

COMMENTS

Providing Equal Educational Opportunities: Title IX and Indian Tribal Schools

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The federal government has long assumed a legal obligation to provide education to the Indian tribes.¹ The government's initial education policy developed as an integral part of its more general policy of "civilizing" the American Indian.² However, federal policies over the past sixty-five years have placed an increasing emphasis on Indian self-governance.³ Consequently, responsibility for the day-to-day operation of Indian education has shifted from federal agencies to tribal governments,⁴ which operate with funds provided by the Department of the Interior and the Department of Education.⁵ Today, there are over one hundred tribally controlled schools nationwide.⁶

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¹ See, for example, Vince Deloria, *Legislative Analysis of the Federal Role in Indian Education* 1-37 (Office of Indian Education 1975) (examining the chronology of the federal government's relationship to the Indians, including obligations to provide education undertaken through treaties and statutes); id at 39-71 (examining the federal government's legal obligations to Indian tribes in the field of education as embodied in various treaties).

² See Felix S. Cohen, *Handbook of Federal Indian Law* 177 (Michie 1982) ("As in earlier eras, education was used as an important device for moving Indians into the mainstream of American society.") (citation omitted). See also Trade and Intercourse Act of 1802, ch 13, § 13, 2 Stat 139, 143 (authorizing the President to expend funds "in order to promote civilization among the friendly Indian tribes"); Act of March 3, 1819, ch 85, § 2, 3 Stat 516, 516-17 (establishing a permanent annual appropriation to introduce the tribes to "the habits and arts of civilization").

³ See, for example, Indian Reorganization Act, Pub L No 73-383, 48 Stat 984 (1934), codified at 25 USC §§ 461 et seq (1994) ("Wheeler-Howard Act") (providing a basis for formalizing tribal self-government and clarifying the powers of reservation governments).

⁴ See Cohen, *Handbook* at 192-95 (cited in note 2) (describing the shift in control over Indian education from the Bureau of Indian Affairs to Indian parents and tribal authorities).

⁵ See Indian Self-Determination and Education Assistance Act of 1975, Pub L No 93-638, 88 Stat 2203, codified at 25 USC §§ 450 et seq (1994) (authorizing federal grants to tribes for the specific purpose of improving tribal governments and permitting tribes to contract to perform services formerly provided by the federal government); Tribally Controlled Schools Act of 1988, Pub L No 100-297, 102 Stat 385, codified at 25 USC §§ 2501 et seq (1994), amended by Pub L No 107-110, 115 Stat 1425 (Jan 8, 2002) (authorizing Indian tribes to contract to receive federal funding for the operation of tribal schools).

⁶ See Bureau of Indian Affairs, Office of Indian Education Programs, *Director's Page*,

Although Congress authorized these schools to promote tribal self-governance,⁷ the recognition of tribal governments has not altered the rights guaranteed by treaty nor diminished the United States's legal responsibility to provide educational services to Indians.⁸ Congress's recognition of tribal governments as providers of educational services is consistent with its historic practice of delegating responsibility for the provision of Indian services to various governmental and private organizations,⁹ but the federal government retains a general legal obligation to serve Indian tribes even if it has delegated some power to other agencies.¹⁰

In this context, there is a tension created when Congress establishes limitations on tribal education. Although the law protects the tribes' interest in self-governance, federal laws related to education—and civil rights laws, in particular—may cut against that very interest. This Comment will explore the conflict of interests by focusing on one civil rights statute: Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any federally funded program or activity.¹¹

The examination of Title IX and its applicability to Indian tribes calls into question the ways in which the federal government should balance its own interests and obligations with the tribes' interest in self-governance. Even as tribes gain greater control of education, the federal government may wish to limit financial support to tribal schools when such support implicitly endorses policies that contravene Congress's expressed will with regards to education and civil rights. Drawing on the principles underlying tribal self-government

available online at <http://www.oiep.bia.edu/director's_page.htm> (visited Mar 15, 2002) ("Since 1995, there have been more schools operated by tribes through grants and contracts than operated by the BIA. In school year . . . 1995, 98 of the 187 [Indian] schools were tribally controlled schools. Since 1995, the number of tribally controlled schools has increased to 120.").

⁷ See generally Robert A. Roessel, Jr., *An Overview of the Rough Rock Demonstration School*, 7 *J Am Indian Educ* 2, 13–14 (1968) (arguing that the development of tribally controlled schools was essential to the Indians' quest for self-determination).

⁸ See Deloria, *Legislative Analysis* at 121 (cited in note 1) ("Recognition of federal tribal governments as sponsoring agencies has in no way altered the rights derived under treaty or changed the general assumption of services for Indians by the United States.").

⁹ See *id.* at 100 (noting that Congress allocated responsibility for Indian programs to various governmental departments).

¹⁰ See *id.* at 73 (noting "[t]wo fundamental facts" that emerge in discussions of the United States's legal responsibility for the education of Indians: (1) Congress may designate "to any department or agency, governmental or private," powers and duties to perform services for Indians; and (2) when Congress assigns such a duty "to a state, a private organization, or a tribal or inter-tribal organization, the legal responsibility of the United States follows the assignment of duties").

¹¹ Title IX of the Education Amendments of 1972, Pub L No 92-318, 86 Stat 235, 373, codified at 20 USC §§ 1681 et seq (1994).

and sex equality, this Comment argues that federally funded tribal schools should comply with Title IX requirements.

Parts I and II of this Comment introduce the relevant background law: Part I examines the history and application of Title IX; Part II discusses the law related to Indian self-governance. Part III argues that tribal schools should be subject to suit for Title IX violations for three reasons. First, Congress intended Title IX to apply to tribal schools. Second, tribal schools cannot claim immunity from suit under Title IX because the tribes waived their immunity by signing assurance letters in which they accepted federal funds. Finally, additional policy reasons, related to general civil rights law and notions of equality contained therein, support this conclusion.

I. TITLE IX

A. Legal History

Concerned that “prejudices and outmoded customs act as barriers to the full realization of women’s basic rights”¹² and desiring to assure women “the opportunity to develop their capacities and fulfill their aspirations on a continuing basis,”¹³ President John F. Kennedy established the President’s Commission on the Status of Women in 1963. The Commission assessed the social and economic position of women in American society and proposed recommendations for federal action in the areas of employment, education, home and community services, insurance and taxes, and legal treatment with respect to civil and political rights.¹⁴ The Commission found that discrimination against women was both pervasive and detrimental to the realization of opportunities for women.¹⁵ Consequently, the Commission issued a comprehensive report proposing expansive changes in the social and economic structure of American society in order to facilitate women’s integration into the workforce and to “encourage women to make their full contribution as citizens.”¹⁶

One of the many responses to the Commission’s findings and proposals was the enactment of Title IX.¹⁷ The language of the introduction to Title IX, which provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education

¹² Exec Order No 10980 (1961) (Kennedy), 3 CFR § 500 (1959–1963), reprinted in 1962 USCCAN 4252.

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *See, for example, Report of the U.S. President’s Commission on the Status of Women* 16–95 (Charles Scribner’s Sons 1965).

¹⁶ *See id.* at 16.

¹⁷ 20 USC § 1681 (1994).

program or activity receiving federal financial assistance,”¹⁸ is modeled on the prohibitions against race and national origin discrimination contained in Title VI of the Civil Rights Act of 1964.¹⁹ Although Title IX was originally proposed as an amendment to Title VI that would have added the word “sex” to its prohibited forms of discrimination,²⁰ the prevalence of discrimination in education resulted in a bill specifically aimed at educational programs.²¹ Specifically, Title IX conditions an offer of federal funding to educational institutions on the recipient’s promise not to discriminate.²² As such, it essentially amounts to a contract between the government and a recipient of federal funds:²³ an exchange of money for a guarantee of non-discrimination in any federally funded educational activity. Title IX is enforceable by private parties through an implied right of action.²⁴

B. Interpretation and Enforcement

The strength of the enforcement mechanisms available pursuant to Title IX, as interpreted by courts and enhanced by subsequent congressional action, demonstrates the forcefulness of the policies underlying the statute: schools must provide an environment free from sexual harassment or discrimination on the basis of sex. In the early 1980s, courts divided over whether Title IX covered only those pro-

¹⁸ *Id.*

¹⁹ Pub L No 8-352, 78 Stat 252, 42 USC § 2000(d) (1994) (“No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance.”).

²⁰ See Ellen J. Vargyas, *Breaking Down Barriers: A Legal Guide to Title IX* 7 (National Women’s Law Center 1994) (“As initially conceived, Title IX would have simply added the word ‘sex’ to the broad prohibition against race and national origin discrimination of all types by recipients of federal funds in Title VI of the Civil Rights Act of 1964.”).

²¹ See *id.* (noting that because “sex discrimination in education was the primary focus of hearings” on gender discrimination, “a provision more narrowly tailored to address sex discrimination in education” was enacted as Title IX). For a detailed description of the legislative history of Title IX, including an account of the proposed goals and remedies sought to be achieved by the bill’s drafters, see Deborah Brake and Elizabeth Catlin, *The Path of Most Resistance: The Long Road toward Gender Equity in Intercollegiate Athletics*, 3 Duke J Gender L & Pol 51, 53 & n 7 (1996) (noting that “hearings on sex discrimination in the summer of 1970 . . . serve[d] as the foundation of the Title IX legislation”).

²² See 20 USC § 1682 (1994) (authorizing federal agencies in charge of distributing federal funds to educational institutions to issue rules and regulations applicable to recipient institutions consistent with the objectives of Title IX).

²³ This analogy has also been used to describe Title VI, which served as the model for Title IX. See *Guardians Association v Civil Service Commission of City of New York*, 463 US 582, 599 (1983) (noting that “Congress intended Title VI to be a typical ‘contractual’ spending-power provision”).

²⁴ See *Cannon v University of Chicago*, 441 US 677, 688–89 (1979) (holding that while personal harm resulting from violation of a federal law does not automatically give rise to a private cause of action under that law, a review of the four “*Cort* factors” implies a right of action under Title IX).

grams directly receiving federal funds within an institution, or the entire institution.²⁵ Although the Supreme Court initially adopted the narrower interpretation,²⁶ Congress ultimately embraced a broader reading by passing the Civil Rights Restoration Act of 1987.²⁷ The Act made clear that an entire institution is covered by Title IX if any of its programs or activities is a recipient of federal funds: Congress included specific findings indicating that the Act was intended to correct the limitations imposed by the Supreme Court and to restore “an institution-wide application” of Title IX.²⁸

The Supreme Court further strengthened Title IX when it armed plaintiffs with the right to seek money damages for an intentional violation of the statute in *Franklin v Gwinnett County Public Schools*.²⁹ Giving plaintiffs access to individual relief made their claims justiciable post-graduation, and the threat of schools having to pay out large damage awards operated as a powerful incentive for them to bring their athletic programs, as well as other educational programs, into compliance with Title IX. Thus, *Franklin* represented a major step forward in Title IX enforcement: By providing the right to seek money damages, the case underscores the fact that ensuring a viable private right of action is essential to protecting and promoting the goals underlying Title IX.

II. TRIBAL SELF-GOVERNANCE: THE APPLICATION OF GENERALLY APPLICABLE LAWS AND THE DOCTRINE OF SOVEREIGN TRIBAL IMMUNITY

Although the policies and application of Title IX are well established, two significant barriers block its application to tribal schools.

²⁵ Compare *Rice v Harvard College*, 663 F2d 336, 338–39 (1st Cir 1981) (refusing to apply Title IX without a claim that sex discrimination occurred in specific educational program receiving federal funds), and *University of Richmond v Bell*, 543 F Supp 321, 333 (E D Va 1982) (holding that the Department of Education could not regulate an athletic department under Title IX, where that department received no federal funds), with *Haffer v Temple University*, 688 F2d 14, 16 (3d Cir 1982) (holding that an athletic department was subject to Title IX when the university as a whole received federal funds).

²⁶ See *Grove City College v Bell*, 465 US 555, 572 (1984) (holding that Title IX applied only to a “program or activity” that actually received federal funds).

²⁷ Pub L No 100-259, 102 Stat 28, codified at 20 USC § 1687 (1994), amended by Pub L No 107-110, 115 Stat 1425 (Jan 8, 2002) (broadening Title IX’s definition of “program or activity” to include “all of the operations of [an institution] . . . any part of which is extended federal financial assistance”).

²⁸ See Brake and Catlin, 3 Duke J Gender L & Pol at 59 n 52 (cited in note 21) (noting that Congress found that “certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX” and that “legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation”), quoting Civil Rights Restoration Act, 102 Stat at 636.

²⁹ 503 US 60, 76 (1992) (holding that a damages remedy is available for an action brought to enforce Title IX).

First, notions of tribal self-governance suggest difficulties in determining when Congress intended generally applicable laws, such as Title IX, to apply to tribes. Second, the doctrine of tribal sovereign immunity, with some exceptions, protects tribes from suit in a nontribal forum.

Because neither the Constitution nor any statute clearly delineates the contours of tribal sovereign immunity, analysis of tribal sovereign immunity requires careful reasoning from fundamental principles of federal Indian law and policy. The principle of tribal sovereignty means that Indian tribes are treated as domestic dependent nations that retain limited powers of sovereignty.³⁰ This sovereignty is limited insofar as it is subject to “the superior and plenary control of Congress.”³¹ This has two important consequences, which are examined in more detail below. First, there is reason to scrutinize congressional intent to determine if a generally applicable law applies to tribes. Second, as sovereign entities, tribes are immune from suit in federal and state courts only if immunity is not waived by Congress or the tribes themselves.³²

A. Generally Applicable Laws

1. Silent statutes and the *Farris* tripartite test

When a law specifically mentions Indian tribes, a court can determine from the language of the law whether Congress intended it to apply to Indians. However, more difficult interpretive questions arise when the statute itself is generally applicable, yet the law in question is silent as to Indian tribes. The Supreme Court has indicated, in dictum, “that a general statute in terms applying to all persons includes Indians and their property interests.”³³ Some lower courts have indicated that they would, in limited circumstances, follow this dictum to interpret congressional silence as an intent to waive tribal immunity.³⁴

³⁰ See, for example, William C. Canby, *American Indian Law in a Nutshell* 72–87 (West 1998).

³¹ *Santa Clara Pueblo v Martinez*, 436 US 49, 58 (1978).

³² See *id.* at 58–59.

³³ *FPC v Tuscarora Indian Nation*, 362 US 99, 116 (1960).

³⁴ See, for example, *Donovan v Coeur d’Alene Tribal Farm*, 751 F2d 1113, 1115 (9th Cir 1985) (asking “whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of [a generally applicable] Act to which they would otherwise be subject” and concluding that it should not); *Navajo Tribe v National Labor Relations Board*, 288 F2d 162, 165 n 4 (DC Cir 1961) (stating that general statutes, including the NLRA, cover Indians and their property interests). See also Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 UC Davis L Rev 85, 88–89 (1991) (criticizing the *Coeur d’Alene* decision for interfering with tribal sovereignty “because at least in some cases, it will allow a law to be enforced on Indian reservations when Congress is silent regarding its intent to interfere”).

In *United States v Farris*,³⁵ the Ninth Circuit proposed a test to determine whether a general statute, silent as to Indian tribes, does in fact apply to Indian tribes.³⁶ The court held that a generally applicable statute presumptively applies to Indians unless: (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.”³⁷ In the absence of any controlling Supreme Court decisions in nontreaty cases, a majority of courts today follow the lead of the Ninth Circuit in *Farris*.³⁸ Taken together, these circuit court decisions make it clear that Congress can, in limited circumstances, divest a tribe’s sovereign powers through a generally applicable statute that is silent as to its application to Indian tribes.³⁹

2. Refining the *Farris* test: when do the exceptions apply?

In *Farris*, the court concluded, without much discussion, that the self-governance exception did not apply to the case then before it. The court simply said that the issue presented—which involved a restaurant operated in conjunction with a gaming facility on the Puyallup Indian Reservation—was “neither profoundly intramural . . . nor essential to self-government.”⁴⁰ In defining “purely intramural,” the court noted that intramural matters generally consist of conditions of tribal membership, domestic relations and inheritance rules.⁴¹ It then held that the operation of gambling facilities was not purely intramural for purposes of the test because the restaurant was a gaming facility open to non-Indians; because the gaming facilities did not relate to the governmental functions of the tribe; and because the gaming facility did not operate exclusively within the domain of the tribe or its members.⁴²

³⁵ 624 F2d 890 (9th Cir 1980).

³⁶ *Id.* at 893–94.

³⁷ *Id.*

³⁸ See *Florida Paraplegic Association v Miccosukee Tribe of Indians of Florida*, 166 F3d 1126, 1129–30 (11th Cir 1999) (adopting the *Farris* test); *Reich v Mashantucket Sand & Gravel*, 95 F3d 174, 182 (2d Cir 1996) (same); *United States v Funmaker*, 10 F3d 1327, 1331 (7th Cir 1993) (same); *Nero v Cherokee Nation of Oklahoma*, 892 F2d 1457, 1462–63 (10th Cir 1989) (same).

³⁹ See, for example, *Florida Paraplegic Assn.*, 166 F3d at 1129–30 (concluding that the Americans with Disabilities Act applies to Indian tribes); *Reich*, 95 F3d at 177–82 (holding that the Occupational Safety and Health Act applies to an Indian tribe); *Smart v State Farm Insurance Co.*, 868 F2d 929, 932–36 (7th Cir 1989) (applying ERISA to an employee’s benefit plan established and operated by an Indian tribe); *Coeur d’Alene*, 751 F2d at 1116 (holding that OSHA applies to a tribe’s commercial activities).

⁴⁰ *Farris*, 624 F2d at 893.

⁴¹ *Id.*

⁴² *Id.* Compare *EEOC v Karuk Tribe Housing Authority*, 260 F3d 1071, 1080–81 (9th Cir

The Ninth Circuit followed this precedent and further refined its approach five years later in *Donovan v Coeur d'Alene Tribal Farm*.⁴³ *Coeur d'Alene* considered whether the Occupational Safety and Health Act ("OSHA")⁴⁴ applied to the Coeur d'Alene Farm, a commercial enterprise wholly owned and operated by the Coeur D'Alene Indian Tribe.⁴⁵ OSHA is a comprehensive law designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."⁴⁶

Employing the approach developed in *Farris*, the *Coeur d'Alene* court found that this language was sufficiently general to meet the presumption that it applied to Indian tribes and, moreover, that none of the exceptions to the general rule applied to the case then before it.⁴⁷ The court also refined the *Farris* test by emphasizing that the tribal self-government exception applied only where the statute would affect "purely intramural matters."⁴⁸ Further defining the meaning of the term "purely intramural," the court embraced the idea that the existence or involvement of a non-Indian person or interest can transform the issue into a nonintramural issue.⁴⁹

B. Tribal Sovereign Immunity

Although a court may determine that a law applies to Indian tribes, those tribes are not necessarily subject to suit under that law. The question of applicability of a statute to tribes is separate from that of immunity from suit. This subpart specifically addresses the question of a tribe's immunity from suit.

If an Indian tribe raises sovereign immunity as a defense to a suit against it, a federal or state court may be barred from hearing the ac-

2001) (holding that the Age Discrimination Employment Act, a general statute silent as to Indian tribes, is not applicable to an Indian tribe in its relationship to its employee because the tribe was acting as a provider of a governmental service to its members and, moreover, the dispute arose between the tribal government and a member of its own tribe and was thus a "purely internal matter").

⁴³ 751 F2d 1113 (9th Cir 1985).

⁴⁴ Occupational Safety and Health Act of 1970, Pub L 91-596, 84 Stat 1590, codified at 29 USC §§ 651 et seq (1994).

⁴⁵ *Coeur d'Alene*, 751 F2d at 1114.

⁴⁶ *Id* at 1115, quoting 29 USC § 651(b).

⁴⁷ 751 F2d at 1116.

⁴⁸ *Id*.

⁴⁹ *Id*, quoting *Farris*, 624 F2d at 893:

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

tion, absent congressional authorization through treaty or statute.⁵⁰ In such a case, tribal sovereign immunity would foreclose subject matter jurisdiction,⁵¹ and the merits of a suit against the tribe could not be heard. The doctrine covers both the tribe and tribal entities,⁵² but most courts draw a distinction between tribal affairs relating to governmental matters, which are afforded protection under the doctrine, and tribal affairs related to commercial dealings, which are not protected.⁵³ The doctrine does not insulate tribal officers or agents from liability to plaintiffs,⁵⁴ unless Congress intends for tribal officers to enjoy immunity where such immunity would operate to protect the tribal government from a level of scrutiny inconsistent with the notion of self-governance.⁵⁵

Courts recognize two significant exceptions to tribal sovereign immunity. First, Congress has plenary control of tribal immunity, and it may modify or dispense with the doctrine entirely.⁵⁶ Second, Indian tribes may waive their immunity without explicit congressional authority.⁵⁷ When looking at tribal waivers, courts examine whether the

⁵⁰ See, for example, *United States v Wheeler*, 435 US 313, 323–24 (1978) (holding that Indian tribes retain those elements of sovereignty not withdrawn by treaty or Congress); *Worcester v Georgia*, 31 US (6 Pet) 515, 560–61 (1832) (holding that the Cherokee Nation is a “distinct community” in which actions must be taken “with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress”).

⁵¹ *Santa Clara Pueblo v Martinez*, 436 US 49, 58 (1979).

⁵² See *Hagen v Sisseton-Wahpeton Community College*, 205 F3d 1040, 1043 (8th Cir 2000) (holding that a community college operated by an Indian tribe is an “arm of the tribe” and therefore entitled to sovereign immunity).

⁵³ See, for example, *Donovan v Coeur d’Alene Tribal Farm*, 751 F2d 1113, 1116 (9th Cir 1985) (holding that the OSHA applied to a tribe’s farm as a commercial enterprise). See also *Roberson v Confederated Tribes*, 1980 US Dist LEXIS 9991, *8, 11 (D Or) (holding that the doctrine of sovereign immunity barred suit against the Confederated Tribes, but that its corporation may be an “employer” under the Labor Management Relations Act and therefore subject to suit).

⁵⁴ See, for example, *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 514 (1991) (holding that the doctrine of sovereign immunity barred suit by a state against an Indian tribe but that individual agents or officers of the tribe might nonetheless be liable for damages in a suit by the state).

⁵⁵ *Martinez*, 436 US at 59–60, 71 (noting that while an officer of a tribe is not protected by the tribe’s immunity from suit, the court must bear in mind that providing a federal forum for such a suit might “constitute[] an interference with tribal autonomy and self-government,” and thus declining to “expos[e] tribal officials to the full array of federal remedies available”).

⁵⁶ See *Citizen Band Potawatomi*, 498 US at 510 (holding that Congress is “at liberty to dispense with . . . tribal immunity or to limit it”); *Martinez*, 436 US at 58 (noting that “[t]his aspect of tribal sovereignty . . . is subject to the superior and plenary control of Congress”). See also Scott D. Danahy, Comment, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses*, 25 Fla St U L Rev 679, 683–84 (1998) (“The . . . widely accepted theory . . . is that by nature of their conquest by the Europeans and later the United States, [the Indians’] sovereignty no longer inherently exists but is permitted by the government. Under this theory, the federal government has the ability to abrogate tribal immunity as it wishes.”).

⁵⁷ See *Confederated Tribes of the Colville Reservation Tribal Credit v White*, 139 F3d 1268,

tribal entity had authority to waive immunity;⁵⁸ and courts generally hold that tribal waivers must be explicit and should be strictly construed.⁵⁹ Despite these rigorous standards, courts have recognized tribal waivers through involvement in bankruptcy proceedings;⁶⁰ arbitration clauses in contracts;⁶¹ and “sue or be sued” clauses in tribal constitutions,⁶² corporate charters,⁶³ and ordinances creating subsidiary tribal entities, such as a housing authority.⁶⁴

Recognizing waiver of tribal immunity is a natural extension of the principles of tribal self-governance. Several statutes promote self-determination by recognizing tribes as basic governmental entities capable of providing essential services and making decisions regarding the well-being of their constituents.⁶⁵ That tribes can waive their immunity in state or federal courts is an extension of this rationale.⁶⁶

1271 (9th Cir 1998) (“Indian tribes may consent to suit without explicit congressional authority.”).

⁵⁸ See, for example, *Namekagon Development Company v Bois Forte Reservation Housing Authority*, 517 F2d 508, 509–10 (8th Cir 1975) (examining a tribal ordinance creating a subsidiary housing authority to determine if the housing authority did, in fact, possess the authority to waive tribal sovereign immunity for the issue at hand).

⁵⁹ See *Martinez*, 436 US at 59 (holding that waivers of tribal sovereign immunity must be “unequivocally expressed”). But see *Ninigret Development Corp v Narrangansett Indian Wetuomuck Housing Authority*, 207 F3d 21, 30 (1st Cir 2000) (advocating a flexible, case-by-case approach to interpreting waiver).

⁶⁰ See, for example, *Confederated Tribes of the Colville Reservation*, 19 F3d at 1269, 1271 (holding that the tribe waived its immunity with respect to claim against a debtor when it participated in Chapter 11 proceedings).

⁶¹ See, for example, *C & L Enterprises, Inc v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 417–20 (2001) (holding that provisions in a construction contract for the installation of a roof on a tribally owned building located off-reservation, providing for application of Oklahoma law, binding arbitration of disputes, and enforcement of arbitration decisions in any state or federal court with jurisdiction constituted a clear waiver of the tribe’s sovereign immunity against suit). See also *Sokagoan Gaming Enterprise Corp v Tushie-Montgomery Associates, Inc*, 86 F3d 656, 659–60 (7th Cir 1996) (holding that where an arbitration clause contains specified arbitral and judicial fora for enforcement of the rights under the contract, the clause does not have to refer to a waiver of sovereign immunity to constitute an explicit waiver).

⁶² See, for example, *Fontenelle v Omaha Tribe of Nebraska*, 430 F2d 143, 147 (8th Cir 1970) (holding that the Omaha Tribe “rendered itself amenable to a quiet title action” through the inclusion of a general “sue or be sued” clause in tribal constitution).

⁶³ See, for example, *Rosebud Sioux Tribe v A & P Steel, Inc*, 874 F2d 550, 552 (8th Cir 1989) (finding waiver by virtue of a provision allowing the tribe “to sue or be sued” found in the tribe’s corporate charter).

⁶⁴ See, for example, *Weeks Construction, Inc v Oglala Sioux Housing Authority*, 797 F2d 668, 671 (8th Cir 1986) (finding that the “sue and be sued” clause in a tribal ordinance creating a housing authority constituted a waiver of that authority’s immunity to suit).

⁶⁵ See, for example, Indian Self-Determination and Education Assistance Act of 1975 (“ISDEA”), Pub L No 93-638, 88 Stat 2203, codified at 25 USC §§ 450a–450n (1994). The ISDEA encourages meaningful tribal sovereignty through “effective . . . participation by the Indian people in the planning, conduct, and administration of [federal] programs and services.” Id at § 450a(b). The ISDEA allows the Secretary of the Interior to contract with tribal organizations to administer service and benefit programs previously administered by the Secretary. Id at § 450f. The Indian Civil Rights Act, Pub L No 90-284, 104 Stat 1892 (1990), codified at 25 USC §§ 1301–41 (1994), validates tribal powers by placing tribes in a position of responsibility and accountabil-

III. TITLE IX AND THE TRIBAL SCHOOLS

Having laid out the foundations of Title IX and the tribal sovereign immunity doctrine, this Comment will argue that Title IX should apply to tribal schools and that tribal schools are subject to Title IX suits because they have waived immunity. This Part will show that, under the tripartite *Farris* test, Title IX applies to Indian tribal schools. It will then argue that tribal schools waived their sovereign immunity by signing assurance letters. Finally, it will show that the strength of the federal interest in Title IX should allow the federal government to intervene in tribal affairs in this limited context.

A. The Application of Title IX to Tribal Schools

As discussed in Part II, the Supreme Court has not indicated whether a generally applicable statute, such as Title IX, applies to Indian tribes, absent explicit language including tribes under the statute.⁶⁷ However, the absence of congressional intent in the language of Title IX with respect to Indian and tribal rights is not necessarily determinative of this dispute. In fact, the Ninth Circuit's presumption in *Farris*—that general statutes whose concerns are widely inclusive and do not affect traditional Indian or tribal rights are typically applied to Indians—governs the analysis of the question presented here.⁶⁸ Thus, unless one of the *Farris* exceptions applies, courts should infer an intent to apply Title IX to Indian tribes. The *Farris* exceptions are three-fold. A law will not apply to Indian tribes if it infringes either upon their right to self-governance, or upon rights guaranteed to them through treaties.⁶⁹ The application of these exceptions in the context of Indian tribal schools will be discussed in subsections 1 and 2 below. The third exception—that explicit legislative language may exempt Indians from a law—is clearly absent in Title IX and need not be discussed.⁷⁰

ity similar to that of the federal, state, and local governments. See Cohen, *Handbook* at 204 (cited in note 2).

⁶⁶ See, for example, *United States v Oregon*, 657 F2d 1009, 1014 (9th Cir 1981) (noting that the Yakima Tribe possesses certain powers of self-determination and that “[t]o hold that the ability to waive immunity is not among these powers would be contrary to that right”); *Merrion v Jicarilla Apache Tribe*, 617 F2d 537, 540 (10th Cir 1980) (en banc) (concluding that a tribal ordinance in which the tribe consented to suit to determine the legal validity of a tax constituted a waiver of that tribe’s immunity with respect to litigation involving the tax); *Fontenelle*, 430 F2d at 147 (“By adopting a provision in its Corporate Charter consenting to sue and be sued, the Omaha Tribe has rendered itself amenable to a quiet title action.”).

⁶⁷ See Part II.A.

⁶⁸ See *Coeur d’Alene*, 751 F2d at 1115 (noting that generally applicable laws have never been interpreted to exclude Indians).

⁶⁹ *Farris*, 624 F2d at 893–94.

⁷⁰ 20 USC § 1681 (1994).

1. Applying *Farris* to tribal schools: is education a matter of self-governance that is purely intramural?

Under *Farris*, the first question is whether Title IX's application would infringe upon a tribe's right to self-governance.⁷¹ While tribal schools are, by definition, operated by a tribal entity, it does not necessarily follow that the operation of the school falls within the definition of self-governance as set out by *Farris* and subsequent cases.⁷² Although Title IX may interfere with some aspects of the tribe's ability to develop a curriculum or to allocate its expenditures, it does not completely usurp the tribe's decisionmaking regarding tribal schools. Title IX does not dictate what the tribes must do in terms of education; it merely says that when tribes act, they must ensure that women and men receive the benefits of that action on an equivalent basis.⁷³

It is still unclear whether legislation comes within the "self-governance" exception if it affects some, but not all, of the tribe's decisionmaking power.⁷⁴ What is clear, however, is that the question is not whether the statute affects tribal self-governance in general, but, rather, whether it affects tribal self-governance in purely intramural matters. The determinative question, then, is whether education is a purely intramural matter.

Although courts have not addressed this issue, a two-part definition of "purely intramural" has emerged through the common law application of the *Farris* test.⁷⁵ If the legislation affects conditions of membership, rules of inheritance or domestic relations, it is purely intramural.⁷⁶ If, however, the regulated activity affects individuals out-

⁷¹ See *Farris*, 624 F2d at 893.

⁷² See, for example, *Reich v Mashantucket Sand and Gravel*, 95 F3d 174, 180 (2d Cir 1996) ("That an entity is owned by a tribe, operates as an arm of a tribe, or takes direction from a tribal council, does not *ipso facto* elevate it to the status of a tribal government.").

⁷³ See 20 USC § 1681.

⁷⁴ Compare *Lumber Industry Pension Fund v Warm Springs Forest Products Industries*, 939 F2d 683, 685 (9th Cir 1991) (determining that the tribe's decisionmaking power was not usurped by applying ERISA because "[t]he tribe was free to form and operate a tribal pension plan, and the mill was free to transfer its employees to that plan at the end of the collective bargaining agreement term." Absent total usurpation of the tribe's decisionmaking power, the statute did not infringe upon the tribe's right to self-governance.), with *Martin v Great Lakes Indian Fish and Wildlife Commission*, 1992 US Dist LEXIS 15883, *22 (D Wis) (concluding that the Fair Labor Standards Act would have a direct effect on self-governance because it would require the tribe to take into consideration the Act's restrictions on overtime and requirements for overtime pay, and "no one can dispute that governmental restrictions on wages to be paid and hours to be worked are a direct interference with an employer's ability to schedule its workers and allocate its expenditures").

⁷⁵ See notes 47-49 and accompanying text.

⁷⁶ See note 49. See also *Nero v Cherokee Nation of Oklahoma*, 892 F2d 1457, 1462-63 (10th Cir 1989) (concluding that certain generally applicable civil rights statutes did not allow plaintiffs to bring a claim alleging that the tribe's denial of a right to vote infringed their civil rights because voting is a matter that "would affect the Tribe's right to self-governance in a purely inter-

side the tribe, or an activity that impacts interstate commerce⁷⁷ or another important federal interest,⁷⁸ it is not purely intramural.

Legislation regulating education affects the tribe's right to define itself culturally and politically,⁷⁹ and is thus intimately related to a tribe's internal affairs.⁸⁰ Education, however, is not purely intramural because tribal schools do not serve only members from one tribe.⁸¹ Although no court has yet determined how to classify decisions affecting nontribal members, courts have held that the principle of self-determination that permits tribes to make substantive decisions affecting their own members does not extend to decisions affecting non-Indian members.⁸²

It is likely that a court's decisions regarding non-Indians will extend to cover the case of nontribal members in the education context: the reasons justifying the court's conclusions when non-Indians are implicated by a tribe's actions also apply to educational activities involving members from different tribes. That is, the tribe's regulation of members of other tribes is an exercise of power beyond what is necessary to regulate its own membership, conditions of inheritance, or domestic relations.⁸³

nal matter" and thus the statutes did not apply to the tribe).

⁷⁷ See *Florida Paraplegic Association v Miccosukee Tribe of Indians of Florida*, 166 F3d 1126, 1129 (11th Cir 1999) ("Tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes."). See also *United States v Funmaker*, 10 F3d 1327, 1331-32 (7th Cir 1993) (determining that a federal statute regulating damage to property allowed a district court to assert jurisdiction over an Indian accused of setting fire to an Indian gambling casino because "a bingo hall and casino designed to attract tourists from surrounding states undeniably affects interstate commerce for Commerce Clause purposes").

⁷⁸ See *Funmaker*, 10 F3d at 1331-32 ("The decision-making power of Indian tribes ends . . . when those decisions violate federal law designed to safeguard important federal interests").

⁷⁹ Advocates of tribal education have long argued that the right to control the education of Indians is intimately related to the ability to define a concept of citizenship for tribal members that recognizes Indian culture and tradition. See David Adams, *A Case Study: Self-Determination and Indian Education*, 13 J Am Indian Educ 21, 22-23 (Jan 1974) (arguing that education should reflect the principles of self-determination by focusing on native culture and language).

⁸⁰ See *Nero*, 892 F2d at 1463 ("Applying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity.'"), quoting *Santa Clara Pueblo v Martinez*, 436 US 49, 72 (1979).

⁸¹ See, for example, *National Centers of Excellence (NCE): Tribal College Partnership Project*, available online at <<http://www.ezec.gov/News/NCE/ncet3.html>> (visited Mar 25, 2002) (listing three tribal colleges and the several tribes each college serves); *National Centers of Excellence: Tribal College Partnership Project: Tribal Colleges* <<http://www.rurdev.usda.gov/ocd/ncel/schools.htm>> (visited Mar 25, 2002) (noting that the Cankdeska Cikana (Little Hoop) Community College serves several tribes, including the Dakota, Lakota, and Spirit Lake Sioux).

⁸² See note 49.

⁸³ See *id.* See also *Montana v United States*, 450 US 544, 564 (1981) (noting that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes").

An analogous case from the employment context provides valuable insight into the limits imposed on sovereignty when the civil rights of nontribal members are at issue. In *Dawavendewa v Salt River Project Agricultural Improvement and Power District*,⁸⁴ a Hopi tribe member alleged that a private employer on the Navajo reservation did not consider him for a position.⁸⁵ He contended that the employer's conduct constituted unlawful employment discrimination by discriminating against him on the basis of national origin.⁸⁶ Although Title VII expressly exempts any business or enterprise on or near an Indian reservation from liability under the statute for giving preferential treatment to an Indian,⁸⁷ the court determined that the exemption did not cover preferences on the basis of tribal affiliation.⁸⁸ The court reasoned that the statute exempts the hiring of Indians from the force of its provisions "in order to compensate for the effects of past and present unjust treatment, not in order to authorize another form of discrimination against particular groups of Indians."⁸⁹

The court's decision in *Dawavendewa* acknowledges that tribes may engage in discriminatory practices, but they may do so only when such practices favor tribal sovereignty and further general Indian interests. According to the court, intertribal discrimination does not further Indian interests. The *Dawavendewa* decision is significant in that the court refused to defer to tribal practices that resulted in discrimination against members of another tribe.⁹⁰ The decision indicates that a tribe's ability to determine its own affairs will be respected as an exercise of self-determination only when that decision exclusively impacts members from the tribe itself.

In addition to its impact on nontribal members, there are other reasons for the rationale that tribal education does not fall within the "purely intramural" exclusion. Perhaps the most important reason is that the education of tribal members affects federal law designed to safeguard important federal interests.⁹¹ Those interests include the

⁸⁴ 154 F3d 1117 (9th Cir 1998).

⁸⁵ *Id.* at 1118.

⁸⁶ *Id.*

⁸⁷ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, 257, codified at 42 USC § 2000e (1994).

⁸⁸ *Dawavendewa*, 154 F3d at 1121.

⁸⁹ *Id.* at 1121-22.

⁹⁰ See *id.* at 1122 ("It seems evident that, under the exemption, favored treatment could not be given to Indian males at the expense of Indian women, or to Indians of mixed blood in derogation of the rights of those who are entirely of Indian ancestry.").

⁹¹ See *Funmaker*, 10 F3d at 1332 (recognizing that, although permitting federal court jurisdiction would impede on the tribe's rights to self-governance, "[t]he decision-making power of Indian tribes ends, however, at the point when those decisions would violate federal law designed to safeguard important federal interests such as the free flow of interstate commerce"). Compare *Nevada v Hicks*, 533 US 353, 409-10 (2001) ("When, however, state interests outside

protection of citizens' civil rights⁹² as well as preserving the control of federal funds given to the school systems.⁹³ Moreover, the United States has undertaken a legal obligation, through treaties and statutes, to provide services to the Indian tribes.⁹⁴ If the United States allowed tribal schools to provide services on an unequal basis to men and women, the national government would, in effect, fail to fulfill its commitment to provide the same services to Indians as it provides to all other children—namely the opportunity for each child, male or female, to obtain an education on an equivalent basis.⁹⁵

This concern with federal interests leads directly to consideration of the second prong of the *Farris* test.

2. Applying *Farris* to tribal schools: does application of Title IX abrogate rights guaranteed by Indian treaties?

In *Farris*, the Ninth Circuit proposed an exception to the presumption that general laws apply to Indians when application of a statute would affect Indian or tribal rights recognized by treaty or statute.⁹⁶ However, the application of Title IX to Indian tribes does not abrogate tribes' rights recognized by treaties or other statutes. On the contrary, the application of Title IX would further the rights guaran-

the reservation are implicated, States may regulate the activities even of tribe members on tribal land." See also Part II.C.1.

⁹² Indians are both members of their respective tribes and American citizens. See Indian Citizenship Act of 1924, Pub L No 68-175, 43 Stat 238, 253, 18 USC § 1401(b) (1994) (granting U.S. citizenship to American Indians born within the territorial limits of the U.S. and also stating that Indians are members of their respective tribes, thereby recognizing that Indians have dual citizenship). Thus, the United States has an interest in protecting Indians as American citizens, and quite apart from their status as members of Indian tribes. See generally Part II.C.1.

⁹³ See *Cannon v University of Chicago*, 441 US 677, 704 (1979) (explaining that Congress enacted Title IX in order to accomplish two distinct purposes: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

⁹⁴ See, for example, 20 USC § 7401 (1994), describing the educational policy of the United States with respect to Indian tribes:

It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality.

See generally Deloria, *Legislative Analysis* (cited in note 1).

⁹⁵ See First Nation's Commission on Civil Rights, *Protecting the Civil Rights of American Indians and Alaska Natives: Nondiscrimination Laws Enforced by the Civil Rights Division, United States Department of Justice*, available online at <<http://jimwindwalker.tripod.com/indianlawusa/id9.html>> (visited Mar 25, 2002) (noting that the Department of Justice requires that "American Indian children who live on an Indian reservation where the land is not taxed have the right to the same educational opportunities that are offered to all other children who live in the school district").

⁹⁶ *Id.*

teed by treaties.⁹⁷ The United States has made many treaties with the Indian tribes, guaranteeing a provision of educational services⁹⁸ and basic protection for Indian rights. For example, a statute that protects the civil rights of all people, including Indian tribal members, comports with the government's promise in the Northwest Ordinance,⁹⁹ which underscores the central role of the national government in preserving and protecting Indian rights. Title IX may be viewed as merely an extension of these previous promises,¹⁰⁰ one that specifies exactly how the government intends to provide services: that is, it will provide such education on an equivalent basis to both men and women. Given the United States's assumed obligations and the promises it made in treaties such as the Northwest Ordinance, Title IX does not interfere with treaty or statutory rights; and, in fact, a determination that Title IX does not apply to Indian tribes *would* contravene the purposes and intent of these treaties.

Having determined that the application of Title IX to tribal schools does not pose problems under the first two prongs of the *Farris* test, there remains only a consideration of the test's final prong: is there an explicit legislative intent to exclude Indian tribes or tribal entities?¹⁰¹ As discussed above, Title IX is silent as to Indian tribes and tribal entities. Thus, this possible exception need not be discussed here.

The analysis of Title IX and Indian tribal schools does not end with consideration of the *Farris* test. Whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions.¹⁰² As outlined in Part II, even if the statute is applicable to a tribe, the tribe is not subject to suit unless the tribe waived its immunity or Congress expressly abrogated it.¹⁰³ It is clear from an examination of the language of the statute that Congress did not expressly abrogate tribes' immunity—Title IX does not even discuss Indian tribes. Thus, to determine whether the tribe is

⁹⁷ See generally Deloria, *Legislative Analysis* (cited in note 1).

⁹⁸ See id at 39–71 (describing the United States's treaty obligations for the education for Indians).

⁹⁹ See Northwest Ordinance, ch 8, Art III, 1 Stat 50 (1789) (“[B]ut laws founded in justice and humanity shall from time to time be made for preventing wrongs done to [the Indians].”).

¹⁰⁰ Consider Testimony of William Kindle, President, Rosebud Sioux Tribe, before the Senate Committee on Indian Affairs 9 (2001), available online at <<http://indian.senate.gov/2001hrgs/plains062601/kindle.PDF>> (visited Mar 25, 2002) (arguing that the federal government has an obligation under treaty to provide not just education but also *safe* educational facilities to members of the Rosebud Sioux Tribe).

¹⁰¹ *Farris*, 624 F2d at 893.

¹⁰² *Florida Paraplegic Association v Miccosukee Tribe of Indians of Florida*, 166 F3d 1126, 1130 (11th Cir 1999) (finding that tribal sovereign immunity protects Indian tribes from suit).

¹⁰³ *Kiowa Tribe v Manufacturing Technologies, Inc*, 523 US 751, 754 (1998) (“As a matter of law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”).

amenable to lawsuit in federal court alleging violations of Title IX, we must turn to the question of the tribe's waiver of immunity.

B. Tribal Waiver of Immunity through Assurance Letters

When an educational institution accepts federal funds for educational purposes, it signs an assurance letter agreeing to abide by the relevant statutes governing the use of federal funds.¹⁰⁴ When a tribal government signs such an agreement in order to receive funds for the operation of a tribal school, that signature should constitute a waiver of immunity to suit by private plaintiffs or the national government in federal court.

There are only two cases, both from the Eighth Circuit, that address whether an assurance letter constitutes a waiver of tribal sovereign immunity, and both held that it does not.¹⁰⁵ Neither case explains in a detailed way the reasons underlying its decision; each merely states that the language of the letters did not constitute an explicit waiver of authority and thus could not be construed as a waiver.¹⁰⁶ Moreover, the Eighth Circuit's definition of waiver is inconsistent with that of other courts, whose interpretation of waiver in other contexts is considerably broader.¹⁰⁷

Most of the courts that have read an implied waiver in tribal contracts have done so because the contract's language was explicit enough to give notice of suit in federal court,¹⁰⁸ or because there was evidence of the tribes' intent to waive immunity by choice of forum or similar clauses.¹⁰⁹ These interpretations are also buttressed by impor-

¹⁰⁴ See 34 CFR § 106.4 (2000):

Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

¹⁰⁵ See *Hagen v Sisseton-Wahpeton Community College*, 205 F3d 1040, 1044 n 2 (8th Cir 2000) ("Nor did the College waive its immunity by executing a certificate of assurance with [Housing and Human Services] in which it agreed to abide by Title VI of the Civil Rights Act of 1964."); *Dillon v Yankton Sioux Tribe Housing Authority*, 144 F3d 581, 583-84 & n 2 (8th Cir 1998) (noting that tribe did not waive its immunity by signing a nondiscrimination assurance attached to a HUD contract).

¹⁰⁶ See *Hagen*, 205 F3d at 1044 n 2; *Dillon*, 144 F3d at 583-84 & n 2.

¹⁰⁷ See notes 106-110. See also *Sokaogon Gaming Enterprise Corp v Tushie-Montgomery Associates, Inc*, 86 F3d 656, 659-60 (7th Cir 1996) (noting that no case has ever refused to find a waiver of tribal immunity on the grounds that the waiver does not explicitly reference the tribe's sovereign immunity).

¹⁰⁸ See, for example, *id* at 660 (holding that where the Indian tribe agreed to arbitrate contractual disputes in accordance with the rules of the American Arbitration Association, it had waived its immunity from suit; even though "[t]here was no explicit mention of court actions[,] the rules themselves provide for judicial enforcement of arbitration awards").

¹⁰⁹ See, for example, *C & L Enterprises v Citizen Band Potawatomi Tribe*, 532 US 411, 422 (2001) (holding that a contract contained a waiver of sufficient clarity where the tribe "proposed

tant policy considerations¹¹⁰ and the same rationales underlying courts' decisions to imply waiver also militate in favor of a different interpretation of the funding contracts than that accorded by the Eighth Circuit.

For example, courts have reasoned that the language of the assurance letters—mandating that the signatories “shall comply”—gives notice of suit because the practical implication of such mandatory language is that the contracts provide a remedy for any breach. To hold that tribes are not subject to suit even after agreeing to such conditions would render the language of the contract void of its commonly understood meaning. Instead of “must comply,” the language would effectively mean: “The tribe, as recipient of federal funds, will comply if it wants to; but if it doesn't comply, there will be no penalty for its actions in a federal or state court.” By adhering to the latter interpretation, courts in effect hold that a tribe may receive funds unconditionally, despite Congress's clear intent to condition the grant of funds on the recipient's compliance with antidiscrimination statutes.

Important policy considerations also militate in favor of recognizing a waiver of tribal sovereign immunity through signed assurance letters. First, the national government has consistently recognized, through treaty and statute, a tribe's right to certain powers of self-determination.¹¹¹ To hold that the ability to waive immunity is not among those powers would be contrary to that right.¹¹² Second, non-Indian interests might prudently avoid contracts with tribes that might otherwise prove beneficial to the tribes, with the result that Indians wishing to solicit funds or to engage in business would be impeded.¹¹³

Finally, and most significantly, to claim that tribes may receive funds only on the condition of signing a nondiscrimination assurance letter and yet provide no meaningful way of enforcing that agreement¹¹⁴ would essentially turn a conditional agreement into an uncon-

and prepared” the relevant contract language).

¹¹⁰ See Heath Oberloh, *Calvello v. Yankton Sioux Tribe: Shoring Up Tribal Sovereign Immunity against the Flood of Commercial Transactions Involving Tribally Owned Businesses*, 44 SD L Rev 746, 746 (1999) (noting that “as tribes expand their commercial ventures” off-reservation, sovereign immunity acts as a barrier to normal contractual resolution and “[d]ue to the resulting inequity, courts have become more willing to limit the trumping power of sovereign immunity”).

¹¹¹ See, for example, 25 USC § 450a (recognizing tribal sovereignty and encouraging tribal self-determination).

¹¹² See *Bottomly v Passamaquoddy Tribe*, 599 F2d 1061, 1066 (1st Cir 1979). See also *Bailey v City of Knoxville*, 113 F Supp 3, 6 (E D Tenn 1953) (“Sovereign immunity means only that the sovereign may not be sued without its consent. Implied in that immunity is the power to consent.”).

¹¹³ See *United States v Oregon*, 657 F2d 1009, 1013 (9th Cir 1981) (recognizing that Indian tribes do have a right to waive sovereign immunity).

¹¹⁴ See Brake and Catlin, 3 Duke J Gender L & Pol at 58 n 62 (cited in note 21) (noting that a private right of action is necessary to ensure that the goals of Title IX are met).

ditional one. Congress enacted Title IX and, as argued above,¹¹⁵ intended it to apply to Indian tribes in a meaningful way. Although Congress has the power to enact a statute limiting the actions of tribes without providing federal means of protecting those who need it,¹¹⁶ it has not done so in this case and courts should be critical of an interpretation that concludes that Congress has provided an unconditional grant of funds.¹¹⁷

C. Other Limits on the Tribal Sovereign Immunity Doctrine

When analyzing the issues discussed in this Comment, two additional arguments should be noted. One concerns the strength of the federal interest at stake, and the second involves what is termed the federal trust doctrine.

1. Federal interest

Sometimes statutes of general application touch on matters that Congress has already addressed—and in so addressing, has made clear that the matters covered by the general statute are of profound national interest. In the civil rights context, Congress clearly manifested an intent to ensure equality for all citizens in public institutions by passing the Civil Rights Act of 1964.¹¹⁸ The Civil Rights Act recognized the federal civil rights of all citizens.¹¹⁹ Although it was enacted primarily in response to racial discrimination, the Civil Rights Act also recognized the importance of protecting against discrimination on the basis of “religion, sex or national origin.”¹²⁰ Thus, the Civil Rights Act may be read as a definitive assertion by Congress that it will not tolerate any discrimination against citizens on the basis of race, religion, sex, or national origin. More specific statutes, such as Title IX, grow from this general declaration and further the purposes underlying it.

Where such strong federal interests are at stake, the sovereign immunity doctrine should be limited, regardless of any tribal interest in self-governance.¹²¹ The Supreme Court has suggested—at least in

¹¹⁵ See Part III.A.

¹¹⁶ *Santa Clara Pueblo v Martinez*, 436 US 49, 65 (1978) (recognizing a cause of action in tribal courts where sovereign immunity protects tribes from suit in federal courts).

¹¹⁷ Although alternative remedies are available because tribes are probably not immune from suit by the United States, see *Quileute Indian Tribe v Babbitt*, 18 F3d 1456, 1459–60 (9th Cir 1994) (“[T]ribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers.”), this Comment does not seek to analyze all alternative remedies, including the effectiveness of suit in tribal court, but is instead concerned with showing that suit in federal court is a viable option.

¹¹⁸ Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e (1994).

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ See *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 153

cases involving non-Indians—that where the government holds a strong interest in the issue or rights implicated, the normal presumption of Indian law should be inverted.¹²² In other words, if Congress has plenary power to waive a tribe’s immunity from suit, it should be assumed—absent express congressional intent not to do so—that Congress intended to waive the tribe’s immunity when preserving that immunity would conflict with or contravene those rights that Congress has already indicated embody strong federal interests.

2. Federal trust doctrine

At least some courts have indicated that tribes lose their claims to sovereignty by entering into a trust relationship with the federal government.¹²³ Canons of construction important to the interpretation of the tribal immunity doctrine arise from this trust relationship.¹²⁴ Because Congress is presumed to act in the tribes’ best interest, courts must read federal statutes as protecting Indian rights.¹²⁵ Thus, the existence of a federal trust relationship between Indians and the national government aids us in understanding the applicability of education laws to Indian tribes. Where the government has assumed responsibility for a sphere of activity, the doctrine of sovereign immunity should not block the application of statutes passed in furtherance of the national government’s assumed obligations.

CONCLUSION

Although a recognition of tribal sovereignty has been—and continues to be—an important federal policy, the national government must also fulfill its historic obligations to make laws in “justice and

(1980) (noting that tribal sovereignty may be limited “where [its] . . . exercise . . . would be inconsistent with the overriding interests of the National Government”); *Oliphant v Suquamish Indian Tribe*, 435 US 191, 208–10 (1978) (stressing the shared assumptions of the executive, judicial, and legislative departments that Indian tribes could not exercise criminal jurisdiction over non-Indians because Indian tribal courts did not accord the full protections of the Bill of Rights).

¹²² See *id.*

¹²³ See *United States v Wheeler*, 435 US 313, 326 (1978) (explaining that the *Oliphant* Court could deprive tribes of jurisdiction over nonmembers because “the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status”). See also *United States v Oregon*, 657 F2d 1009, 1013 (9th Cir 1981) (noting that the trust relationship limits tribes’ rights to self-determination: tribes cannot waive their immunity by contract with regard to property held in trust by the federal government without federal approval).

¹²⁴ See Cohen, *Handbook* at 221–22 (cited in note 2) (discussing the nature of the federal trust responsibility).

¹²⁵ See *id.* at 224. See also *Santa Clara Pueblo*, 436 US 49 at 60–61 (noting that a central purpose of enacting the Indian Civil Rights Act was to “protect individual Indians from arbitrary and unjust actions of tribal governments”).

humanity”¹²⁶ and to prevent wrongs from being done to the tribes or to their members. Where important federal interests are at stake—such as the elimination of sex-based discrimination in schools—and the government is acting in an area in which it has assumed legal obligations, the courts can, and must, assert jurisdiction over claims brought against tribes acting in contravention to the expressed intent of Congress.

Consistent with this policy and the current law, courts should interpret Title IX to apply to Indian tribal schools. Furthermore, the courts should interpret waiver in a way that recognizes the importance of the federal interests at stake and the need for meaningful enforcement of these interests. Thus, private plaintiffs should be allowed to sue Indian tribes in federal court for violations of Title IX.

¹²⁶ Northwest Ordinance, ch 8, Art III, 1 Stat 50 (1789).

