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The Ninth Circuit Court of Appeals' Enforcement of the Fair Labor Standards Act in Solis v. Matheson: A Discussion of Laws of General Applicability and their Impact on Tribal Sovereignty and Independence

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NOTE

THE NINTH CIRCUIT COURT OF APPEALS' ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT IN *SOLIS V. MATHESON*: A DISCUSSION OF LAWS OF GENERAL APPLICABILITY AND THEIR IMPACT ON TRIBAL SOVEREIGNTY AND INDEPENDENCE

Doug Nix[*]

I. Introduction

With tens of thousands of new congressional regulations becoming effective every year and hundreds of thousands already in effect, to say that the impact on anyone or any group falling subject to these regulations is immense is an understatement. So when a statute makes broad categorizations about when it regulates by stating, for example, that it applies to employers with employees engaged in interstate commerce, whom exactly does it mean to include?[1] This statute, the Fair Labor Standards Act, and many others like it, never refers to Indian tribes, either because Congress never considered the possibility of the statute applying to tribes because they did not intend for it to apply to them, or perhaps because they simply assumed it *would* apply. In cases that raise the issue of whether these types of statutes were intended to apply to Indian tribes, the only thing that is clear is that the statutes are not.

These are telling conditions for the atmosphere surrounding the Ninth Circuit Court of Appeals when it heard *Solis v. Matheson*, a case that adds to what has been an ongoing battle between the longstanding principle that ambiguous federal statutes are to be resolved in favor of Indian tribes (therefore requiring specific congressional intent in order to apply the statute to them) and the belief that federal statutes should be presumed to apply to Indian tribes.[2] The court

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1. *See* 29 U.S.C. § 207(a)(1) (2006).

2. 563 F.3d 425 (9th Cir. 2009); *see also* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) ("[I]t 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."); Elk v. Wilkins, 112 U.S. 94, 100 (1884) ("General acts of congress [do] not apply to Indians, unless

in *Matheson* held that the Fair Labor Standards Act (FLSA), a federal statute silent on whether it pertains to Indian tribes or their members, applied to a business located on an Indian reservation and owned by tribal members.[3] The importance of a court holding as the Ninth Circuit did in this case is because of the reasons implied above: that the enormous amount of statutes that were once unclear as to their application to tribes may now be presumed to apply to them. This creates a new reality for many Indian tribes: that in order to overturn this presumption, they now must engage in costly litigation or else risk being massively regulated by the federal government and thereby lose both tribal sovereignty and independence.

This note examines the Ninth Circuit's troubling interpretation of prior case law in *Solis v. Matheson* and argues that the cases on which it relies were misused and their holdings stretched much further than was ever intended. The note then addresses the relevant canons of statutory construction and discusses how their neglect, along with the misinterpretation of applicable cases, led to the creation of the exceptions used in *Matheson*. The discussion continues by describing the ramifications that this type of analysis will have on tribal sovereignty and independence and further suggests alternatives to the Ninth Circuit's interpretation that more accurately reflect standing case law. This note concludes by tying together the reasons why the Supreme Court should grant certiorari in this case (or one like it) to clear up this muddied issue and prevent the possibility of this holding extending further to the point where this presumption continues to apply even in the presence of conflicting tribal laws.

II. The Application of FLSA to the Mathesons

Solis v. Matheson involves a smoke shop owned by Paul and Nick Matheson, members of the Puyallup Indian Tribe.[4] The shop is located on trust land within the Puyallup Reservation, but sells products both to Indians and non-Indians.[5] The case arose when the U.S. Secretary of Labor filed suit against the Mathesons for failure to pay overtime wages to their employees, as required by FLSA.[6] The Mathesons countered that FLSA should not apply to them because they are eligible either for the intramural-affairs exception, the treaty-rights exception, or both.[7]

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so expressed as to clearly manifest an intention to include them.").

3. *Matheson*, 563 F.3d at 428.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 429.

FLSA applies to enterprises that have employees and engage in interstate commerce.[8] The statute's objective is "to achieve certain minimum labor standards, such as overtime [wage] requirements."[9] The court in *Matheson* began its analysis by stating that FLSA did not expressly apply to tribes and, as such, was a statute of general applicability.[10] It then continued under the presumption that statutes of general applicability apply to tribes and their members unless one of a few narrowly construed exceptions is implicated.[11]

From there the court addressed the intramural exception. Because the smoke shop was owned only by tribal members and not the tribe itself, the court found there was nothing "profoundly intramural" about the Mathesons' business, therefore ruling that the exception did not apply.[12] Next, the court held that, because there was neither a direct discussion of employment or wages in the treaty nor any language ambiguous enough to be construed as covering required payment of wages, the application of FLSA to a retail business did not impact the tribe's treaty with the United States.[13] Not finding any of the exceptions applicable, the court additionally concluded that the Secretary of Labor was authorized to enter the reservation for the purpose of locating records necessary to enforce the statute despite treaty language giving the Puyallup Tribe the right to exclude and prevent non-Indians from residing on their land.[14] The court did, however, vacate the automatic appointment of a receiver upon the Mathesons' failure to pay because evidence had neither been presented nor findings made to show why such appointment was necessary.[15]

III. Legal History

A. How the Issue Arose

The issue of whether statutes of general applicability apply to Indian tribes first arose in *Elk v. Wilkins*, in which the United States Supreme Court found that, "Under the constitution of the United States, as originally established, ... [g]eneral acts of congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[16] Confusion then began to

8. 29 U.S.C. § 202 (2006).
9. *Matheson*, 563 F.3d at 429; *see also* 29 U.S.C. § 207(a).
10. *Matheson*, 563 F.3d at 429.
11. *Id.* at 429-30.
12. *Id.* at 434.
13. *Id.* at 435.
14. *Id.* at 437.
15. *Id.* at 438.
16. 112 U.S. 94, 99-100 (1884).

arise after the Supreme Court's holding in *Federal Power Commission v. Tuscarora Indian Nation*.[17] *Tuscarora* addressed whether a section of tribal lands may be condemned by a licensee under the eminent-domain powers granted by the Federal Power Act.[18] The Court found that the Act clearly indicated that Congress intended to include tribal lands under the statute.[19] But given Congress's authority to limit, modify, or even eliminate sovereign powers that the tribes otherwise retain,[20] once the Court acknowledged Congress's intent to apply the statute to the Indian tribes, its analysis needed to go no further. As a result, the Court's now oft-quoted statement 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"[21] is arguably dicta.

Tuscarora relied on two cases in particular, *Superintendent of Five Civilized Tribes* ex rel. *Fox v. Commissioner*[22] and *Oklahoma Tax Commission v. United States*,[23] where the Court found that statutes broadly included Indian tribes because Congress had not made any indication to the contrary.[24] The first found that the statute at issue was so broad as to express Congress's intent to tax every citizen.[25] The second relied on the rule against finding implied exemptions in tax statutes to conclude that the Indian-owned properties at issue were intended to be subject to the tax.[26] The language in *Tuscarora* has led several circuit courts to find that a presumption exists that statutes of general applicability apply to tribes and their members.[27]

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17. 362 U.S. 99 (1960).
18. *Id.* at 115.
19. *Id.* at 118.
20. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).
21. *Tuscarora*, 362 U.S. at 116.
22. 295 U.S. 418 (1935).
23. 319 U.S. 598 (1943).
24. *Tuscarora*, 362 U.S. at 116-17.
25. *Fox*, 295 U.S. at 419-20.
26. *Okla. Tax Comm'n*, 319 U.S. at 604.
27. *See, e.g.*, Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1082 (9th Cir. 2001); Equal Employment Opportunity Comm'n v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250-51 (8th Cir. 1993); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115-16 (9th Cir. 1985); United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), *superseded by statute on other grounds*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2497, *as recognized in* United States v. E.C. Invs., Inc., 77 F.3d 327, 330 (9th Cir. 1996).

Eighteen years later, the Supreme Court once more addressed the issue of tribal sovereignty in *Santa Clara Pueblo v. Martinez*.[28] The holding in *Martinez*—that an "unequivocal expression" of congressional intent is required before courts can find that a tribe's sovereign immunity has been abrogated[29]—appears to be inconsistent with *Tuscarora* and is instead much more aligned with the principles of tribal sovereignty and autonomy. Moreover, the Court in *Montana v. United States*, consistent with its willingness to support tribal independence, delineated the inherent sovereign power Indian tribes retained over non-tribal members who enter into consensual commercial relationships with them on or off Indian fee lands.[30]

Additional Supreme Court cases in the 1980s increased doubt that the language in *Tuscarora* was anything more than overgeneralized dicta and that statutes ambiguous as to their application should be interpreted to benefit tribes so as to be consistent with traditional notions of sovereignty and tribal independence.[31] *Merrion v. Jicarilla Apache Tribe*[32] was such a case. In upholding the tribe's authority to tax non-members conducting business on reservation lands, the Court held that Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy,"[33] and their "authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power."[34]

B. The Circuit Courts

Reeling from this ambiguity, circuit courts have understandably been split as to how these general statutes apply to tribes and their members.[35] In

28. 436 U.S. 49 (1979).

29. *Id.* at 59.

30. 450 U.S. 544, 565 (1981).

31. *See, e.g.*, Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) ("[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.'") (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

32. 455 U.S. 130 (1982).

33. *Id.* at 140 (quoting S. REP. NO. 45-698, at 1-2 (1879)).

34. *Id.* at 141.

35. *See, e.g.*, Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080 (9th Cir. 2001) (holding that in the absence of express statutory language the Age Discrimination in Employment Act did not apply because the relationship between the tribal housing authority and a tribal member it employed touched on "purely internal matters");

Donovan v. Navajo Forest Products Industries the Tenth Circuit refused to apply the Occupational Safety and Health Act to a tribal business absent congressional intent, as application would abrogate treaty provisions and dilute principles of tribal sovereignty and self-government "merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons."[36] In light of *Merrion*, the court held it would not divest tribal power to manage reservation lands without some expression of legislative intent to do so.[37] But then the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm* re-energized *Tuscarora*, giving its language new life by interpreting its wording as a general rule that presumes the applicability of federal statutes to tribes and their members unless one of three exceptions is met.[38]

The court in *Coeur d'Alene* stated that

> [a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.[39]

Taking their lead from *Coeur d'Alene*, many circuits now presume the applicability of ambiguous federal statutes and apply the three exceptions solidified in that case.[40]

Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 181-82 (2d Cir. 1996) (presuming the applicability of OSHA in holding it applied to a tribal enterprise and would not interfere with the tribe's self-governance in purely intramural affairs despite the fact that the tribal enterprise was owned and operated by the tribe within the boundaries of the reservation); Equal Employment Opportunity Comm'n v. Cherokee Nation, 871 F.2d 937, 938 n.3 (10th Cir. 1989) (questioning "the continuing vitality of the *Tuscarora* decision in light of" *Merrion*); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 713 (10th Cir. 1982) ("*Merrion*, in our view, limits or, by implication, overrules *Tuscarora* . . . .").

36. *Navajo Forest Prods. Indus.*, 692 F.2d at 714.

37. *Id.*

38. 751 F.2d 1113, 1116 (9th Cir. 1985).

39. *Id.* (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980), *superseded by statute on other grounds*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2497, *as recognized in* United States v. E.C. Invs., Inc., 77 F.3d 327, 330 (9th Cir. 1996)).

40. *See, e.g.*, Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004); *Karuk Tribe Hous. Auth.*, 260 F.3d at 1078-79; *Mashantucket Sand & Gravel*, 95 F.3d at 181-82.

The Supreme Court then came back onto the scene with *United States v. Dion*, holding that when a conflict exists between the law and Indian treaty rights, a court may uphold the enforcement of a law against Indian tribes only when Congress "actually considered the conflict" and expressly chose to abrogate such rights.[41] This creates the interesting argument of whether this was simply meant to approve of a treaty-rights exception or whether the Court's statement, if read in the context of the entire opinion, was an indirect espousal of Congress's inability to regulate tribes and their members without expressing an intent to do so.

C. Where Do These Decisions Leave Us?

The Supreme Court has not yet ruled on the applicability of FLSA to Indian tribes, and so far the issue has come before only two circuits.[42] The Seventh Circuit in *Reich v. Great Lakes Fish & Wildlife Commission* was the first to hear the issue, but the court opted not to confront the principal issue by instead finding FLSA inapplicable based on an exemption in the statute for law-enforcement officials.[43] In passing, the court pointed out that FLSA presumably applied, but with no mention of *Tuscarora*.[44]

The first case addressing FLSA to reach the Ninth Circuit, *Snyder v. Navajo Nation*, involved similar facts and concluded with a similar holding; however, it explicitly presumed applicability pursuant to *Tuscarora*.[45] The court then tried to tie the exemption into one of the *Coeur d'Alene* exceptions, stating that "[t]ribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural."[46] Because the statute expressly exempted the employees involved,[47] the language seemed unnecessary. But it appears the court was willing to construe the facts to show its willingness to apply *Tuscarora* and the *Coeur d'Alene* exceptions to FLSA and other statutes of general applicability. With differing opinions having arisen in the circuit courts, it appears time for the Supreme Court to take action by validating one approach or formulating one of its own.

41. 476 U.S. 734, 740 (1986).

42. Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009); *Snyder*, 382 F.3d at 895; Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993).

43. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 495.

44. *Id.*

45. *Snyder*, 382 F.3d at 895.

46. *Id.*

47. *Id.*

IV. The Presumption for Statutes of General Applicability

A. Introduction to the Ninth Circuit's Analysis

Solis v. Matheson had the perfect set of facts that *Snyder* lacked. Unlike the plaintiffs in *Snyder*, the Mathesons did not fall into any clearly defined exception in the Fair Labor Standards Act.[48] Without an express exception in the Act, the court had to address whether FLSA, a statute of general applicability, presumptively applied to Indian tribes. The case therefore created an opportunity for the Ninth Circuit to solidify its application of *Tuscarora* and *Coeur d'Alene* to FLSA.

The Ninth Circuit's reliance in *Matheson* on *Tuscarora* (and consequently on *Coeur d'Alene*) to apply FLSA, a statute of general applicability, to a business owned by tribal members is misplaced. The Supreme Court's longstanding efforts to encourage tribal independence and construe ambiguous statutes to tribes' benefit, if nothing else, mandates broader exceptions consistent with these objectives to rebut the tenuous presumption of applicability absent congressional intent.[49]

The fundamental issue in *Matheson* centers around whether statutes of general applicability presumptively apply to businesses owned by tribal members and located on tribal lands or whether general acts of Congress do not apply to Indian tribes or their members unless at least some degree of evidence suggests Congress intended to do so. This issue arises from dicta in *Tuscarora*, where the Court stated that, despite the fact that general acts of Congress originally did not apply to Indians under the United States Constitution absent a clear intention to include them, "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."[50] If read to mean that a presumption now exists that statutes of general applicability apply to Indian tribes and their property, the language is clearly dicta because the Court found that Congress intended to include Indians in the statute at issue. On the other hand, despite the fact this language is seemingly straightforward, it is possible that the Court simply overstated an idea that would otherwise comport with more traditional themes in Indian law: that the Court was no longer going to require express congressional intent to apply the statute to Indian tribes, but would now

48. *See* Solis v. Matheson, 563 F.3d 425, 429 (9th Cir. 2009).

49. *See* United States v. Dion, 476 U.S. 734, 740 (1986); Montana v. United States, 450 U.S. 544, 565-66 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); Elk v. Wilkins, 112 U.S. 94, 100 (1884).

50. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

consider the *implied* intention of Congress as well. If limited to this, the holding would coincide much more with general principles of statutory construction as well as with previous and subsequent case law.[51]

B. Principles of Statutory Construction

The dissection of this issue must begin with the significant canon of statutory construction, consistently upheld by the Supreme Court, that federal statutes be read generously in favor of Indian tribes and their members and that ambiguous provisions be interpreted to their benefit.[52] This has been further expanded to support the general objective of aligning a statute with traditional notions of sovereignty and tribal independence.[53] These principles prove essential when a court addresses whether a federal statute applies to a business owned by tribal members because, under these guidelines, a federal statute ambiguous as to its application should be analyzed in the light most favorable to the tribe. The canons also comport with the Supreme Court's original assertion that, absent a clear expression to the contrary, federal statutes do not apply to Indians.[54] *Solis v. Matheson* exemplifies a situation where these canons of statutory construction should apply.

The Fair Labor Standards Act, the statute the Secretary of Labor sought to enforce, applies to enterprises with employees who engage in interstate commerce.[55] It also delineates a long list of other groups that are included. The minimum-wage section of the Act even distinguishes between employees employed in Puerto Rico and the Virgin Islands, seamen on an American vessel, and employees who are employed in agriculture,[56] but neither it nor any other section of the Act expresses any intention to apply its provisions to Indians, tribes, or tribal employees. In fact, it fails to mention them at all. For that reason its application to tribes is ambiguous and thus should be construed liberally in their favor.

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51. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); *Merrion*, 455 U.S. at 152; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980); *Elk*, 112 U.S. at 100.

52. *Blackfeet Tribe*, 471 U.S. at 766 ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Merrion*, 455 U.S. at 152 ("'[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.'" (quoting *Bracker*, 448 U.S. at 143-44)).

53. *Bracker*, 448 U.S. at 143-44.

54. *Elk*, 112 U.S. at 100.

55. 29 U.S.C. § 203 (2006).

56. *Id.* § 206(a).

Read in a light favorable to the Mathesons' business, the statute should not apply. First, and most obviously, it is a detriment to their business. The court's holding requires the Mathesons to comply with FLSA, a statute that heightens certain labor standards, such as overtime requirements,[57] that they must follow. This will present a major extra expense added to the cost of the Mathesons' business and is therefore clearly not at all favorable to them. The holding also requires them to pay $31,339.27 in overtime wages, which if they fail to pay allows a receiver to be appointed who could have the authority to enter onto the reservation and collect their assets.[58]

Second, applying the Act to the Mathesons' business impinges on the Puyallup Tribe's sovereignty and independence by taking away its power to regulate or not regulate businesses owned by tribal members. Even though this statute and many others like it could be said to provide a benefit to the population as a whole, such as in this case ensuring minimum labor standards for workers, the canons of construction nevertheless dictate that the statute should be read in favor of tribal sovereignty and tribal independence. Under this interpretation an ambiguous congressional act that is unfavorable to Indian tribes or their members should always be construed in support of not applying to Indian tribes.

C. The Ninth Circuit in Matheson

The Ninth Circuit begins its analysis by acknowledging that an Indian tribe has "a strong interest as a sovereign in regulating economic activity involving its own members within its own territory and . . . may enact laws governing such activity."[59] Paradoxically though, the court follows this admission with a finding that, because the Mathesons did not assert that the Puyallup Tribe enacted different wage and hour laws that would have in effect been preempted by FLSA, there was no evidence that the "Puyallup Tribe . . . acted on its right of self-governance in [that] field."[60] But how does a finding that Indian tribes have a strong interest in regulating economic activities of their members create an assumption that the absence of tribal laws negates the significance of their ability to self-govern? And while the court does not go so far as to say that any

57. *Id.* § 207(a)(2).

58. Solis v. Matheson, 563 F.3d 425, 438 (9th Cir. 2009).

59. *Id.* at 433-34 (quoting Nat'l Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1978)).

60. *Id.* at 434.

tribal laws that contradict FLSA would be preempted, it certainly does not say that it would not.[61]

With or without tribal laws, this language should be an important part of a court's consideration because it also goes back to the canons of construction. Even without tribal laws to the contrary, federal acts should still be read favoring the tribe's interest in regulating the economic activity of its members. This is additionally supported by the precept espoused in *Montana v. United States* that

> 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 nonmembers 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.[62]

The court in *Matheson* argues that there is neither evidence that the tribe asserted regulatory authority over employment and wages for non-Indians nor evidence that "non-Indians employed at [the Mathesons' smoke shop] entered into any agreements or dealings with the Puyallup Tribe that would subject [them] to tribal civil jurisdiction."[63]

First, if the tribe retains the inherent sovereign authority to regulate the activities of non-members who enter into commercial relationships with it or its members, should the lack of specific regulations in the area covered by the general statute really subvert the tribe's independent ability to govern such matters? It would appear much more consistent with *Montana* for a court to find that a tribe retains the independent authority to regulate consensual commercial dealings absent clear congressional intent to the contrary. Moreover, the court presumes that an absence of regulations is not a policy decision when, in fact, such lack of regulation often is a conscious choice made by a tribe to decrease overhead costs and promote business profitability and economic growth. This represents a fundamental interest the tribe has in

61. *Id.* at 433-34.
62. 450 U.S. 544, 565-66 (1981) (citations omitted).
63. *Matheson*, 563 F.3d at 436.

regulating economic activity, as it would provide jobs and increase the standard of living for tribal members.

This argument is further supported by a relatively recent case where the Supreme Court upheld the Jicarilla Apache Tribe's right to impose a severance tax on non-Indians who produced oil and gas from within the tribe's reservation.[64] *Matheson* actually cites this case in support of its supposition that pursuant to *Montana* Indian tribes retain only the ability to regulate their economic infrastructure by asserting their authority over the specific issue covered by a statute, such as by asserting the right to tax in *Merrion*.[65] This is yet another selective reading by the Ninth Circuit. *Merrion* specifically provides that the power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction."[66] Furthermore, the Supreme Court in *Merrion* recognized that Indian tribes retain the right "of self-government and jurisdiction over the persons and property within the limits of the territory they occupy" so long as that jurisdiction has not been limited or removed by treaty or act of Congress.[67] This case makes clear that tribes have the authority to regulate economic activity on their land. Tribes should not be deprived of this right absent the clear intention of Congress to do so.

Second, the court deceptively notes the lack of evidence that the smoke shop's employees entered into any agreements or dealings with the Puyallup Tribe that would subject them to tribal civil jurisdiction.[68] *Montana* clearly expresses, however, that all that is required to subject a non-Indian to tribal civil jurisdiction is a consensual contractual relationship with the tribe or its members.[69] When a non-Indian enters into a consensual employment contract to work for an employer, he should be subject to the tribe's employment regulations or, as in this case, the lack thereof. Here, the employees of the Mathesons' smoke shop most likely entered into employment contracts with the smoke shop, and this by itself should be enough to subject them to the Puyallup Tribe's civil jurisdiction.

If the court finds it must assume that the statute presumptively applies, then according to the Ninth Circuit the intramural, treaty, and expression-of-intention exceptions outlined by the Ninth Circuit in *Coeur d'Alene* can be

64. *Merrion*, 455 U.S. at 137-44.
65. *Matheson*, 563 F.3d at 433-34.
66. *Merrion*, 455 U.S. at 137.
67. *Id.* at 140 (quoting S. REP. NO. 45-698, at 1-2 (1879)).
68. *Matheson*, 563 F.3d at 436.
69. Montana v. United States, 450 U.S. 544, 565 (1981).

invoked, if applicable, to rebut the presumption that the statute applies.[70] In *Matheson*, the court lists conditions of tribal membership, inheritance rules, and domestic relations as examples of things it considers as purely intramural.[71] Given the language in *Montana*,[72] the intramural exception should not be interpreted so narrowly, but instead should be given a much broader reading. For example, in *Equal Employment Opportunity Commission v. Fond du Lac Heavy Equipment & Construction Co.* the Eighth Circuit found that "[t]he consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe" and that to allow this consideration to be controlled by the federal government "dilutes the sovereignty of the tribe."[73] To fully understand whether the exceptions created by the Ninth Circuit should have ever been created (and, if so, with what principles they should be read in conjunction), it is important first to understand the perpetual misapplication of precedent that led it to create these exceptions in the first place.

D. The "Exceptions"

The exceptions laid out in *Coeur d'Alene* have taken hold across the country and have gained the allegiance of many circuit courts.[74] The exceptions did not, however, originate with *Coeur d'Alene*. *United States v. Farris*, a criminal case also out of the Ninth Circuit, found that the presumption applied but failed to cite *Tuscarora* or any other authority for this proposition.[75] This is important because the court in *Coeur d'Alene* relied only on *Farris* for its three exceptions,[76] and *Matheson* in turn relies on *Coeur d'Alene*.[77] The court in *Farris* explained that there seemed to be three exceptions to the rule that statutes of general applicability are presumed to apply to Indian tribes.[78]

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70. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

71. *Matheson*, 563 F.3d at 430 (quoting *Coeur d'Alene*, 751 F.2d at 1116).

72. *Montana*, 450 U.S. at 565-66.

73. 986 F.2d 246, 249 (8th Cir. 1993).

74. *See* Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004); Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996).

75. 624 F.2d 890 (9th Cir. 1980), *superseded by statute on other grounds*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2497, *as recognized in* United States v. E.C. Invs., Inc., 77 F.3d 327, 330 (9th Cir. 1996).

76. *Coeur d'Alene*, 751 F.2d at 1116.

77. Solis v. Matheson, 563 F.3d 425, 430 (9th Cir. 2009).

78. *Farris*, 624 F.2d at 893.

For its first proposition, the court in *Farris* cites *Santa Clara Pueblo v. Martinez*,[79] where the Supreme Court reversed the Tenth Circuit's application of the Indian Civil Rights Act, thus disallowing actions against the tribe or tribal officers.[80] The Supreme Court, in finding the Act did not impliedly authorize actions for declaratory or injunctive relief, held that Congress must make its intention clear in order to permit such an intrusion on tribal sovereignty.[81] *Farris* attempts to argue that, because the Court in *Martinez* acknowledged that Indian tribes "have power to make their own substantive law in internal matters,"[82] this results in limiting an Indian tribe's ability to self-govern to matters that are purely intramural.[83] In other words, *Farris* tries to use language that the Supreme Court cites in favor of tribal independence and the protection of tribal sovereignty to create a limitation on those very principles. In no way does the language imply or even hint that intramural matters are an exception to an unstated general rule.

Interestingly enough, *Coeur d'Alene* dealt with a statute that impinges on tribal sovereignty without expressing unambiguous congressional intent.[84] The court in that case exposed the Coeur d'Alene Tribe to suit under the Occupational Safety and Health Act.[85] This makes it appear strangely similar to *Martinez*, the case cited for the creation of the "intramural exception."[86] *Martinez*, however, did not find that statutes of general applicability were presumed to include Indians, but rather the opposite: that an unequivocal expression of congressional intent was required.[87] The Court, unlike the court in *Farris*, *Coeur d'Alene*, or *Matheson*, based its finding on a much more adept view of Indian rights and tribal sovereignty. This is not to say that tribal sovereignty should be the limit to the exception or that there should be an exception at all—it is merely to show the lack of thorough analysis that created the exceptions in the first place. *Farris* and its progeny fail to understand the overall federal policy of promoting self-governance and self-sufficiency and the connection between tribal governmental services, the revenue generated by tribal enterprises, and tribal autonomy.

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79. *Id.*
80. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).
81. *Id.*
82. *Id.* at 55-56.
83. *Farris*, 624 F.2d at 893.
84. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).
85. *Id.* at 1114.
86. *See Farris*, 624 F.2d at 893.
87. *Martinez*, 436 U.S. at 59.

How the second and third exceptions were formulated, however, is much more understandable. The second exception—that absent the clear expression of Congress's intent general statutes do not abrogate rights guaranteed by Indian treaties[88]—should come from the established canons of statutory construction. It is also consistent with the idea that treaties and statutes are to be resolved in the Indians' favor.[89] The Court uses this canon in finding that "[t]he ratifying legislation must be construed to exempt the Indians' preserved rights."[90] Of course, a treaty ratified by Congress is not the same thing as a congressional statute, though in many instances it may have a similar effect or may be governed by the same principles of interpretation. So it makes perfect sense that the Supreme Court, in concluding that a congressional act did not abrogate a tribal member's hunting and fishing rights, would affirm that "'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress'" while not mentioning that Indians are afforded the same protections when a congressional act attempts to erode tribal independence.[91] The principle that treaty rights should not be abrogated absent clear congressional intent is therefore reasonable, but the Ninth Circuit's attempt to limit that principle by making it an exception is not.

One case cited by the court in *Farris* seems to assert that a treaty must overturn the general presumption that the statute applies,[92] but the two more recent Supreme Court cases cited by the court come nowhere near to saying that in the absence of the rights guaranteed in a treaty a generally applicable statute would apply.[93] To the contrary, they are surrounded by language that supports tribal sovereignty and independence. More importantly, the oldest case, *Superintendent of Five Civilized Tribes* ex rel. *Fox v. Commissioner*, held that income derived from outside the reservation was included under the taxing act's general terms because no treaty or other act of Congress held otherwise.[94] While the Court in no way looked at the Act in the light most favorable to the tribal member (as it should have done), it is still understandable that it would find that tribal members earning income outside the reservation would not be entitled to a presumption that the statute did not apply. The point of the

88. *Farris*, 624 F.2d at 893.

89. *See* Antoine v. Washington, 420 U.S. 194, 199 (1975).

90. *Id.* at 206.

91. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (quoting Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934)).

92. Superintendent of Five Civilized Tribes *ex rel.* Fox v. Comm'r, 295 U.S. 418, 420-21 (1935).

93. *Antoine*, 420 U.S. 194; *Menominee Tribe*, 391 U.S. 404.

94. 295 U.S. at 421.

presumption is that, as once-distinct sovereigns pre-existing the Constitution, tribes are entitled to rights on their reservations that they would have enjoyed prior to colonization absent a clear expression of Congress to limit or remove those rights.[95] It is completely reasonable that a court would find that earning tax-free income is outside of the scope of those sovereign rights. This analysis is much more consistent with the two most recent cases cited by the court in *Farris*[96] and is also more aligned with the Supreme Court's holding in *Merrion*.[97]

As explained in *Merrion*, a tribe's authority to control economic activity within its jurisdiction is not simply derived from a treaty right to exclude non-members from its land, but rather comes from its inherent power to self-govern.[98] Even the dissent in *Merrion* agreed that "[s]ince a tribe may exclude nonmembers entirely from tribal territory, the tribe necessarily may impose conditions on a right of entry granted to a nonmember to do business on the reservation."[99] These cases support the proposition that statutes should be construed to require congressional intent before treaty rights may be revoked, not that in the absence of a treaty such protection is not still in place.[100]

The third exception is almost self-explanatory. If Congress expresses an intention not to apply a statute to Indian tribes, then it is self-evident that there should not be a presumption that the statute applies. Logically, Congress, having the authority specifically to apply statutes to tribes, also has the power to specify that the statute does not apply to tribes and, as long as there were no constitutional problems, courts would be bound to uphold that intent. The second or third exceptions, however, could be invoked regardless of whether a court believes there should be a presumption that the statute applies to tribes. Given the language in *Tuscarora* it is conceivable that the court in *Farris* would think it prudent to view Supreme Court cases defending a tribe's rights granted under a treaty or upholding a tribe's rights to govern intramural matters as carving out "exceptions." In spite of this, given the more recent Supreme Court cases and the longstanding rights and protections the courts have afforded Indian tribes, these decisions should be viewed not as creating exceptions but as safeguarding specific rights preserved by the courts for Indian tribes to the inclusion of other rights they have retained as once-sovereign nations.

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95. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978).
96. *Antoine*, 420 U.S. 194; *Menominee Tribe*, 391 U.S. 404.
97. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137-46 (1978).
98. *Id.* at 137-41.
99. *Id.* at 160 (Stevens, J., dissenting).
100. *Merrion*, 455 U.S. 130; *Antoine*, 420 U.S. 194; *Menominee Tribe*, 391 U.S. 404.

E. Application of the Exceptions

The Mathesons did not argue the applicability of the third exception, that Congress explicitly or implicitly intended the law not to apply to Indians.[101] If Congress had indicated its intention to apply or not to apply the statute, the case more than likely would not have arisen. Faced with the Ninth Circuit's presumption that statutes of general applicability apply to Indian tribes, the Mathesons did, however, argue both the intramural exception and the treaty-rights exception.[102]

The court's application of "the exceptions" in *Matheson* is a great example of the slippery slope that has been created and has now all but wiped out any value that the intramural exception once had. The court even went so far as to say that the intramural exception may be used "only *in those rare circumstances* where the immediate ramifications of the conduct are felt primarily within the reservation."[103] The court, in holding that there was nothing "profoundly intramural" about a tribe's ability to regulate or not to regulate employment standards for a business owned by its members and located on its reservation, pointed to the fact that the business employs non-Indians, sells goods to non-Indians, and is owned by tribal members rather than by the tribe itself.[104] The intramural exception should not be so narrowly construed. As *Merrion* explained in describing a tribe's ability to tax, the right "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction."[105] Though the statement does not appear to have been intended as an exception, if the exceptions are validated by the Supreme Court it is much more sensible to make them broad enough to include economic and other activities located on tribal lands that are important to self-governance.

Arguing the applicability of the treaty-rights exception, the Mathesons asserted that their tribe's treaty right to occupy and exclude entitles them to regulate employment and wages of non-tribal members who enter into consensual employment agreements to work for tribal members and, in this case, on tribal lands.[106] The court in *Matheson* quotes from *Montana*, stating

101. Solis v. Matheson, 563 F.3d 425, 429 (9th Cir. 2009).

102. *Id.* at 430.

103. *Id.* (quoting Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004)) (emphasis added).

104. *Id.* at 434.

105. *Merrion*, 455 U.S. at 137.

106. *Matheson*, 563 F.3d at 435.

that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations."[107] *Montana* did not say that the tribe must exercise its right in order to retain it.[108] Nevertheless, the court in *Matheson* focuses on the fact that, besides issuing a license to conduct business, the Puyallup Tribe did not specifically seek to regulate wages and hours of employment.[109] In concentrating on this, the court misconstrues the Supreme Court's holdings both in *Montana* and *Merrion* and, in the process, severely limits the applicability of the treaty-rights exception. The court in *Matheson* limits *Montana* to cases where the tribe asserted regulatory authority over the activities of nonmembers.[110] It also cites only the beginning of the *Merrion* holding, that "[a] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands."[111]

What the court in *Matheson* fails to understand is that the inherent sovereign power Indian tribes retain over non-members mentioned in *Montana* is explained by the rest of the holding in *Merrion*. Reading further into the heart of the *Merrion* holding reveals that the Supreme Court found a tribe's authority is not simply derived from its treaty right to exclude non-members, but rather comes from its inherent power to self-govern.[112] More specifically, the Court in *Merrion*, in quoting from a treatise on Indian law, explained, "[O]ver all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business."[113] From this statement it would be logical to conclude that a tribe is not required specifically to assert regulatory authority over employment and wages for non-Indians, but rather, these rights are derived from the tribe's general authority as a sovereign. The court in *Matheson* should have considered the Puyallup Tribe's authority to control economic authority, which it derives not only from its treaty right to exclude, but also from its inherent power to self-govern within its jurisdiction.

107. *Id.* (quoting Montana v. United States, 450 U.S. 544, 565-66 (1981)).
108. *Montana*, 450 U.S. 544.
109. *Matheson*, 563 F.3d at 436.
110. *Id.* at 436.
111. *Id.* at 435 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982)).
112. *Merrion*, 455 U.S. at 137-44.
113. *Id.* at 146 n.12 (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 439 (1942)).

F. What Legal Reasoning Should the Court Have Used?

Merrion stands as a compelling example of sound legal reasoning that furthers tribal independence by taking into account the traditional notions of tribal sovereignty.[114] Though it places emphasis on the importance of a tribe's ability to tax, its underlying objective of supporting tribal independence gives circuit courts good reason to question the continuing validity of *Tuscarora*.[115] Its recognition of the broad authority Indian tribes retain to regulate economic activity within their territories reveals, at minimum, that the exceptions truly are far too narrow. In reality the rule should be an inverse of the first and third exceptions: absent congressional intent to the contrary, general acts of Congress should be presumed not to apply to Indian tribes unless the subject matter the statute regulates is so far outside traditional notions of tribal sovereignty that it should be held as a right not retained by the tribe. The canons of statutory construction and the tribe's treaty right to exclude non-members support this analysis, but, more importantly, this standard allows Indian tribes to retain sovereign authority over matters necessary for their self-governance. In applying this rule to the *Matheson* case, the ability to regulate or not to regulate commercial activity, labor, employment, and other areas central to economic activity on its reservation is a right that the Puyallup Tribe would as an independent sovereign have expected to retain and, as such, it should enjoy the presumption that statutes of Congress do not take that right absent a clear intention to do so.

IV. Conclusion

Solis v. Matheson serves as an excellent example of how, when a court presumes the applicability of an ambiguous statute (citing *Tuscarora*) and then uses the exceptions set out in *Coeur d'Alene*, Indian tribes stand little chance. Given that this case involves a direct analysis of the language from *Tuscarora* as well as the validity of *Coeur d'Alene*, it would be an excellent case for the Supreme Court to accept on certiorari so that it can clarify its dicta in *Tuscarora* and settle what is required of Congress before a federal statute may abrogate tribal sovereignty.

The majority view is quickly trending toward a presumption that statutes of general applicability apply to Indian tribes. It is likely that the next step downward will be that statutes of general applicability will preempt legislation

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114. *See id.* at 137-46.

115. *See* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 713 (10th Cir. 1982).

already enacted by tribes. That is why it is very important for the independence and self-governance of Indian tribes that this trend be stopped and, if possible, reversed. The Supreme Court should step in and adopt a standard, such as the one suggested above, that promotes tribal independence by recognizing that, on matters involving a tribe's general authority as a sovereign, Congress must unequivocally express its intention to include Indian tribes.