statutes apply to tribes. The two statutes the Court interpreted were not general statutes, but specifically stated that they applied to Indian lands. The Court's statutory interpretation, though, deferred to Indian sovereignty by refusing to infer, even from statutes that expressly applied some limits to Indian sovereignty, that these same statutes also removed the sovereign tribal right of

134. Id.
135. The first statute the lessees claimed implicitly abrogated the tribal right to impose a severance tax was the Act of May 11, 1938, 25 U.S.C. §§ 396a-396g (1982), creating a regulatory scheme for leasing and developing Indian oil and gas reserves. The lessees claimed that Indian taxation of oil and gas production was inconsistent with the 1938 Act's encouragement of oil and gas production on Indian land. Hence, the statute implicitly prohibited the taxes. The Court, however, reasoned that the 1938 Act did not prohibit severance taxes because the statute purported not to "restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe . . . ." 25 U.S.C. § 396 (b) (1982).

The second statute the lessees relied upon was the Act of Mar. 3, 1927, 25 U.S.C. §§ 398a-398e (1982), that permitted state taxation of mineral leases on Executive Order reservations. The Court decided that the state taxation statute was consistent with Indian taxation because different sovereigns can tax the same transactions. 455 U.S. at 150-51.

136. The lessees claimed that tribal taxation was inconsistent with the national policy of encouraging development of oil and gas production. The Court rejected the national policy argument because it did not explain why national energy policy would allow states, but not tribes, to tax the severance of oil and gas. 455 U.S. at 151-52.
137. Id. at 149 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).
138. The Supreme Court found no indication that Congress had not removed the tribe's power to impose a severance tax. 455 U.S. at 152.
139. Id. (quoting White Mt. Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).
140. See supra note 135.
141. Id.
The Court indicated that a statute would abolish that right only by specifically declaring that it was doing so. By stating that in the statutes and national policy it found "no 'clear indications' that Congress had implicitly deprived the Tribe of its power to impose the severance tax," the Court suggested that Congress must act explicitly when the effect of its action is to diminish tribal sovereignty.

While *Merrion* does not address directly the applicability to tribes of general statutes, its dictum demonstrates the Court's preference for Indian sovereignty in the face of statutes that fail to abrogate expressly that sovereignty. *Merrion* thereby provides a rule of statutory construction consistent with the proper interpretation of the *Tuscarora* dictum, the judiciary's interpretation of treaties to protect tribal self-government, and the government's current policy of Indian self-determination.

C. Applying the Merrion Rule: Nonapplicability of the Act to Indian Businesses on Reservations

The Occupational Safety and Health Act is a general statute that does not expressly refer to Indian-owned businesses on reservations. It states that its purpose is "to assure so far as possible every man and woman in the Nation safe and healthful working conditions and to preserve our human resources." The legislative history, like the face of the Act, speaks in broad terms of the need to protect all workers. Similarly, the statute defines "person," in its definition of employer, as "one or more individuals, partnerships, associations, corporations, business

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142. 455 U.S. at 152.
143. Id.
144. Id. at 149-52.
145. See supra notes 96-98.
146. See supra notes 39-44 and accompanying text.
147. See supra notes 30-36 and accompanying text.
149. See, e.g., H.R. Rep. No. 1291, 91st Cong., 2d Sess. 14-16 (1970). The Report states: "Clearly, the life of a worker in one state is as important as a worker's life in another state, and uniform standards must be required to protect all workers from dangerous substances." Id. at 15.
150. If an individual Indian owned a business on a reservation the Act would not necessarily apply to it. The cases holding that general statutes apply to individual Indians usually refer to Indians living apart from their tribes, and therefore not subject to tribal jurisdiction. See, e.g., supra note 97 and accompanying text. Application of the Act to individual Indians' businesses on reservations would be just as great an infringement on tribal sovereignty as application of the Act to tribal businesses. In either case, tribes would lose the power to pass their own occupational health and safety laws, and to ex-
trusts, legal representatives, or any organized group of persons.”151 Yet nowhere in the Act is there any reference to Indians, tribes, or reservations. Thus, the applicability to Indian businesses of the Act turns on the proper construction of such a general statute.

No Supreme Court case has yet squarely decided the question of the applicability to Indian reservations of such a general statute.152 Faced with such a question, a court must look for guidance to either the Tuscarora or Merrion rule. Although applying the Tuscarora rule to the Occupational Safety and Health Act might be seen as consistent with the government’s trust responsibility to protect Indians,153 the rule’s scope is properly limited to the area of federal criminal law.154 Because the Act is not a criminal statute, the Merrion rule—consistent with the proper interpretation of the Tuscarora dictum,155 with the judiciary’s interpretation of treaties to protect tribal self-government,156 with the government’s current policy of Indian self-determination,157 and with the government’s trust obligation to protect Indian sovereignty158—must control. Supreme Court precedent, expressing as it does an overriding preference for tribal sovereignty,159 compels the conclusion that federal courts should apply the Merrion rule whenever sovereignty is in issue. Under this rule, courts should refuse to apply the Act to Indian-owned businesses on reservations because the Act fails to express its applicability to Indians. Properly interpreted, the Tuscarora rule does not suggest a different result.160

III. AMENDING THE ACT TO APPLY TO INDIAN BUSINESSES ON RESERVATIONS

Because the Act does not apply to Indian businesses, the only safety protection Indian workers receive is that which their tri-

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151. 29 U.S.C. § 652(4) (1982); see supra note 98 and accompanying text.  
152. The Tuscarora and Merrion rules are both based on dicta. See supra notes 89, 127, and accompanying text.  
153. See supra notes 68-74 and accompanying text.  
154. See supra notes 101-25 and accompanying text.  
155. See supra notes 96-98 and accompanying text.  
156. See supra notes 39-44 and accompanying text.  
157. See supra notes 30-36 and accompanying text.  
158. See supra note 75 and accompanying text.  
159. See supra notes 96-98, 126-47 and accompanying text.  
160. See supra notes 96-98 and accompanying text.
bal governments or employment supervisors choose to give them. As such protection may prove inadequate, Congress should amend the Act so that it applies to Indian businesses. Because of the importance of tribal sovereignty, however, amendment must be delicately crafted to protect Indian workers without unnecessarily impinging on tribal autonomy. Before amendment of the Act, therefore, Congress should conduct hearings to give the tribes, as sovereigns, an opportunity to suggest how they think the Act should apply to them. In particular, Congress and the Indians need to explore the possibility of tribal administration of the Act to Indian businesses. Congress and the Indians also need to formulate a plan whereby the government will help pay financially troubled Indian businesses' costs of complying with the Act, so that the Act will not bankrupt such businesses.

A. Inadequate Protection of Employees of Indian Businesses

In the absence of the Act's jurisdiction over reservation businesses owned by individual Indians or tribes, Indian workers may receive workplace protection formally through tribal laws, or informally through concerned individual managers. Indian tribes have the sovereign power to enact their own health and safety laws governing reservation businesses. Alternatively, tribes can voluntarily adopt the Act's standards. The latter legislative action is preferable because the federal government's expertise in formulating worker health and safety standards will be likely to produce fair, efficient, and manageable protective regulations. Two problems, however, exist with either legislative scheme. First, some tribes may never adopt occupational health and safety standards. Indian businesses are often tribally owned, and a tribe that values profits more than safety might not pass safety laws. A related problem of tribal legislation is that even


162. Indians who profit from reservation businesses may be more interested in avoiding the cost of compliance with the Act than protecting fellow Indians. In Castaneda v. Partida, 430 U.S. 482, 499-500 (1977), the Supreme Court noted that members of a minority do not necessarily protect the best interests of other people of the same minority. The Court found intentional discrimination against Mexican-Americans in grand jury selection, in a county in which three of the five jury commissioners were Mexican-Americans.
tribes that pass safety laws might decide from time to time to protect their profits by laxly enforcing safety regulations.

Managers' concerns for worker safety may be a complement to or an alternative for tribal legislation as a means of protecting workers. Managers can ask for safety information from a variety of sources such as the companies that insure their businesses and the Occupational Safety and Health Administration. Managers, however, cannot provide comprehensive protection for their workers because they do not always have the expertise to know that certain situations are hazardous. Additionally, managers, like tribal governments, may be more interested in protecting profits than safety. Further protection seems desirable because neither tribal legislation nor supervisory benevolence necessarily will produce adequate safety regulation. 163

B. The Need to Protect Workers and the Government's Trust Responsibility to Indians

The concern for workers that the Act represents, and the government's trust duty to protect Indians, mandate that Congress amend the Act to include Indian businesses. 164 Such an amendment should recognize the government's duty to respect tribal sovereignty, 165 as well as to protect individual Indians, by giving tribes an opportunity to express their views on the form of the

163. Congress's plenary authority over Indians unquestionably gives it the power to amend the Occupational Safety and Health Act so that it applies to Indian businesses on reservations. See supra notes 54-66 and accompanying text. Such an amendment surely would infringe upon sovereignty by removing tribes' power to impose their own occupational safety laws, and to exclude federal inspectors from their land. Yet it would also provide Indian workers with needed workplace protection. Congress need not always leave Indian tribes completely alone, out of deference to sovereignty; rather, sovereignty is too important a value for courts to allow to wither from mere congressional inattention. What is needed is a judicial rule that forces Congress to consider the deleterious effects on sovereignty of otherwise beneficial legislation. Once it has undertaken such analysis, Congress will often determine, as it should in the case of the Occupational Safety and Health Act, that some form of the legislation should apply to tribes. In this regard, Congress should attend to Indian views of a proposed statute in determining whether it may be amended to protect Indians in ways that will have only minimal adverse impact on sovereignty. See infra notes 175-82 and accompanying text.

164. An admitted disadvantage of applying the Act to reservation businesses is that Indians "are undoubtedly the most highly regulated group in our society." Wilkinson & Volkman, supra note 39, at 614-15 n.66. See F. Cohen, supra note 16, at vii ("The federal Congress . . . has enacted over four thousand treaties and statutes dealing with Native Americans. Regulations and guidelines implementing these laws are even more numerous. The tribes' own laws, and some state statutes dealing with Indians, add to the complexity.").

165. See supra note 75 and accompanying text.
amendment and by considering tribal administration of the Act on reservations.

Congressional passage of the Act created a national policy of assuring safe and healthful conditions for all workers.166 The Act was a response to the problem of work-related accidents and deaths. In hearings about the Act, the Senate Committee on Labor and Human Affairs noted that "14,500 persons are killed annually as a result of industrial accidents . . . . By the lowest count 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many more than are lost through strikes."167 Congress should amend the Act so that tribal workers are not denied the protection other American workers receive.

Apart from the importance of the Act’s purpose, Indians deserve the Act’s safeguards because of the United States’s trust responsibility to protect Indians.168 In the twentieth century, the government has manifested recognition of its trust responsibility by providing social programs for Indians.169 Indians have benefited from general federal programs to aid the poor and minorities,170 as well as from special programs for Indians such as those of “[t]he Departments of Health and Human Services, Education, Housing and Urban Development, Labor, Commerce, and Justice and agencies such as the federal Legal Services Corporation.”171 Examples include programs for Indians in education,172

166. See supra text accompanying note 148.


168. See supra notes 68-74 and accompanying text. While this trust obligation must yield to that of supporting tribal sovereignty, Congress can protect individual Indians and promote tribal sovereignty by carefully weighing the benefits of proposed protective legislation against its toll on tribal sovereignty before deciding whether to pass it. When Congress decides that protective legislation is necessary for Indians, it should respect sovereignty by consulting with the tribes in formulating such legislation. See infra notes 175-82 and accompanying text.

169. Indians do not appear to have strongly objected to these programs on the ground that they have removed the tribes' sovereign power to care for their own people. The Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450n (1982), gives some tribes some control over social programs by allowing them to administer many federal programs for their people. See supra note 33 and accompanying text.

Today, Indians are trying to decrease or eliminate their reliance on federal programs. Richard Hayward, the tribal chairman of the Mashantucket Pequots, explains his tribe's desire to achieve self-sufficiency, a hope of many tribes, by stating, "There are grand opportunities coming up. We hope not to be on any government payrolls, to be able to pay our own way. I see it happening." N.Y. Times, Oct. 20, 1983, at 2, col. 1.

170. F. COHEN, supra note 16, at 674.

171. Id.

housing,\textsuperscript{173} and health.\textsuperscript{174} Congressional extension of the Act's coverage would be consistent with the government's policy of providing programs to aid Indians, and with the Act's objective of protecting the nation's workers.

\textbf{C. Indian Participation in Determining Administration}

Congress should extend the Act's coverage to Indian businesses by amending it so that it explicitly states that it covers businesses on reservations. Before the amendment, however, Congress should conduct hearings to give Indians an opportunity to explain how they think the Act should apply to them.\textsuperscript{176} Such hearings would recognize that tribes, as sovereigns, have a right to express their opinions about inspections on their land, and about health and safety laws that will affect their people.\textsuperscript{176} Able to closely observe the health and safety problems of their people, tribal representatives will be likely to give Congress unique insight into the safety needs of Indian workers.

A major issue for Indians to discuss with Congress is whether the tribes could administer the Act to Indian businesses. In recent years, tribes have accepted an increasing amount of responsibility for performing the federal government's tasks on reser-

\textsuperscript{173} The Housing Improvement Program, administered by the Bureau of Indian Affairs under 25 C.F.R. §§ 256.1-.10 (1984), provides grants for building repairs to Indians living on or off reservations, regardless of eligibility for assistance under other federal housing programs.

\textsuperscript{174} Congress expressed its concern for Indians' medical needs in the Indian Health Care Act, 25 U.S.C. §§ 1601-1680 (1982). The Health Care Act states:

\begin{quote}
The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all the resources necessary to effect that policy.
\end{quote}

Id. § 1602.

\textsuperscript{175} Brecher, \textit{Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions}, 19 \textit{Ariz. L. Rev.} 286 (1977), states:

\begin{quote}
[T]he only way Congress can effectively prevent the unintended extension of federal power over Indian country is to incorporate an awareness of Indian desires and aspirations into the legislative process on any bill that might affect Indian interests. Congress would then be in a position to acknowledge and deal with those interests explicitly. In doing so, the legislature should call for input from the Indian people to be affected and, to the maximum degree possible, be guided by that input.
\end{quote}

\textit{Id.} at 312.

\textsuperscript{176} Congressional hearings about tribes' views of extension of the Act to them would be consistent with the government's current policy of recognizing and fostering Indian autonomy. \textit{See supra} notes 30-36 and accompanying text.
vations. For example, the Surface Mining Control and Reclamation Act of 1977, which imposes federal reclamation standards for mining on Indian land, directs the Secretary of the Interior to work with Indians to determine how they can administer the statute on their lands. The Indian Self-Determination and Educational Assistance Act declares Congress's commitment to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of these programs and services." Indian administration of the Occupational Safety and Health Act on reservations would be consistent with the Act's policy of decentralization by allowing states to administer health and safety programs. Tribes could inspect businesses owned by individual Indians, but effective administration of the Act with respect to tribally-owned enterprises would be impossible because of the conflict of interest between tribal enforcement of the statute and tribal ownership of businesses.

D. Government Subsidization of Compliance

Congress and the Indian tribes need to decide how financially troubled Indian businesses would pay for the cost of complying with the Act's regulations. Two different sections of the Act implicitly set guidelines for the permissible cost of the Act's standards. Section 652(8) defines an "occupational safety and health standard" as "a standard which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The use of "reasonably" in section 652(8) suggests that before implementation of standards, the Secretary should consider the standards' costs.

178. Id. § 1300.
180. Id. § 450a(b).
182. Many individual Indians own businesses on reservations, and Indian leaders are encouraging more Indians to acquire their own enterprises. Indians prefer individual Indian ownership to joint ventures with private companies because Native American entrepreneurs are more sensitive to their culture than non-Indian companies. Telephone interview with Jacob Coin, Director of Business/Socio-Economic Development Strategy (SEDS) for the Council for Tribal Employment Rights (Mar. 1985).
and benefits to businesses and society. Section 655(b)(5), however, suggests that standards for toxic substances may be valid, regardless of their costs. Whatever the standards of "reasonable" safety, some of the regulations may be too expensive for tribal businesses to meet. Some Indian businesses are not currently profitable. For other reasons related to the social conditions of Indians on reservations, even unprofitable Indian businesses may need to be encouraged to survive. Bankruptcy of tribal businesses that could not afford compliance costs would aggravate reservation unemployment, already unusually high. The Reagan Administration's cuts in general welfare programs, as well as those targeted for Indians, have increased the need for Indian businesses. Tribal businesses not only aid Indians financially, but also further the maintenance of Indian culture by allowing Indians to remain together on reservations.

The importance of Indian businesses dictates that financially troubled tribal enterprises should not have to bear the cost of compliance with the Act. To ensure the survival of Indian businesses, the government should give loans or grants to Indian

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184. See American Textile Mfrs.' Inst. v. Donovan, 452 U.S. 490 (1981) (holding that the Secretary of Labor does not have to do a cost-benefit analysis before promulgating worker safeguards for toxic substances).

185. One reason some Indian businesses have financial problems is that profits are not their only goal. In Donovan v. Coeur d'Alene Tribal Farm, 1983-1984 O.S.H. Dec. (CCH) ¶ 26,732, rev'd, 751 F.2d 1113 (9th Cir. 1985), the Occupational Safety and Health Commission described the goals of the Farm as to improve "the economic and social conditions of the people of the reservations, with the profit motive being secondary to these purposes." Id. at 34,168.

186. See, e.g., F. COHEN, supra note 16, at 718; Profile, TERO, vol. 1, no. 2, at 6 (Council for Tribal Employment Rights 1984) ("The 2.8 million acre [Wind River] reservation has about 7000 Indian people. Smith [director of Wind River's Tribal Energy Rights Organization] says that the unemployment rate is 64%, which is mild, he adds, compared to some reservations with unemployment in the eighty and ninety percentiles [sic].") (on file with U. Mich. J.L. Ref.).


188. Clinton, supra note 38, at 979, states:

[F]or the reservation policy to remain a viable option for the tribal Indian, tribally leased economic development of Indian reservations is essential. Only the development of economic opportunities within the structure of the tribal society will continue to preserve Indian control and Indian culture within the land base allocated for such purposes. See also supra notes 46-48 and accompanying text.

189. If the government decided to help Indian businesses through a loan program, it could use § 636(b)(3) of the Small Business Budget Reconciliation and Loan Consolidation/Improvement Act, 15 U.S.C. §§ 632, 633, 636, 636a, 639, 696 (1982), provided that businesses met all of the statute's requirements. Section 636(b)(3) states that the government can make loans as the Small Business Administration may determine to be necessary or appropriate to assist any small business concern in effecting additions to, alterations in, or reinstatements in the same or a
businesses that cannot afford to pay their compliance costs. Government payment of Indians’ compliance costs, through either a loan or grant program, would be consistent with the government’s policy of providing economic assistance to Indian businesses. The federal government currently gives economic aid, such as revolving loan funds,\textsuperscript{190} to tribal enterprises. Indian businesses, though, should pay their own costs if they can afford them, thereby allowing Indians to move closer to self-sufficiency.

\section*{Conclusion}

The Occupational Safety and Health Act is a general statute that does not apply to Indian businesses on reservations because it does not specifically mention them. Such an interpretation of the Act is consistent with the government’s current policy of fostering Indian self-determination, the government’s duty to promote tribal autonomy, and judicial deference for Indian sovereignty in treaty construction.

Congress should amend the Act in a manner that fulfills the government’s obligations to protect both tribal independence and individual Indians. Thus, Congress should amend the Act to explicitly extend its protection to workers on Indian reservations, while respecting Indian sovereignty by giving Indians an opportunity to decide how the Act will apply to them.

—Maureen M. Crough