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Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency

Vicki J. Limas*

I. INTRODUCTION

As Native American tribal economies continue to develop and grow, tribal governments and businesses are providing additional revenues for tribal operations and significant sources of employment for tribal members and others.¹ With increased employment opportunities, however, come increasing numbers of employment disputes. The federal government regulates by statute many aspects of the employment relationship in the public and private sectors: wages and hours, employer-provided benefit plans, safety and health, employee organizing and collective bargaining, and prohibition of discrimination on the basis of race, color, national origin, sex, religion, age, and disability. These labor and employment statutes are of "general applicability," covering entities that fit within the statutes' broad definitions of "employers."

Tribal employers are increasingly subject to charges or lawsuits alleging violations of these federal statutes; thus the primary question for courts and administrative agencies becomes whether Congress intended these statutes to apply to Native American tribes that fall within the statutes' definitions of "employers." Only two of these labor and employment statutes expressly exclude tribes from their coverage: Title VII of the Civil Rights Act of 1964,

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1. The broad scope of tribal businesses and employment opportunities provided by those business are described in Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 362-64 (1993). Sources for that discussion include ROBERT H. WHITE, *TRIBAL ASSETS* (1990); SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* (1989); John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495 (1991); LACOURSE COMMUNICATIONS CORP., *THE RED PAGES: BUSINESSES ACROSS INDIAN AMERICA* (1985).

as amended,² and Title I of the Americans with Disabilities Act of 1990, as amended.³ All other federal statutes regulating employment are silent⁴ as to their applicability to tribes. Because the scope of coverage of the labor and employment statutes is similar and many tribal employers fit within the statutes' broad scope, the courts must determine whether Congress intended the statutes to cover tribes as employers. The answer to the question of coverage depends on whether application of the statutes would interfere with tribal rights and whether Congress intended such interference.

In determining the applicability of these statutes to tribal employers, courts and administrative agencies have taken two inconsistent approaches. One approach recognizes tribes' status as sovereign entities whose commercial activity is essentially governmental activity, as the activity is undertaken to fund the sovereign itself. This approach interprets the relationship between the tribal employer and employee so as to preserve the sovereign rights of the tribe, giving the tribe the benefit of the doubt in favor of federal non-interference when regulatory statutes are silent as to their applicability to tribes. The other approach treats tribal employers like any private-sector commercial employer rather than a sovereign entity, discounts the statutes' effect on tribal sovereign rights, and defers to tribes only when application of the statute would "abrogate"⁵ an explicitly identified treaty right. The latter approach is not only inconsistent with the first, it is inconsistent with federal law and policy toward Native American tribes that promotes tribal sovereignty, self-sufficiency, and economic development.

As background, this article will first discuss federal law and policy pertaining to Native American tribes, particularly with respect to sovereignty, self-sufficiency, and economic growth. The article will then present data on the current economic state of tribal governments. The article will next look at how federal law addresses the general questions of whether and how federal legislation is to be applied to tribes when Congress has not spoken, and will examine the various approaches courts have taken in applying federal labor and employment statutes to tribes. The article concludes that application of any of these statutes to Native American tribes necessarily interferes with their sovereign rights. Therefore, courts cannot apply these statutes to tribes unless

2. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).

3. 42 U.S.C. §§ 12101-213 (Supp. IV 1992).

4. When a law is "silent," neither the statute itself, nor the committee reports, nor the floor statements of legislators during consideration of the legislation, contain any reference to Indians. One can conclude that Congress never actually considered the impact such a law would have on [tribal Indians' rights].

Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 88 n.4 (1991).

5. Courts disagree upon the meaning of "abrogate"; see *infra* text accompanying notes 124-31.

Congress has first made explicit, through language in the statute itself, or through deliberations recorded as legislative history of the statute, that it has considered the effect of application of the statute on tribal rights and intends that the statute should apply to tribes.

II. THE FEDERAL-TRIBAL RELATIONSHIP

A. The "Plenary Power" Doctrine

The controversy as to whether federal statutes apply to Native American tribes is complicated by the unique relationship between the federal and tribal governments.⁶ Native tribal governments neither interact with the federal government at arm's length as independent nations nor as states protected by constitutional restraints on the assertion of authority by the federal government.⁷

Native American tribes of course existed as independent sovereign nations long before European settlement;⁸ indeed, European nations, and subsequently the early United States government,⁹ interacted with native tribes on a sovereign-to-sovereign basis through intergovernmental treaties.¹⁰ Native

6. "One of the legacies of the colonization process is the fact that Indian tribes, which began their interaction with the federal government as largely sovereign entities *outside* the republic, were increasingly absorbed into the republic, eventually becoming internal sovereigns of a *limited kind*." Frank Pommerheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 417. North American native tribes "represent the only aboriginal peoples [in the world] still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands." VINE DELORIA, JR. & CLIFFORD LYTTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 2 (1984).

7. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

8. The Supreme Court acknowledges the primacy of Native American sovereignty in its discussions of the development of federal Native American law. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) ("Before the coming of the Europeans, the tribes were self-governing sovereign political communities.").

9. The United States Constitution refers to Native Americans in three places: it twice excludes "Indians not taxed" from the apportionment formula of the House of Representatives. U.S. CONST. art. I, § 2, cl. 3; *id.* at amend. XIV, § 2. It also delegates authority to Congress to regulate commerce "with the Indian tribes." *Id.* at art. I, § 8, cl. 3. One scholar points out that these references "demonstrate[] the extent to which that foundational document established a government for the colonizers and treated Indians and tribes as outsiders." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993).

10. The United States government signed its first treaty with the Delaware Tribe in 1778. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832). Congress terminated future treaty-making with native tribes

tribes, however, are no longer fully independent sovereign nations. Through the acquisition of tribal lands by the United States' overwhelming military power, tribal governments have been subordinated to the control of the federal government; they have become "domestic dependent nations . . . completely under the sovereignty and dominion of the United States."¹¹

The Supreme Court constitutionally validated the federal government's assumption of authority over native tribes under the doctrine of "plenary power."¹² Under this doctrine, the federal government can assert virtually unlimited authority over Native American tribes, subject only to constraints imposed by the United States Constitution and the special nature of the relationship between the United States and the tribes.¹³ The Supreme Court has likened the relationship between the federal government and native tribes to a "guardianship," creating a trust relationship between the two.¹⁴ In this relationship, tribes retain sovereign power over their own political, economic, and social affairs; they have lost only those powers that are inconsistent with their "dependent" status, i.e., "external" powers to deal independently with other sovereigns.¹⁵ Even the sovereign power of self-government, however, remains subject to limitation, or even termination, by the United States government.¹⁶

Still, under the plenary power doctrine, native tribes remain within the United States "a separate people,"¹⁷ "distinct, independent political communities."¹⁸ Thus, Native American tribes presumptively retain all powers of internal sovereignty they originally possessed as independent sovereign nations, to the extent that the federal government has not taken away such powers.¹⁹

in 1871. Act of Mar. 3, 1871, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1988)).

11. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

12. For criticisms of the plenary power doctrine as having no constitutional basis, see Newton, *supra* note 7, at 199; Pommersheim, *supra* note 6, at 442.

13. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 217-20 (1982). "Indian statutes are subject to constitutional restrictions and must be tied rationally to the trust obligations of Congress." *Id.* at 219.

14. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

15. *Wheeler*, 435 U.S. at 326 ("[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.").

16. "Termination abolishes tribal government and eliminates all tribal landholdings." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 58 (2d ed. 1992). The Supreme Court upheld Congress' right to terminate tribes in *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

17. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

18. *Worcester*, 31 U.S. (6 Pet.) at 559. The Supreme Court has carried these terms into its twentieth century descriptions of tribes' political status. See, e.g., *Wheeler*, 435 U.S. at 322; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1977).

19. See *Wheeler*, 435 U.S. at 323:

B. Tribal Sovereign Rights

The primary source of tribal rights is a tribe's inherent status as a sovereign government, and a sovereign's fundamental right is the right to govern itself. The following powers are inherent in tribal self-government, or sovereignty: the power to determine the form of government; the power to determine citizenship in the government; the power to enact laws; the power to tax;²⁰ the power to enforce laws within the sovereign's territorial jurisdiction,²¹ including the power to establish a judiciary; and the power to exclude individuals from the jurisdiction.²² The latter powers include the power "to exercise civil authority over . . . conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."²³ Other powers inherent in sovereignty are the sovereign's powers to regulate commerce within its territory,²⁴ to manage its own domestic affairs,²⁵ (i.e., those matters involving social relations such as

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status.

20. The Supreme Court has characterized the power to tax as "a necessary instrument of self-government and territorial management" that derives from a tribe's "general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

21. The power to enforce laws does not include the power of a tribe to exercise criminal jurisdiction over non-Indians. See generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Tribes do, however, possess jurisdiction over natives who commit "non-major" crimes on tribal lands. See 25 U.S.C. § 1301(2) (Supp. IV 1992); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (making permanent tribal jurisdiction of 25 U.S.C. § 1301(2) over Indians who commit non-major crimes on tribal lands). "Non-major" crimes are those other than the specified "major crimes" over which the federal government possesses jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153 (1988). Tribes also generally possess the power to exercise civil jurisdiction over non-members:

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

Montana v. United States, 450 U.S. 544, 565-66 (1981) (citations omitted), *quoted with approval in South Dakota v. Bourland*, 113 S. Ct. 2309, 2319-20 (1993).

22. The various sovereign powers listed in this sentence are discussed in COHEN, *supra* note 13, at 247-52.

23. *Montana*, 450 U.S. at 566.

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

25. See *Santa Clara Pueblo*, 436 U.S. at 55-56 and cases cited therein.

marriage, divorce, adoption, and inheritance),²⁶ and to claim immunity from lawsuits unless it has consented to such suits.²⁷

All of the sovereign powers listed above are retained powers that are not dependent on the existence of a treaty,²⁸ and they all are necessary to self-determination. This notion of a tribes' retained independence in matters of internal tribal sovereignty and self-determination continues to be fully recognized in all aspects of federal Native American law by all three branches of the federal government. For example, in the recently enacted Indian Tribal Justice Act,²⁹ Congress specifically refers to the "government-to-government relationship" between the United States and Native American tribes, the "self-determination, self-reliance, and inherent sovereignty of Indian tribes," and tribes' "inherent authority to establish their own form of government."³⁰ On April 29, 1994, during an "historic"³¹ and "unprecedented"³² summit with tribal leaders to discuss issues and policies concerning Native Americans, President Clinton signed a policy memorandum addressed to heads of executive departments and agencies setting forth principles governing their dealings with tribal governments.³³ The stated purpose of the principles "is to clarify our responsibility to ensure that the Federal Government operates

26. See PEVAR, *supra* note 16, at 100.

27. *Santa Clara Pueblo*, 436 U.S. at 58.

28. See COHEN, *supra* note 13, at 241-42, 246.

29. Pub. L. No. 103-176; 107 Stat. 2004 (1993) (codified at 25 U.S.C.A. §§ 3601-31 (West Supp. 1994)).

30. The findings section of the Act states:

The Congress finds and declares that —

(1) there is a government-to-government relationship between the United States and each Indian tribe;

.....

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems

Indian Tribal Justice Act § 2, 107 Stat. at 2004 (codified at 25 U.S.C.A. § 3601 (West Supp. 1994)).

The proposed Tribal Self-Governance Act of 1993 contains similar findings:

Congress finds that —

(1) the tribal right of self-governance flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States Government with Indian tribes

S. 1618, 103d Cong., 1st Sess. § 2 (1993).

31. Tracey A. Reeves, *U.S. Tribes Encouraged by Gathering*, THE PHOENIX GAZETTE, Apr. 30, 1994, at A1.

32. John M. Broder, *Tribal Leaders Meet Clinton, Air Concerns*, L.A. TIMES, Apr. 30, 1994, at A1.

33. Presidential Documents, *Government-to-Government Relations With Native American Tribal Governments*, 59 Fed. Reg. 22,951 (Memorandum of Apr. 29, 1994).

[C]ritically important community interests are being protected by this immunity: Suits against the tribe seeking damages attack the community treasury. This money belongs to all the people of the Sauk-Suiattle nation. It must be guarded against the attacks of individuals so that it can be used for the good of all in the tribal community. Secondly, any suit against the tribe forces the tribe to expend community monies in legal fees. The possible amounts that can be expended on this effort would be great if suits of this nature are not limited. Finally, the entire community stands to suffer irreparable harm if their leaders, foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices.³⁸

The Supreme Court has recognized and upheld tribal sovereign immunity from nonconsensual suits in federal and state courts for over fifty years.³⁹ Its most cited discussion of tribal sovereign immunity appears in *Santa Clara Pueblo v. Martinez*,⁴⁰ in which it held that Congress did not waive tribes' sovereign immunity from suits brought against them in federal courts under the Indian Civil Rights Act ("ICRA").⁴¹ The Court's interpretation of whether immunity is waived by a statute directed specifically to Native American tribes⁴² is instructive to this discussion of the applicability of general federal statutes to tribes.

Santa Clara Pueblo involved a suit in federal court alleging that the Santa Clara Pueblo's membership ordinance violated equal protection rights guaranteed under the ICRA.⁴³ The Pueblo asserted its sovereign immunity in defense.⁴⁴ The Court first discussed its longstanding doctrine that tribes, as sovereigns, are immune from suit unless Congress waives tribal immunity⁴⁵ and that any such waiver must be "*unequivocally expressed.*"⁴⁶ It then found no express and unequivocal waiver of immunity in the text of the ICRA,

38. *Moses v. Joseph*, 2 Tribal C. Rep. A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980).

39. The Court's first acknowledgement of the doctrine appeared in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("Indian Nations are exempt from suit without Congressional authorization."). More recently, in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977), the Court deemed it "settled" that "[a]bsent an effective waiver or consent . . . a state court may not exercise jurisdiction over a recognized Indian tribe." The Court's development of the doctrine is discussed in Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986); and Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058 (1982), among other works.

40. 436 U.S. 49 (1978).

41. 25 U.S.C. §§ 1301-03 (1988 & Supp. V 1993).

42. The Indian Civil Rights Act, also called the "Indian Bill of Rights," limits the actions of tribal governments in ways similar to the constraints placed upon federal and state governments in the Bill of Rights to the U.S. Constitution. See *Santa Clara Pueblo*, 436 U.S. at 57.

43. *Id.* at 51.

44. *Id.* at 53.

45. *Id.* at 55-59.

46. *Id.* at 58 (emphasis added).

within a government-to-government relationship . . . with Native American tribes . . . reflecting respect for the rights of self-government due the sovereign tribal governments."³⁴ Moreover, recent Supreme Court cases recognize tribal sovereignty as the foundation of issues in Native American law.³⁵

The power of sovereign immunity is particularly germane to this discussion of the applicability of federal statutes to tribes, for such statutes (including the labor and employment statutes) can subject a tribe to suits for damages or penalties.³⁶ A sovereign's immunity from damage suits protects its ability to carry out governmental duties without interference and protects it from economic losses that could impair or destroy governmental functions.³⁷ A tribal court judge considering the question of immunity applied these rationales in the context of Native American tribal governments in the following statements:

34. *Id.* at 22,951. The "principles" enumerated in the memorandum include the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

Id.

35. See *Bourland*, 113 S. Ct. at 2321-22 (Blackmun, J., dissenting) ("[I]t is a fundamental principle of federal Indian law that Indian tribes possess 'inherent powers of a limited sovereignty which has never been extinguished.'"); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations,' that exercise inherent sovereign authority over their members and territories."). See also *Santa Clara Pueblo*, 436 U.S. at 55-56 ("[Tribes] have power to make their own substantive law in internal matters . . . and to enforce that law in their own forums.") (citations omitted). Both *Citizen Band Potawatomi* and *Santa Clara Pueblo* upheld the tribal power of sovereign immunity, discussed in the subsequent text.

36. See text accompanying *infra* notes 204-16 for a discussion of the penalties associated with federal labor and employment statutes.

37. See, e.g., Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 170-71 (1984). For a history of the sovereign immunity doctrine, see generally James Fleming, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 611-15 (1955). A recent Supreme Court discussion of the doctrine appears in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

Under the plenary power doctrine, Congress may limit or abolish treaty or statutory rights, like sovereign rights, through legislation.⁵⁵ However, under current federal policy favoring tribal sovereignty, self-determination, and economic self-sufficiency, Congress is reluctant to derogate its policy by exercising its prerogative to limit or abolish tribal rights.⁵⁶

D. Federal Policy Toward Tribal Sovereignty and Self-Sufficiency

As discussed above, United States Native American law and policy recognize tribes as sovereign governments that retain all attributes of sovereignty over their own affairs. These attributes play a critical role in tribal development and self-determination.⁵⁷ Throughout recent years, Congress has committed itself to furthering the self-determination and economic goals of tribal governments. For instance, it recently passed the Indian Employment, Training and Related Services Demonstration Act of 1992,⁵⁸ whose purposes are "to demonstrate how Indian tribal governments can integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally determined goals consistent with the policy of self-determination."⁵⁹ The Act authorizes the distribution of federal funds for implementation of tribal plans to accomplish those purposes.⁶⁰

An economic means of attaining self-determination and self-sufficiency may be accomplished through the operation of tribal businesses, which may be a tribe's only source of income apart from federal subsidies.⁶¹ Tribes operate commercial enterprises to sustain their economies and thereby gain independence from federal support. In that way, the businesses are an integral aspect of tribal sovereignty, as they enable tribes to realize the goal of self-determination. A recent book chronicling the economic "success stories" of four tribes explains this relationship between economic independence and sovereignty:

Without the means to establish economic sovereignty, most Native

Nature of Federal Indian Law, 78 CAL. L. REV. 1137, 1147-48 (1990). Professor Frickey does not criticize the holding itself, but rather points out that it is more correctly explained as a reflection of practical reasoning enveloping "attention to context, a critical approach to preunderstandings, and the fusing of horizons." *Id.* at 1240.

55. See COHEN, *supra* note 13, at 241-42.

56. Cf. Skibine, *supra* note 4, at 107-08.

57. See *infra* text accompanying notes 61-70.

58. 25 U.S.C. §§ 3401-17 (Supp. V 1993).

59. *Id.* § 3401.

60. *Id.* § 3408.

61. O'BRIEN, *supra* note 1, at 228.

as the Act only expressly authorized suits in federal court for habeas corpus relief.⁴⁷ Such a provision for relief, the Court reasoned, was not a general waiver of tribal immunity because the respondent in a habeas suit would be an individual, not a tribe.⁴⁸ Therefore, it concluded, "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."⁴⁹ Thus, although Congress can, under the plenary power doctrine, diminish the tribal power of sovereign immunity by subjecting tribes to statutory regulation, it cannot do so unless it has "unequivocally expressed" its intent to waive a tribe's immunity.⁵⁰

C. Other Sources of Tribal Rights

In addition to the inherent rights such as those discussed above, tribes may acquire rights through negotiated treaties⁵¹ with the federal government, in which tribes have ceded certain rights in exchange for others,⁵² or the federal government may confer tribal rights directly through legislation or executive order.⁵³ Treaty rights may be expressly stated in the treaty document, or they may be implied; for example, the Supreme Court has held that granting of lands to a tribe by treaty implies the right of tribal members to hunt and fish on that land.⁵⁴

47. *Id.* at 59.

48. *Id.*

49. *Id.*

50. *Id.* at 58.

51. The term "negotiated" is used loosely, as most tribes could not bargain as equals with the federal government. See PETER NABAKOV, *NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT*, 1492-1992 117-44 (1991).

52. See, e.g., *United States v. Winans*, 198 U.S. 371, 381 (1905).

53. See, e.g., *United States v. Mazurie*, 419 U.S. 544, 554 (1975) (Congress properly delegated authority to tribes to regulate liquor sales on tribal lands under Act of Aug. 15, 1953, ch. 502, 67 Stat. 586 (codified as amended at 18 U.S.C. § 1161 (1988))).

54. The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. By this treaty the Menominees retroceded certain lands they had acquired under an earlier treaty and the United States confirmed to them the Wolf River Reservation "for a home, to be held as Indian lands are held." Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree . . . that the language "to be held as Indian lands are held" includes the right to fish and to hunt The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.

Menominee Tribe, 391 U.S. at 405-06 (citation omitted). Moreover, the Court held that the Termination Act of 1954 that terminated federal supervision over the Menominee Tribe did not abrogate the tribe's hunting and fishing rights. *Id.* at 412. For a criticism of the latter holding as actually being contrary to "congressional intent," see Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic*

courts employ special canons of construction to determine tribal rights under treaties and statutes, to “ameliorate some of the harshness of the plenary power doctrine,” and “to encourage narrow construction against invasions of Indian interests and broad construction favoring Indian rights.”¹³⁹

The weaker status of tribes in the negotiation of treaties, coupled with the obligations of the trust relationship between tribes and the federal government, have caused the courts to view treaties as adhesion contracts to be construed in favor of the tribes.¹⁴⁰ In interpreting treaties, then, the Supreme Court has developed the following rules, “which, taken together, create a strong presumption that treaty rights have not been abrogated or modified by subsequent congressional enactments”:¹⁴¹ first, ambiguities in a treaty document must be resolved in favor of the tribe that is party to the document; second, a treaty must be interpreted in the way that the tribe would have understood it; and third, a treaty must be construed liberally to protect the tribe’s interests.¹⁴²

The Supreme Court also recognizes that this trust relationship requires courts to apply similar canons of construction to determine whether federal statutes infringe upon tribal rights.¹⁴³ Thus, statutes must be interpreted liberally in favor of tribes and ambiguous provisions must be interpreted to

cautions that we tread lightly in the absence of clear indications of legislative intent.”).

139. Frickey, *supra* note 9, at 1141.

140. Thus the construction of Indian treaties is akin to the construction of adhesion contracts, in that Indian treaties, like adhesion contracts, are liberally construed in favor of the weaker party, and their terms are given the meaning attached to them by laymen unversed in the law. The goal is to achieve the reasonable expectations of the weaker party. Many principles of trust law are also applicable.

Wilkinson & Volkman, *supra* note 113, at 617-18.

141. COHEN, *supra* note 13, at 222.

142. PEVAR, *supra* note 16, at 40 (citing *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976); *DeCoteau v. District Court*, 420 U.S. 425, 447 (1975); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) for the first proposition; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); *Meehan*, 175 U.S. at 10 for the second proposition; and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) for the third proposition)). See also Wilkinson & Volkman, *supra* note 113, at 617; Frickey, *supra* note 9, at 1177.

Thus began the notion that treaties are to be interpreted as the Indians would have understood them, and that drastic invasions of Indian rights should be found only where compelled by clear treaty language. Chief Justice Marshall’s creation of these canons is based in part on empirical assumptions about the probable expectations of the tribe and about the bargaining process between the tribe and the federal government. But the canons have a heavy normative component as well: The Chief Justice assumed not just good faith on the part of federal negotiators, but also a federal responsibility to ensure forthright negotiating and clear drafting to avoid “covert” losses of Indian rights.

Frickey, *supra* note 54, at 1177.

143. *Oneida Indian Nation*, 470 U.S. at 247.

tribes' benefit.¹⁴⁴ Furthermore, statutory interpretations must comport with current policies concerning federal-tribal relations, rather than the federal policy in effect at the time of the statute's enactment:

Judicially accepted canons of construction dictate that legislation be liberally construed and that any ambiguities be resolved in favor of Indians. Furthermore, even when a statute was passed in an assimilationist era, which might suggest a generalized congressional intent to abrogate tribal powers, the courts will not "strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."¹⁴⁵

But the Supreme Court has not articulated a clear standard for determining either (1) the existence of or extent of intrusion on tribal rights, or (2) congressional intent to abrogate, modify, or otherwise infringe upon those rights.¹⁴⁶ *Dion* purports to address these issues, but, like *Tuscarora*, it did not involve a statute in which Congress was *silent* as to the statute's effect on tribal interests.¹⁴⁷ Furthermore, *Dion* did not involve the issue of whether application of the statute would abrogate or modify tribal rights, as the statute clearly did so.¹⁴⁸ Therefore, *Dion* is of limited use to the issue of applicability of labor and employment statutes, but lower courts interpreting those statutes have relied on it nonetheless.¹⁴⁹

In *Dion*, the Court considered whether Congress intended the Bald Eagle Protection Act¹⁵⁰ to abrogate the implied treaty right of Native Americans to hunt bald and golden eagles on reservation land.¹⁵¹ A member of the Yankton Sioux Tribe was convicted under the Act of killing an eagle and selling eagle parts, but the Eighth Circuit reversed the conviction on the ground that the Act did not abrogate the implied treaty right of the Tribe to hunt eagles on its reservation for noncommercial purposes.¹⁵² The Supreme Court recognized that tribal members retained the rights to fish and hunt on

144. *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

145. COHEN, *supra* note 13, at 242 (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), *quoted with approval in Bryan*, 426 U.S. at 388 n.14).

146. For a comprehensive discussion of various standards articulated and their applications by the Court through 1975, see Wilkinson & Volkman, *supra* note 113, at 623-45.

147. See *infra* text accompanying note 162.

148. See *infra* text accompanying note 153.

149. See, e.g., *EEOC v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246, 249-50 (8th Cir. 1993); *Cherokee Nation*, 871 F.2d at 938, 940-41.

150. 16 U.S.C. §§ 668a-668d (1988).

151. *Dion*, 476 U.S. at 736.

152. *Id.* at 735-36.

these statutes regulate policies and practices of “employers” as the statutes define that term, the class of persons and entities that falls within the definitions of “employers” is broad, or “general.” Most Native American tribes that operate governments or businesses fit within the statutes’ definitions of “employers”: these tribes are engaged in “industries affecting commerce” as that term is broadly defined in the labor statutes, and most employ the minimum number of employees the statutes require for coverage.⁹¹

B. The Tuscarora Rule

The most widely cited rule governing the application of general federal statutes to Native American tribes is the following statement from *Federal Power Commission v. Tuscarora Indian Nation*⁹²: “[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.”⁹³ This statement, however, represented an abrupt departure from previous Supreme Court rulings.⁹⁴ Prior to *Tuscarora*, the Court had consistently ruled that, because of tribes’ sovereignty, federal statutes of general applicability did not apply to tribes or individual members on tribal lands.⁹⁵ However, despite the ostensible breadth of the “*Tuscarora* rule” and the frequency with which lower courts cite it (particularly those interpreting the labor and employment statutes), the rule actually arose in a very narrow context. The limitations of this rule are evident from an examination of the case’s facts and the Court’s reasoning from those facts.⁹⁶

In *Tuscarora*, the Court held that the Federal Power Act⁹⁷ (“FPA”) authorized licensing of construction of a power plant, even though the construction necessitated appropriation by eminent domain of the Tuscarora Nation’s homeland. The Tuscaroras held this land in fee simple rather than by treaty with the United States.⁹⁸ The FPA protects lands designated as

91. See *infra* notes 202-03 containing text of relevant labor and employment statutes.

92. 362 U.S. 99 (1960).

93. *Id.* at 116.

94. See *infra* text accompanying notes 105-11.

95. See *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (and cases cited therein); see also *United States v. Kagama*, 118 U.S. 381, 381-82 (1886) (“[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations . . . as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.”).

96. As Professor Skibine notes, “*Tuscarora* involved neither Indians within an Indian reservation nor a general law that was silent with respect to its application to Indians.” Skibine, *supra* note 4, at 104.

97. 16 U.S.C. § 791a-823b (1988 & Supp. V 1993).

98. Justice Black, in his dissent, relates the history of the acquisition of the subject land by the

“reservations” by providing that “the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired.”⁹⁹ The FPA defines “reservations” as “national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands and interests in lands owned by the United States”¹⁰⁰

First, the Court found that the language of the FPA did not protect the Tuscaroras’ land because it was not a “reservation.”¹⁰¹ The Court interpreted the FPA’s definition quite literally and technically, limiting the word “reservation” by the phrase “and other lands . . . owned by the United States.”¹⁰² The Court then reasoned that because the Tuscoras held the land in fee simple, it was not “owned by the United States” and therefore not a “reservation” within the meaning of the FPA.¹⁰³

Next, the Court found that the Tuscaroras’ land was not exempt as Indian land from either the FPA’s general condemnation provision or its delegation of eminent domain power; because the Tuscaroras held the land in fee simple, and not by treaty, they were to be considered under the statute as any other feeholder.¹⁰⁴ The Tuscaroras claimed that the FPA, as a statute of general applicability, did not apply to Indians or their lands under the Supreme Court’s established rule that “[u]nder the Constitution of the United States, as

Tuscaroras. *Tuscarora*, 362 U.S. at 134. The Tuscaroras settled on the land in 1780 after white colonists drove them from their original homelands. *Id.* In 1784, the United States government promised in a treaty that “[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.” *Id.* at 137 (quoting the Treaty of Fort Stanwix of Oct. 22, 1784, art. II, 7 Stat. 15, 15). Again in 1794, the United States treated with the Seneca and Six Nations of New York, of which the Tuscarora was a member tribe, promising that the land these nations occupied “shall remain [the Tribes’ property] until they choose to sell the [property] to the people of the United States.” *Id.* at 138 (quoting the Treaty of Canandaigua of Nov. 11, 1794, art. II, 7 Stat. 44, 45). In 1800 the Tuscaroras’ legal right to the land was challenged; as a result, the land was deeded to the Tuscaroras by the Senecas and the Holland Land Company. *Id.* at 134. Four years later, the Tuscaroras were able to obtain \$15,000 for the land they fled in North Carolina, and the United States assisted their purchase of additional land from the Holland Land Company adjoining the Tuscaroras’ deeded land that the Tuscaroras had been occupying. *Id.*

Of the majority’s characterization of the Tuscaroras’ status as fee simple landholders, Justice Black commented:

Of course it is true that in 1794, when the Treaty was signed, the Tuscarora Nation did not yet have the technical legal title to that part of the reservation which the Government was later able to obtain for it. But the solemn pledge of the United States to its wards is not to be construed like a money-lender’s mortgage. Up to this time it has always been the established rule that this Court would give treaties with the Indians an enlarged interpretation; one that would assure them beyond all doubt that this Government does not engage in sharp practices with its wards.

Id. at 137-38 (Black, J., dissenting).

99. 16 U.S.C. § 797(e) (1988).

100. *Id.* § 796(2) (emphasis added).

101. *Tuscarora*, 362 U.S. at 115.

102. *Id.*

103. *Id.*

104. *Id.* at 118.

statement, 'the intention to *abrogate or modify* a treaty right is not to be lightly imputed to the Congress.'¹²⁸

Cases subsequent to *Dion*, however, disagree on whether "abrogate" and "modify" mean the same thing when applying the "*Tuscarora* rule" exceptions. This confusion exists even within a single circuit. For example, the Seventh Circuit paraphrased the exceptions to the "*Tuscarora* rule" as applying when a general statute "would *modify or affect* Indian or Tribal rights."¹²⁹ Later, however, the court states: "Simply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian tribe. . . . The critical issue is whether application of the statute would *jeopardize* a right that is secured by the treaty."¹³⁰ The dissenter in a later Seventh Circuit case focused on the latter passage, rejecting the notion that "abrogate" means "modify."¹³¹

With regard to the question of whether the application of a general federal statute affects sovereign rights, however, courts focus not only on the extent of the impact but on whether the rights affected involve matters that are "purely intramural."¹³² Again, courts reach different conclusions on this question. Some read "purely intramural" expansively, so as to encompass all aspects of tribal sovereignty.¹³³ Others read the phrase much more narrowly

128. *Dion*, 476 U.S. at 739 (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), which quoted *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934)) (emphasis added).

129. *Smart*, 868 F.2d at 932-33 (emphasis added). Specifically, the court stated:

But there is a significant *caveat* to the *Tuscarora* rule. Statutes of general application that would *modify or affect* Indian or Tribal rights sustained by treaty or other statute must specifically evince Congress' intent to interfere with those rights before a federal court will construe the statute in issue against those rights. . . .

. . . Therefore, consistent with the general rule of *Tuscarora* and the exception thereto, it must be determined whether ERISA is a statute of general application and, if so, whether its application to the Chippewa Tribe would *modify* an existing right of the Tribe secured under treaty or other statute or a right essential to self-governance in intramural matters.

Id. (second emphasis added) (citations omitted).

130. *Id.* at 934-35 (emphasis added).

131. *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490, 503 (7th Cir. 1993) (Coffey, J., dissenting). The dissent explained:

The language in *Smart* is plainly at odds with the district court's application of *Smart* to the facts before us. If any modification of a treaty right barred application of a federal statute with general applicability . . . then the principle from *Tuscarora* . . . would be cast aside and eviscerated. That a statute must do more than "modify" a treaty right for the Indians to be exempted is evident from the fact that on several occasions courts have applied general federal statutes to the Indians.

Id. (Coffey, J., dissenting) (citation omitted). The majority in *Great Lakes Indian Fish and Wildlife Comm'n* did not apply *Tuscarora* or its exceptions; it decided the case on wholly different grounds. See *infra* text accompanying notes 356-65. The dissent was responding to the lower court's application of the *Tuscarora* exceptions.

132. See *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

133. See *infra* text accompanying notes 244-52, 259-63.

to include only matters involving membership, inheritance, and domestic relations.¹³⁴

Should a court determine that application of a statute affects sovereign or treaty rights, it must next determine whether Congress intended¹³⁵ the statute to affect the tribal right. Only when there is "clear and reliable" evidence¹³⁶ in the statute or its legislative history of congressional intent to infringe upon tribal rights can the general statute be applied to the tribe.¹³⁷ In order to determine the existence and extent of tribal rights affected and to determine whether there exists "clear and reliable" evidence of congressional intent to interfere with those rights through legislation, federal courts have developed rules that tend to favor "the tradition of federal policy to encourage the development and exercise of tribal self-governing powers" and "the assumed federal obligation to preserve and protect those powers."¹³⁸ To that end,

134. See *infra* text accompanying notes 302-44.

Santa Clara Pueblo is most often cited for this limiting definition. There, the Court summarized principles of tribal sovereignty. 436 U.S. 49, 55-56 (1977). After noting that tribes "remain a 'separate people, with the power of regulating their internal and social relations,'" (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) and citing *United States v. Wheeler*, 435 U.S. 313 (1978)), the Court stated that tribes "have [the] power to make their own substantive law[s] in internal matters," and cited early cases as examples of such matters. *Santa Clara Pueblo*, 436 U.S. at 55-56 (citing *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations); *Jones v. Meehan*, 175 U.S. 1 (1899) (inheritance); *Roff v. Burney*, 168 U.S. 218 (1897) (membership)). *Santa Clara Pueblo* itself involved tribal membership rules. *Id.* at 51.

135. This analysis adopts Professor Frickey's characterization of "conventional" assumptions about the nature of "congressional intent" in the context of Native American law:

The whole notion of legislative intent is subject to the attack that a large, disputatious body like Congress can have no meaningful, collective intention. Notwithstanding this obvious problem with identifying the "actual" intent of Congress, many lawyers and judges have conventionally conceptualized the role of a judge interpreting a statute as the faithful agent of the enacting legislature. Legislative expectations have salience in a democracy, since statutes embody Congress' authoritative decisions for our polity. Courts usually derive legislative intent from statutory language and legislative history. When, as is often the case, these sources reveal no clear legislative intent, courts often engage in a second-best analysis that Judge Posner has aptly called "imaginative reconstruction," which asks what the enacting legislature probably would have done had it anticipated the issue under litigation.

. . . The best indices of congressional intent, according to this conventional approach, include statutory language, legislative history, and the general context in which Congress acted.

Frickey, *supra* note 9, at 1143 (footnotes omitted). Professor Frickey ultimately argues that, despite the Supreme Court's purported attempts to derive "legislative intent" in many Native American law cases, the Court's reasoning in these cases actually shows that it has misconstrued or even ignored actual indicia of congressional intent. Rather, the author posits, these cases more accurately (and appropriately) reflect inductive, practical reasoning based from the contemporary perspective of the particular case, its advocates and its judges, rather than from formalistic, deductive reasoning that is the benchmark of traditional legislative intent analysis. *Id.* at 1137 (summary).

136. *Dion*, 476 U.S. at 739.

137. CLINTON ET AL., *supra* note 116, at 230.

138. COHEN, *supra* note 13, at 243. See also *Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area [of tribal relations]

Americans remain America's internal exiles, living within confines established by their conquerors hundreds of years ago. The tragedy is that Indian destitution is entirely unnecessary. Many Native communities hold the raw materials of true self-determination in their hands. . . .

. . . .

In the last two decades, several tribes have recognized the extraordinary value of these assets, not only in terms of their material worth but in terms of what they mean for the quality of Native life. After centuries of decline as the objects of subjugation and neglect, these tribes have established and sustained profitable tribal economies—*internally generated, not federally imposed—as a strategy for addressing longstanding social problems and establishing authentic independence*. Employing every strategy from congressional lobbying to leveraged buy-outs, each community, in its own way, has learned to play white society's games, but by different rules and according to different scorecards. These communities are beginning to enter the mainstream economy so long denied them to mount a quiet economic revolution, which has the potential for reestablishing a Native American independence based on economic sovereignty.⁶²

Although tribal businesses are “for-profit,” the profits from such businesses flow directly to the tribal governments for the benefit of the government and its populace.⁶³ As another scholar explains, “Indian economic development may be less about creating wealth than it is about creating the conditions for political power in the context of socially responsible choices for the continued existence and cohesion of the Indian nation.”⁶⁴

Another recent article explains that Native American tribes tend to hold a much different view of corporate activity from “mainstream” corporate America.⁶⁵ Native American tribal cultures, in general, emphasize “the importance of group, non-economic bonds and the sharing of wealth,”⁶⁶ the sanctity of nature,⁶⁷ and collective responsibility not only for the welfare of individual members and the tribe as a group, but for the tribe's relations with outsiders.⁶⁸ Therefore, the idea of a corporation as a separate entity created

62. WHITE, *supra* note 1, at 6-7 (emphasis added).

63. *Id.* at 7 (“Because tribal businesses are ultimately accountable to local tribal governments (and because their tribal employees are also in effect their owners), these enterprises provide powerful leverage for human development.”). See also Michael M. Pacheco, *Toward a Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 S.D. L. REV. 49, 85 (1994) (“When a tribe undertakes a business enterprise, it usually acts on behalf of the entire tribal community.”).

64. Mohawk, *supra* note 1, at 499.

65. Pacheco, *supra* note 63, at 51-60.

66. *Id.* at 58.

67. *Id.*

68. *Id.* at 58-59.

to increase the wealth of its individual shareholders while protecting them from liability is foreign to the "world views" of tribal cultures.⁶⁹ Tribes' "undifferentiated view of economic-social-political-religious problems"⁷⁰ thus accounts for the central role of tribal businesses in the overall welfare and continuation of the tribe itself.

The Supreme Court recently acknowledged the important relationship between tribal businesses and self-determination and ruled in a manner that preserved all aspects of tribal sovereign immunity so as to enable tribes to attain the goal of self-sufficiency. Specifically, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,⁷¹ the State of Oklahoma sought, inter alia, to sue the Tribe in state court for taxes on the Tribe's cigarette sales.⁷² The Court refused the State's request to abandon the doctrine of tribal sovereign immunity or, in the alternative, to limit tribal sovereign immunity to governmental, rather than business, activities.⁷³ It reasoned that Congress had "consistently reiterated its approval of the immunity doctrine"⁷⁴ by passing acts such as the Indian Financing Act of 1974⁷⁵ and the Indian Self-Determination and Education Assistance Act,⁷⁶ which "reflect Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'"⁷⁷ Elimination of the immunity defense for tribal businesses, the Court effectively concluded, would thwart these goals to the same extent as elimination of the immunity defense for tribal governments.⁷⁸

Thus, although Congress may limit or take away tribal rights, federal policy favoring tribal sovereignty, self-determination, and self-sufficiency dictates that Congress may not casually diminish tribal rights by legislation. An examination of the economic status of tribal governments provides insight into this policy.

69. *Id.* at 56-60.

70. *Id.* at 58 (quoting VINE DELORIA, JR., WE TALK, YOU LISTEN: NEW TRIBES, NEW TURF 157 (1970)).

71. 498 U.S. 505 (1991).

72. *Id.* at 507.

73. *Id.* at 510.

74. *Id.*

75. 25 U.S.C. §§ 1451-544 (1988).

76. 25 U.S.C. §§ 450-450n (1988 & Supp. V 1993).

77. *Citizen Band Potawatomi*, 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

78. *Id.*

the “*Tuscarora* rule” with established principles of federal law governing treatment of Native American tribes, have limited application of the general rule to exceptional circumstances.

C. *Limitation on the Tuscarora Rule*

The Supreme Court’s reasoning implicitly limits the reach of *Tuscarora* to situations in which application of a general statute would not interfere with any tribal rights.¹¹⁶ Indeed, the lower courts have read such a limitation into the “*Tuscarora* rule.” The frequently cited limitation, developed by the Ninth Circuit in *United States v. Farris*¹¹⁷ and extended by subsequent cases to laws involving labor and employment statutes, states that the *Tuscarora* rule does not apply to tribes under three circumstances:

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”¹¹⁸

Maureen M. Crough, Comment, *A Proposal for Extension of the Occupational Safety and Health Act to Indian-Owned Businesses on Reservations*, 18 U. MICH. J.L. REF. 473, 486-87 (1985) (footnotes omitted).

For a similar discussion of *Tuscarora*’s reasoning from the tax cases and departure from precedent, see also Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 591 (1989).

116. The Supreme Court has used the “*Tuscarora* rule” only one other time, in a case in which it likewise determined that no tribal right existed and that application of the general statute (again, the FPA) therefore abrogated no rights. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786-87 (1983), the Court held that the FPA superceded section 8 of the Mission Indian Relief Act of 1891, ch. 65, § 8, 26 Stat. 712, 714. It reasoned that even though the latter act empowered the Mission Bands to contract with third parties for water rights-of-way across their lands, the act did not empower the Bands to veto the Federal Power Commission’s decision to utilize their lands for construction of a hydroelectric plant, where no treaty gave the Bands that authority and the legislative history of the FPA explicitly rejected a provision that would have required tribal consent for a license. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 229-30 (1983).

Interestingly, *Tuscarora* is most often cited in Supreme Court opinions for its *dissent*’s final comment: “Great nations, like great men, should keep their word.” 362 U.S. at 142 (Black, J., dissenting). In his dissent, Justice Black, joined by Chief Justice Warren and Justice Douglas, stated that the taking of the *Tuscaroras*’ land not only was “positively prohibit[ed]” by the FPA, it “violat[e]d the Nation’s long-established policy of recognizing and preserving Indian reservations for tribal use, and that it constitute[d] a breach of Indian treaties recognized by Congress since at least 1794.” *Id.* at 125.

117. 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

118. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *Farris*, 624 F.2d at 893-94); *accord Smart v. State Farm Insurance Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 n.3 (10th Cir. 1989). *Coeur d’Alene Tribal Farm, Smart*, and *Cherokee Nation* involved application of labor and employment statutes and will be discussed further *infra*.

"In any of these three situations," the *Farris* court explained, "Congress must expressly apply a statute to Indians before we will hold that it reaches them."¹¹⁹ Application of this rule, however, is hardly straightforward. Opinions vary greatly as to whether one of these three circumstances is present in cases in which Congress is silent as to general statutes' applicability to tribes.

Thus, in determining whether a general federal statute applies to tribes, the first inquiry must be whether application of the statute would affect tribal rights, either treaty rights or self-governance rights.¹²⁰ A necessary part of that inquiry is to determine what right is being affected. Some courts read general rights of sovereignty into tribal treaties, blurring the distinction between sovereign rights and treaty rights; other courts consider treaty rights to include all implied treaty rights; while other courts require identification of a particular explicit treaty right before they will apply the "*Tuscarora* rule" exceptions.¹²¹

Once the tribal right affected by application of a statute is identified, courts must determine the extent to which the right would be affected by application of the statute.¹²² Interestingly, the language setting out the exceptions to the "*Tuscarora* rule" describes differently the effect that statutes must have on sovereign rights, as opposed to treaty rights. As to self-governance rights, the "*Tuscarora* rule" does not apply if "the law touches 'exclusive rights of self-governance in purely intramural matters.'"¹²³ But if treaty rights are concerned, the rule does not apply if "application of the law . . . would 'abrogate rights guaranteed by Indian treaties.'"¹²⁴

Although the word "abrogate" seems to imply a greater impact on tribal rights than "touches," the precise meaning of "abrogate" is not clear.¹²⁵ The Supreme Court, in *United States v. Dion*,¹²⁶ recently examined the question of whether a statute abrogated tribal treaty rights.¹²⁷ In laying out the precedent governing interpretation of treaties, the Court cited language from two prior cases that seems to equate "abrogate" and "modify" in the context of determining congressional intent: "We do not construe statutes as abrogating treaty rights in 'a backhanded way'[,] in the absence of explicit

119. *Farris*, 624 F.2d at 893; see *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

120. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

121. See *infra* text accompanying notes 288-344.

122. See *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

123. *Id.* (emphasis added).

124. *Id.* (emphasis added).

125. See *id.*

126. 476 U.S. 734 (1986).

127. *Dion's* discussion of this question is discussed more fully in the text accompanying *infra* notes 150-75.

III. ECONOMIC REALITIES OF TRIBAL GOVERNMENTS

Although Native American tribes function through governments, the vast majority of tribal governments operate by way of meager funding derived primarily from federal sources.⁷⁹ Tribal governments possess the sovereign power to tax, but cannot look to their anemic economies or largely unemployed constituencies for any kind of tax base. Compared with state and municipal governments, tribes truly operate on “shoestrings.”

The relative poverty of tribal governments is a matter of record. With regard to the status of federal funding to tribes, which is for the most part funneled through the Bureau of Indian Affairs (“BIA”),⁸⁰ Senator John McCain observed in his statement introducing the proposed Tribal Self-Governance Act of 1993⁸¹:

I also want to emphasize that this program is not about equity funding. Unfortunately, Federal Indian programs are already severely underfunded. It is my hope that the Congress will not only increase funding for Indian programs, but will also ensure that such funding actually goes toward meeting the needs of the Indian people rather than the needs of a bloated Federal bureaucracy.⁸²

79. Most tribes have no formal economy to generate capital. Their capital comes mostly from outside the reservation. Only 30 percent of tribal money originates from tribal businesses or from annuities from the sale of land or judgment awards. The remaining 70 percent of all tribal dollars are federal dollars that enter the reservation economy in the form of grants.

O'BRIEN, *supra* note 1, at 228.

80. [T]he bureaucratic maze that constitutes the BIA and the unbelievably high administrative overhead costs associated with the BIA management or oversight of federal Indian programs justly have been criticized as siphoning off desperately needed Indian program funds before they reach the Indian communities they are designed to serve.

Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 136 (1993).

81. S. 1618, 103d Cong., 1st Sess. (1993).

82. 139 CONG. REC. S15,089 (daily ed. Nov. 4, 1993). The proposed act would permanently install a funding scheme piloted in the Tribal Self-Governance Demonstration Project Act, Pub. L. No. 102-184, 105 Stat. 1278 (1991) (amending provisions of 25 U.S.C. §§ 450-450n (1988 & Supp. V 1993)). Under that project, approximately eighteen tribes received grants directly, to be spent as the tribes themselves determined. *Id.*; see also Clinton, *supra* note 80, at 138. Federal aid to state and local governments dwarfs federal aid to Native American governments. The following overall figures provide some insight: federal outlays for 1993 for grants to state and local governments totalled approximately 193.5 billion dollars. OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1995 178 (1994) (Table 12.1 — Summary Comparison of Total Outlays for Grants to State and Local Governments). Federal funding appropriations to the BIA for Indian

Reservations are home to some of the poorest people in the country. In 1989, 47.3% of families on reservations or trust land lived below the poverty level, compared to 11.5% of families in the entire country.⁸³ The median family income on reservations and trust land was \$13,489, compared to \$34,213 nationwide.⁸⁴ Reservation unemployment figures range from 30 to 90 percent.⁸⁵

A most telling illustration of the poverty of tribal governments occurred this spring at the tribal summit convened by President Clinton. Although he invited representatives of all the 547 federally recognized tribes to the White House,⁸⁶ over 40% of the tribes could not afford to send anyone.⁸⁷ Moreover, some of the 322 tribes who sent representatives spent up to half of their year's budgets to do so.⁸⁸

IV. RULES GOVERNING APPLICATION OF GENERAL FEDERAL STATUTES TO TRIBES

A. *Statutes of General Applicability*

The "generality" of a statute refers to the scope of the class of persons or entities to which the statute applies.⁸⁹ For example, a statute addressed to "all persons" (such as criminal statutes) would apply to a large class and thus have general applicability. On the other hand, a statute specifically directed to, or regulating the activities of, a unique group (such as the regulation of Native American tribes by the Indian Civil Rights Act)⁹⁰ would apply to a special, or limited, class.

This article focuses on federal labor and employment statutes. Although

programs and to other agencies for Indian health services and education in 1993 totalled approximately 3.3 billion dollars. CONGRESSIONAL QUARTERLY ALMANAC 619 (1993).

83. Dirk Johnson, *Economies Come to Life on Indian Reservations*, N.Y. TIMES, July 3, 1994, at A1, A10-11, A11 (citing the Census Bureau and National Indian Policy Center).

84. *Id.*

85. O'BRIEN, *supra* note 1, at 226.

86. Broder, *supra* note 32, at A1.

87. *Id.*

88. Linda Kanamine, *Native American Leaders Gather at White House; The Issues: Sovereignty, "Commitment,"* USA TODAY, Apr. 29, 1994, at 2A.

89. "Generality" has been defined as: "The capacity of a word or term denoting a class (e.g., 'American citizen') to refer simultaneously to all members of the class." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 284 (1975).

90. 25 U.S.C. §§ 1301-03 (1988 & Supp. V 1993).

originally established . . . General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.”¹⁰⁵ The Court agreed that the FPA was a statute of general applicability; however, it refused to follow its previously established rule.¹⁰⁶

Instead, the Court turned to prior cases involving taxation of Native American individuals, not tribes.¹⁰⁷ In one case, the Court held that federal income tax statutes applied to earnings from funds of a member of the Creek Nation that had been held and invested by the Superintendent of the Five Civilized Tribes.¹⁰⁸ In another, the Court held that a state could impose an inheritance tax on the estate of a tribal member.¹⁰⁹ In both of these tax cases, the Court applied a rule unique to tax law that “[t]he intent to exclude [the subject matter from the tax] must be definitely expressed, where . . . the language of the Act laying the tax is broad enough to include the subject matter.”¹¹⁰ The Court then applied this rule to the question of whether the FPA applied to the Tuscaroras’ land and concluded:

The [FPA] gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. . . . [U]pon the authority of the cases cited, we must hold that [the condemnation provision of the FPA] applies to these lands owned in fee simple by the Tuscarora Indian Nation.¹¹¹

Irrespective of the Court’s reliance on rules developed in tax cases involving individuals rather than tribes, however, the key to the outcome of *Tuscarora* was simply the fact that the land involved was held in fee simple,

105. *Id.* at 115-16 (discussing *Elk*, 112 U.S. at 99-100).

106. *See id.* at 116.

107. *See id.* at 116-18.

108. *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418, 419-20 (1935).

109. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 608-10 (1943).

110. *See Tuscarora*, 362 U.S. at 117 (citing *Superintendent of Five Civilized Tribes*, 295 U.S. at 420, discussing *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)). The Court’s use of the rule of these tax law cases ignores its previous recognition that taxing statutes are subject to the same liberal interpretation as all other statutes applied to tribes:

[T]hough the provision of non-taxability added to the value of the property, it can be withdrawn because, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears. . . . But in the Government’s dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. *This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.*

Choate v. Trapp, 224 U.S. 665, 674-75 (1912) (emphasis added) (citations omitted).

111. *Tuscarora*, 362 U.S. at 118.

not by treaty.¹¹² Therefore, the Court was able to find that the land did not constitute a “reservation” protected by the FPA and that the Tuscaroras had no treaty rights to the land that would be abrogated by application of the FPA.¹¹³ Because the FPA explicitly contemplated treatment of tribal lands, the Court’s statement that “a general statute in terms applying to all persons includes Indians and their property interests”¹¹⁴—the “*Tuscarora* rule”—is merely dictum.

Commentators have followed the case’s dissent in roundly criticizing the reasoning of *Tuscarora* as well as the lower courts’ subsequent adoption of the resulting dictum.¹¹⁵ However, lower courts, recognizing the incongruity of

112. *See id.* at 123.

113. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” — How Long a Time is That?*, 63 CAL. L. REV. 601, 629-30 (1975).

114. *Tuscarora*, 362 U.S. at 116.

115. Justice Black’s dissent criticized the majority’s choice of precedent as follows:

The cases which the Court cites in its opinion do not justify the broad meaning read into § 21. Many of those cases deal with taxation—federal and state. The fact that Indians are sometimes taxed like other citizens does not even remotely indicate that Congress has weakened in any way its policy to preserve “tribal lands embraced within Indian reservations.” Moreover, cases dealing with individuals who are not Indians are not applicable to tribal reservations. . . . Other cases relied on by the Court . . . all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians’ lands

Id. at 132 (Black, J., dissenting) (citations omitted).

Noting that Justice Black did not state why he would distinguish tax cases, Professor Skibine suggests the following rationales:

[A]n obvious reason to presume congressional intent to include reservation Indians in tax legislation is the use of all-inclusive language in the tax laws. Tax laws apply anywhere within the exterior boundaries of the United States and apply to income from whatever source. Another reason to distinguish tax cases is the longstanding principle against any tax exemptions by implication. The pattern of congressional treatment of both Indians and exemptions in the field of taxation thus militates for a presumption that when Congress enacts general tax legislation, it intends to include reservation Indians

Another important factor distinguishing these tax laws and the court decisions applying them to reservation Indians is that both the laws and the earlier decisions were issued at a time when congressional policy was one of assimilation, not one of encouraging tribal self-government.

Skibine, *supra* note 4, at 105-07 (footnotes omitted).

Another commentator offers the following analysis of the error in using the rationale of *Tuscarora* to find that general federal statutes apply to tribes:

The dictum says no more than that general laws apply to individual Indians living away from their tribes, a subject tangential to the holding that laws specifically referring to tribes apply to them. This interpretation is correct for two reasons. First, the dictum expressly relied upon three tax cases that held general statutes applicable to individual Indians separated from their tribes. The *Tuscarora* rule’s expansive reading of the original case’s dictum is unjustified because tribal sovereignty was not at issue in the cases on which the dictum is based. Second, the dictum’s assertion that the term “persons,” in a statute, applies to Indians strongly suggests that those Indians are individuals, not tribes. The *Tuscarora* rule fails to acknowledge that the special status of tribes generally excludes them from the statutory definition of “persons.”

land ceded to the Tribe under a treaty with the federal government, even though those rights were not expressly mentioned in the treaty.¹⁵³ Therefore, the Court proceeded to the question of whether Congress intended by the legislation to abrogate tribal members' right to hunt eagles on their land.¹⁵⁴

The Court began by requiring that "Congress' intention to abrogate Indian treaty rights be clear and plain."¹⁵⁵ But it acknowledged that it had previously articulated a number of "different standards over the years for determining such clear and plain intent,"¹⁵⁶ ranging from a requirement of "'express declaration' of [Congress'] intent to abrogate treaty rights" in early cases,¹⁵⁷ to a looser standard of discerning this intent from "legislative history," "surrounding circumstances," or "the face of the Act."¹⁵⁸ While admitting its preference that Congress explicitly state that Congress is abrogating tribal rights, the Court refused to require such explicit language for a finding of abrogation:

We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute."¹⁵⁹

To clarify the preceding passage, the Court added: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."¹⁶⁰

The Court's statements in *Dion*, however, do little to clarify the standard to determine whether the intent to abrogate tribal rights is "clear and plain," particularly when the statute and its legislative history are silent. The Court does state that, although no express language of intent is required, there must be "clear and reliable evidence" in either the statute or its legislative history that Congress "actually considered" that the application of the statute would abrogate treaty rights.¹⁶¹ In *Dion*, such evidence was present in both the statute and legislative history.

The Court easily determined that the face of the Bald Eagle Protection Act

153. *Id.* at 737-38.

154. *Id.* at 738.

155. *Id.*

156. *Id.* at 739.

157. *Id.*

158. *Id.* (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977)).

159. *Id.* (quoting COHEN, *supra* note 13, at 223).

160. *Id.* at 739-40.

161. *Id.*

evinced intent to abrogate the Tribe's right to hunt eagles, as the Act provides that the Secretary of the Interior may "permit the taking, possession, and transportation of eagles 'for the religious purposes of Indian tribes,' . . . upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle."¹⁶² Moreover, the Court noted that the legislative history of the Act contains a number of references to the significance of eagles to certain tribal cultures.¹⁶³ On the one hand, the House Committee report "cited the demand for eagle feathers for Indian religious ceremonies as one of the threats to the continued survival of the golden eagle that necessitated passage of the bill."¹⁶⁴ On the other hand, the report discussed the effect that a law totally banning the hunting of eagles would have on customs and religious practices of certain tribes.¹⁶⁵ The report indicated that in response to those concerns the Committee added the exemption language quoted above to the bill.¹⁶⁶ The bill passed the House, and the Senate did not modify the language concerning exceptions for tribal religious use of eagles permitted by the Secretary of the Interior.¹⁶⁷ Such "clear and reliable" evidence in the Act's legislative history compelled the Court to find that Congress intended to abrogate tribal hunting rights with the Bald Eagle Protection Act.¹⁶⁸

One scholar explains the significance of the Court's requirement of "clear and reliable" evidence of congressional intent (what he terms a "clear-statement rule") to Native American law by discussing use of the rule in constitutional law cases concerning states' rights.¹⁶⁹ He notes that the Court invokes "particularly stringent clear-statement rules . . . in order to protect values rooted in federalism and the separation of powers from evisceration at the hands of Congress" when it reasons that Congress may legislate away states' Eleventh Amendment immunity from suit or regulate core state functions "'only by making its intention unmistakably clear in the language of the statute.'"¹⁷⁰ Clear-statement rules enable the Court to avoid difficult interpretative questions as to whether legislation "goes too far" and requires that such questions be confronted directly in the legislative process rather than

162. *Dion*, 476 U.S. at 740 (quoting 16 U.S.C. § 668a).

163. *Id.* at 740-43.

164. *Id.* at 743.

165. *Id.* at 741-42.

166. *Id.* at 742.

167. *Id.* at 742-43.

168. *Id.* at 745 ("Congress' 1962 action, we conclude, reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species. We therefore read the statute as having abrogated that treaty right.")

169. Frickey, *supra* note 9, at 415.

170. *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

indirectly through judicial review.¹⁷¹

Dion's rule ascribes to the same purpose of protecting tribal sovereignty from erosion by congressional legislation.¹⁷² Like a constitution, a treaty is a "document of sovereignty."¹⁷³ But Congress has the power to abrogate treaties unilaterally.¹⁷⁴ *Dion's* requirement of "clear and reliable" evidence of intent to abrogate treaty rights provides a judicial check on legislation that may "go too far" in taking away sovereign rights.¹⁷⁵ *Farris* extends the same protection over the sovereign right of self-governance: "Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians."¹⁷⁶ When a statute "touches 'exclusive rights of self-governance in purely intramural matters' . . . Congress must expressly apply [the] statute to Indians."¹⁷⁷ *Dion's* "clear and reliable" standard has been used to determine "express" evidence of intent.¹⁷⁸

However, courts have continued to grapple with the problem of what constitutes "clear and reliable" evidence of congressional intent to modify or abrogate tribal rights in the face of congressional silence—i.e., when the

171. *See id.* at 415-16.

Federalism and the separation of powers are fundamental to our system, but the Court cannot easily protect them through constitutional invalidation. Most separation of powers and federalism questions essentially ask whether Congress adopted legislation that "goes too far" in invading the domain of the executive or of the states. It is difficult to find some principled way to draw this line, and in the modern regulatory state there is an evident need for wide-ranging congressional authority

This approach . . . provides the Court with a structural lodestar to cut through the complexities of a difficult statutory case. The state gets the benefit of a strong presumption in favor of its sovereignty, and the opposing party bears the burden of marshalling the legal complexities and finding clear evidence of congressional support for its position. If, as is often the case, state sovereignty survives the challenge, the burden of combatting inertia and seeking legal change lies with the party who sought to intrude upon state authority. If this party undertakes the lobbying effort necessary to obtain federal legislation to overturn the Court's decision, it must do so openly, by clear language in a bill. In theory, at least, this approach encourages a fair fight in Congress, which is structurally better suited than the Court to weigh state sovereignty against other interests. Because it is much easier to kill legislation than to pass it, states ultimately retain all the institutional and procedural advantages in conflicts over their sovereignty, but Congress retains the capacity to erode state sovereignty whenever the national interest is sufficiently strong.

Id. (footnotes omitted).

172. *Id.* at 417 ("Just as contemporary decisions protect against all but express repeals of values rooted in the Constitution, the Indian treaty abrogation doctrine protects against all but clear repeals of values rooted in the spirit of Indian treaties.")

173. *Id.*

174. *Id.*

175. *Id.*

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

177. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

178. *See, e.g., Fond du Lac Heavy Equip.*, 986 F.2d at 248.

statute or legislative history nowhere indicates that Congress ever considered the statute's effect on tribal rights.¹⁷⁹ This is the crucial problem for courts and agencies considering the applicability to tribes of labor and employment legislation, all but two of which are silent with respect to tribal employers.¹⁸⁰ To compound this difficulty, courts have struggled in these labor and employment cases with the initial problem of determining the nature of the rights being modified or abrogated.¹⁸¹ The following section illustrates the inconsistencies in the reasoning of these cases.

V. APPLICATION OF FEDERAL LABOR AND EMPLOYMENT STATUTES TO TRIBES

A. Federal Labor and Employment Statutes of General Applicability

Congress has legislated many aspects of the employment relationship to reflect broad policy considerations designed to redress the imbalance of power in the employment relationship and to protect the welfare of employees. The most far-reaching of these statutes include the following, most of which federal courts have considered in relation to their applicability to Native American tribes.

The antidiscrimination statutes prohibit discrimination in employment based on certain characteristics. Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended,¹⁸² prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion.¹⁸³ Certain of the Reconstruction Era Civil Rights Acts, namely 42 U.S.C. § 1981¹⁸⁴ and

179. Professor Frickey points out in his criticism of "intentionalism" as a foundational approach to Native American law that "a primary empirical problem is that intentionalism requires asking a counterfactual and difficult question in many cases. It is unlikely that Congress ever anticipated, much less had some expectation about, the precise issue being litigated." Frickey, *supra* note 54, at 1211. This observation is especially pertinent to labor and employment laws; except with respect to Title VII and the ADA, whose language was copied directly from Title VII, it is highly doubtful that Congress considered Native American tribes as a class of employers. *Cf. infra* note 284.

180. *See infra* text accompanying notes 244-410.

181. *See infra* text accompanying notes 302-410.

182. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).

183. *See id.* § 2000e-2.

184. Section 1981 prohibits racial and race-based ethnicity discrimination in private and public sector employment. *See* 42 U.S.C. §§ 1981(c), 1981a (Supp. IV 1992); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 606, 609 (1987).

§ 1983,¹⁸⁵ prohibit race and ethnicity discrimination in employment as well. The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended,¹⁸⁶ prohibits discrimination in employment against persons age forty and older.¹⁸⁷ Title I of the Americans with Disabilities Act of 1990 ("ADA")¹⁸⁸ and portions of the Rehabilitation Act of 1973¹⁸⁹ require employers to provide reasonable accommodation to persons with physical or mental disabilities who are otherwise qualified for the job.¹⁹⁰

Other statutes regulate tangible terms and conditions of employment. The Fair Labor Standards Act of 1938 ("FLSA"), as amended,¹⁹¹ authorizes the Secretary of Labor to set and enforce standards for minimum wages¹⁹² and terms of payment for overtime work of the nonprofessional labor force,¹⁹³ prohibits sex discrimination in compensation,¹⁹⁴ and regulates employment of children.¹⁹⁵ The Occupational Safety and Health Act ("OSHA")¹⁹⁶ prescribes workplace safety and health standards. The Employee Retirement Income Security Act ("ERISA")¹⁹⁷ regulates employers' pension and health benefit plans. The newly enacted Family and Medical Leave Act ("FMLA")¹⁹⁸ provides for employee leaves of absence of up to twelve weeks each year for the birth or adoption of a child or the serious health condition of an employee or the employee's family member.¹⁹⁹

A comprehensive statute governs collective bargaining relationships between

185. In the context of employment discrimination, § 1983 provides a cause of action against public-sector employers for violation of employees' equal protection rights. *See* 42 U.S.C. § 1983 (1988).

186. 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993).

187. *See id.* §§ 623, 631.

188. 42 U.S.C. §§ 12111-17 (Supp. IV 1992).

189. 29 U.S.C. §§ 791, 793, 794 (1988).

190. Employers covered by the Rehabilitation Act of 1973 are limited to the federal government (§ 791), federal contractors with contracts of \$10,000 or more (§ 793), and entities receiving federal grants (§ 794). The Americans with Disabilities Act of 1990 extends to private employers and affords the same coverage as that afforded under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 1981(c) (Title VII), 12111(5) (ADA).

191. 29 U.S.C. §§ 201-19 (1988 & Supp. V 1993).

192. *Id.* § 206.

193. *Id.* § 207.

194. The Equal Pay Act, *Id.* § 206(d).

195. 29 U.S.C. § 212.

196. 29 U.S.C. §§ 651-78 (1988 & Supp. V 1993).

197. 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

198. 29 U.S.C.A. §§ 2601-54 (West Supp. 1994). Definitional provisions of the FMLA are tied in to those of other labor and employment statutes. *See, e.g.*, § 2611(1) (definitions of "commerce" and "industry affecting commerce" are the same as in the Labor Management Relations Act of 1947, 29 U.S.C. § 142 (1),(3)); § 2611(3) (definitions of "employ," "employee," and "State" are the same as in FLSA, 29 U.S.C. § 203(c), (e), and (g)). Moreover, among the stated purposes of the FMLA are to "minimize[] the potential for employment discrimination on the basis of sex" and "to promote the goal of equal employment opportunity for women and men." 29 U.S.C.A. § 2601(b)(4), (5).

199. *See* 29 U.S.C.A. § 2612(a)(1).

labor and management. The National Labor Relations Act, as amended by the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act ("NLRA"),²⁰⁰ defines employees' rights to organize, to bargain with their employers as to the terms and conditions of employment, and to engage in concerted activity for the purpose of collective bargaining "or other mutual aid or protection."²⁰¹

These federal labor and employment statutes are "of general applicability"; that is, they cover all persons and entities that fall within the statutes' definitions of "employers" and "employees." With the exceptions of Title VII and the ADA, which expressly exclude Indian tribes from their definitions of covered employers,²⁰² none of the statutes or the documents comprising their legislative histories mention Indians or Indian tribes. In all other respects, these statutes define "employer" or set out the scope of their coverage similarly to Title VII and the ADA: they all require that the employment relationship involve activities or products that move in interstate commerce; they all indicate whether they apply to the public sector (federal, state, and local governments); and they may designate a minimum number of employees required for coverage.²⁰³

200. 29 U.S.C. §§ 151-87 (1988 & Supp. V 1993).

201. *See id.* § 157.

202. Title VII defines "employer" as follows:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service

42 U.S.C. § 2000e(b) (emphasis added).

The ADA defines "employer" similarly:

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person The term "employer" does not include — (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe

42 U.S.C. § 12111(A), (B)(i) (emphasis added).

203. For general comparative purposes, the current language setting out the scope of coverage of these other major labor statutes is listed below. When original statutory language is being compared, the original language will be provided in the specific discussion. *See* comparison of original language of ADEA with that of Title VII at *infra* note 241.

The Age Discrimination in Employment Act, 29 U.S.C. §§ 630(b), (f), (h); 633a(a):

§ 630(b) [*employer*]: The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

§ 630(f) [*employee*]: The term “employee” means an individual employed by any employer except that the term “employee” shall not include any person elected to public office in any State or political subdivision of a State by the qualified voters thereof The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

§ 630(h) [*commerce*]: The term “industry affecting commerce” means any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce

§ 633a(a) [coverage extended to *government employment* in 1978]: All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in military departments . . . in executive agencies . . . in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

The Fair Labor Standards Act, 29 U.S.C. §§ 203(d), (e), (s)(1); 206(a); 207(a)(2), (k):

§ 203(d) [*employer*]: “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization

§ 203(e) [*employee/government employment*]: [T]he term “employee” means any individual employed by an employer. (2) In the case of an individual employed by a public agency, such term means—(A) any individual employed by the government of the United States—(i) as a civilian in the military departments . . . (ii) in any executive agency . . . (iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service, (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or (v) in the Library of Congress; (B) any individual employed by the United States Postal Service or the Postal Rate Commission; and (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and (ii) who—(I) holds a public elective office of that State, political subdivision, or agency, (II) is selected by the holder of such an office to be a member of his personal staff, (III) is appointed by such an officeholder to serve on a policymaking level, (IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or (V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

§ 203(s)(1) [*commerce*]: “Enterprise engaged in commerce or in the production of goods for commerce” means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and . . . (1) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 . . . (5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or (6) is an activity of a public agency.

§ 206(a) [*employee/commerce*]: Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates

§ 207(a)(2) [*employee/commerce*]: [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . (A) for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 207(k) [*government employment*]: No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities [if employed in tours of duty meeting specified requirements].

The Family and Medical Leave Act, 29 U.S.C.A. § 2611(3), (4)(A)(i):

§ 2611(3) [*employ/employee/government employment*]: The terms “employ,” “employee,” and “State” have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(c), (e), and (g)).

§ 2611(4)(A)(i) [*employer*]: The term “employer” means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

The Occupational Safety and Health Act, 29 U.S.C. § 652(5), (6):

§ 652(5) [*employer/government employment*]: The term “employer” means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

§ 652(6) [*employee/commerce*]: The term “employee” means an employee of an employer who is employed in a business of his employer which affects commerce.

The Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(5), (6), (12), (32); 1003:

§ 1002(5) [*employer*]: The term “employer” means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan

§ 1002(6) [*employee*]: The term “employee” means any individual employed by an employer.

§ 1002(12) [*commerce*]: The term “industry or activity affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry “affecting commerce” within the meaning of the Labor Management Relations Act

§ 1002(32) [*government-provided plans*]: The term “governmental plan” means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing

§ 1003 [*coverage/commerce/government-provided plans*]: (a) Except as provided in subsection

The labor and employment statutes all contain broad remedial provisions. An employer found to have violated the antidiscrimination and wage payment statutes (Title VII, § 1981, the ADA, the ADEA, the FLSA, and the FMLA) must provide full make-whole relief, which can include back wages and retroactive benefits.²⁰⁴ In cases of intentional discrimination under Title VII, § 1981, and the ADA, a court may require the employer to pay compensatory and punitive damages.²⁰⁵ A court may assess “liquidated damages” (a form

(b) . . . this subchapter shall apply to any employee benefit plan if it is established or maintained—(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by an employee organization or organizations representing employees engaged in commerce or in any industry affecting commerce; or (3) by both. (b) The provisions of this subchapter shall not apply to any employee benefit plan if—(1) such plan is a governmental plan (as defined in section 1002(32) of this title)

The National Labor Relations Act, 29 U.S.C. §§ 142(1), (3); 152(2), (3), (6), (7); 160(a):

§ 142(1) [*commerce*]: The term “industry affecting commerce” means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

§ 142(3) [*commerce/employer/employee*]: The terms “commerce” . . . “employer” . . . [and] “employee” . . . shall have the same meaning as when used in subchapter II [the National Labor Relations Act] of this chapter.

§ 152(2) [*employer/government employment*]: The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer)

§ 152(3) [*employee*]: The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

§ 152(6) [*commerce*]: The term “commerce” means any trade, traffic, commerce, transportation, or communication among the several states

§ 152(7) [*affecting commerce*]: The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

§ 160(a) [*commerce*]: The [National Labor Relations] Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.

204. See 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(b) (ADEA); 29 U.S.C.A. § 2617(a)(1)(A)(iii) (FMLA); 42 U.S.C. § 1988 (§ 1981); 42 U.S.C. § 2000e-5(g) (Title VII); 42 U.S.C. § 12117 (ADA).

205. See 42 U.S.C. § 1981a.

of punitive damages), equal to the amount of actual damages, for violations of the FLSA,²⁰⁶ the FMLA,²⁰⁷ and “willful” violations of the ADEA.²⁰⁸ In addition, repeated willful violations of the FLSA carry criminal penalties, including imprisonment, as well as civil fines,²⁰⁹ and violations of the child labor provisions of the FLSA carry civil penalties.²¹⁰ If an employer is a fiduciary to a benefit plan covered by ERISA and fails to comply with ERISA’s fiduciary requirements, the employer may be liable to employees for benefits under covered pension and health plans,²¹¹ and may be assessed a civil penalty.²¹² A fiduciary employer may also be fined for incorrect recordkeeping and reporting activities.²¹³ All of these labor and employment statutes provide for the payment of attorneys’ fees to prevailing plaintiffs.²¹⁴ Although the safety and health (OSHA) and labor-management relations statutes (NLRA) do not afford private rights of action against employers, employers are subject to civil and criminal penalties, including imprisonment, under OSHA,²¹⁵ and may be liable to employees for backpay and unpaid benefits for unfair labor practices under the NLRA.²¹⁶ Despite the similar purposes, scope, and remedies of the labor and employment statutes, lower federal courts have reached inconsistent results in determining whether these statutes apply to Native American tribes. Following is a discussion of the various rationales courts have used to determine whether the federal labor and employment statutes apply to tribes as employers.

B. Case Law Applying Labor and Employment Statutes to Tribes

Federal courts have used three rationales to determine whether Congress intended federal labor statutes to apply to tribes. First, the basis for finding that the antidiscrimination statutes do not apply to tribes is that Congress did not intend the statutes to interfere with sovereign tribal rights of self-government; the language of Title VII and the ADA that excludes tribes from

206. 29 U.S.C. § 216(b).

207. 29 U.S.C.A. § 2617(a)(1)(A)(iii).

208. 29 U.S.C. § 626(b).

209. *Id.* § 216(a), (e).

210. *Id.* § 216(e).

211. *Id.* § 1109.

212. *Id.* § 1132(a), (f).

213. *Id.* § 1132(c).

214. 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(b) (ADEA); 29 U.S.C. § 1132(g) (ERISA); 29 U.S.C.A. § 2617(a)(3) (FMLA); 42 U.S.C. § 1988(b) (§ 1981); 42 U.S.C. §§ 2000e-5(k) (Title VII); 42 U.S.C. § 12117(a) (ADA).

215. 29 U.S.C. § 666.

216. *Id.* § 160(c).

coverage makes Congress' intent explicit. When courts consider the ADEA and Reconstruction Era Civil Rights Acts (notably § 1981), which are silent as to tribes, courts have determined that the close relationship of these statutes to Title VII indicates that Congress likewise did not intend them to apply to tribes. Second, the statutes that regulate terms and conditions of employment such as safety and health in the workplace (OSHA), wages and hours (FLSA), and employer-provided pensions and health benefit plans (ERISA), have been interpreted variously, based on the courts' determination of whether the statutes interfere with tribal self-government rights or treaty rights. Finally, a rationale that presumes tribes to be sovereign governments has been used in administrative and court cases interpreting the labor/management statutes; in these cases, tribes fall within the NLRA's general exemption of "governments," depending on whether the workplace is located on a reservation.

1. The Antidiscrimination Statutes: Title VII, ADA, ADEA, and § 1981

Courts have consistently interpreted the antidiscrimination statutes not to apply to tribes. Courts have concluded from express statutory language in Title VII and the relationship of the other antidiscrimination statutes (i.e., the ADEA and § 1981) to Title VII that application of these statutes to tribes would interfere with tribes' sovereign rights of self-government and that Congress did not intend such interference. As stated previously, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act expressly exclude native tribes from their definitions of covered employers.²¹⁷ Recall that Title VII prohibits employers from discriminating against employees or applicants for employment on the basis of race, color, national origin, sex, or religion; the ADA requires employers to reasonably accommodate the mental or physical disabilities of employees or applicants who are otherwise qualified for the position in question.²¹⁸

The legislative history of Title VII reveals that Congress excluded native tribes from the Act's definition of "employer" to recognize their status as self-governing political entities. Senator Mundt of South Dakota, who proposed the exclusion of "Indian tribes" from the Senate bill's definition of "employer," explained the rationale for his amendment as follows:

The reason why it is necessary to add these words is that Indian tribes, in many parts of the country, are virtually political subdivisions of the Government. To a large extent many tribes control and operate their own

217. See *supra* note 202.

218. See *supra* text accompanying notes 182, 188.

affairs, even to the extent of having their own elected officials, courts and police forces. This amendment would provide to American Indian tribes in their capacity as a political entity [sic], the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill.²¹⁹

Mundt compared this amendment to one he had already successfully introduced, which preserved the right of employers on or near a tribal reservation to give hiring preference to Native Americans living on or near the reservation.²²⁰ He further explained that the effect of these two amendments would be to "assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted."²²¹

Two distinct rationales for excluding Native American tribes from coverage by Title VII can be inferred from Mundt's remarks. On the one hand, his statement that "Indian tribes . . . are virtually political subdivisions of the Government" seems to characterize native tribes merely as part of the federal government. Under that rationale, tribes would come under the exemption afforded the federal government, and the statutory language would make this relationship explicit. On the other hand, Mundt emphasized tribes' status as political entities separate from the federal government that are entitled "to conduct their own affairs and economic activities" outside of regulation by Title VII. This rationale implies that tribes were to be treated under Title VII as sovereign entities in their own right, whose own economic activities, like those of the federal government, were not to be interfered with by the Act.

The first rationale, which implies that tribes are branches of the federal government, runs counter to Supreme Court characterizations of the relationship between tribal governments and federal and state governments. As early as 1884, the Supreme Court characterized native tribal governments as independent governments, not branches of the federal government or state governments,²²² and modern cases have consistently reiterated this point.²²³

219. 110 CONG. REC. 13,702 (1964).

220. This provision is codified at 42 U.S.C. § 2000e-2(i).

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

Id.

221. 110 CONG. REC. 13,702. Senator Mundt observed that Native Americans comprise "the one minority group in the United States which has suffered the longest and the most from the callous indifference and the poor judgment of Americans generally." *Id.*

222. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation

Subsequent Supreme Court interpretation of Title VII's amendments reflects also that Congress did not intend to treat tribes as branches of the federal government within the context of that statute; rather, tribes were considered sovereigns in their own right able to exercise control over their employment relationships without congressional interference, the second rationale implicit from Senator Mundt's remarks.²²⁴

The Court's interpretation of Title VII as reflecting congressional intent to recognize and preserve tribal sovereignty arose in connection with the 1972 amendments extending Title VII's coverage to employment by state, local and federal governments.²²⁵ The purpose of the amendments was to codify the constitutional prohibition against racial discrimination in public sector employment.²²⁶ The addition of federal employment coverage in Title VII also codified existing federal policy against discrimination in federal employment.²²⁷

Even though the legislative history of the 1972 amendment allowing causes of action against the federal government does not mention Native American tribes, the Court found in *Morton v. Mancari*²²⁸ that the amendment affected neither tribes' exemption from coverage nor their hiring preference rights

shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.”).

223. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (“[W]e have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.”); *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (“[W]hen the Navajo Tribe exercises this power [to punish tribal members for tribal offenses], it does so as part of its retained sovereignty and not as an arm of the Federal Government.”).

224. *See infra* text accompanying notes 228-35.

225. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The provision covering federal employment is codified at 42 U.S.C. § 2000e-16; the provision covering state and local governmental employment deleted these terms from the exclusions stated in Title VII's definition of “employer” at 42 U.S.C. § 2000e(b).

226. The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited.

H.R. REP. NO. 238, 92d Cong., 1st Sess., pt.2, 18 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2153 (citation omitted).

227. The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964. And Congress itself has specifically provided that it is “the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin.”

Id. at 22, *reprinted in* 1972 U.S.C.C.A.N. at 2157 (citations omitted).

228. 417 U.S. 535 (1974).

under Title VII.²²⁹ In response to a challenge that the 1972 amendment repealed the Indian hiring preference provision in the Indian Reorganization Act of 1934²³⁰ for Bureau of Indian Affairs employment, the Court held that Congress had not repealed any preference afforded Native Americans.²³¹ In reaching its holding, the Court found that *both* provisions of Title VII as originally enacted relating to Native American tribes—the exclusion of tribes as employers as well as the provision allowing employers to prefer to hire Native Americans “on or near the reservation”—reflected the “longstanding federal policy” of letting tribes run their own affairs by “providing a unique legal status to Indians in matters concerning tribal or ‘on or near’ reservation employment.”²³² The Court observed that the legislative history of the 1972 amendment did not mention tribes²³³ and that both provisions remained intact after the amendment.²³⁴ The retention of the exceptions for private employment, coupled with subsequent laws granting Native Americans preference in certain education programs and previous federal policy exempting Native American preferences from consideration as a prohibited form of discrimination in federal employment, convinced the Court that Congress did not intend to repeal the preference law by enacting the 1972 amendment.²³⁵

Thus, while *Mancari* did not pertain specifically to Title VII’s provision excluding tribes from its definition of “employer,” its reasoning interprets that provision as reflecting the “unique legal status” of tribal employment²³⁶ and congressional deference to tribes’ sovereign right to conduct tribal employment matters without federal regulation by Title VII.²³⁷

That Congress intended not to interfere with tribal sovereignty in employment matters is also evident from the express exclusion of tribes from the definition of “employer” in the Americans with Disabilities Act of 1990 (“ADA”). The legislative history of the ADA contains no explanation for the exemption of Native American tribes under the definition of “employer.” The legislative history merely states that Congress incorporated by reference the Title VII definition of “employer” into the ADA and grafted the procedural framework of Title VII onto the ADA: Title VII’s definition of “employer” was part of this “procedural framework.”²³⁸

229. *Id.* at 554-55.

230. 25 U.S.C. § 472 (1988).

231. *Mancari*, 417 U.S. at 547-48.

232. *Id.*

233. *Id.* at 547.

234. *Id.* at 548.

235. *Id.* at 547-51.

236. *Id.* at 547-48.

237. *See id.*

238. The following explanations of the ADA’s definition provisions appear in two House Committee

Therefore, the express exclusion of tribes from coverage by Title VII and the ADA has created no issue for the courts.²³⁹ An issue does arise, however, when the statute is silent as to its coverage of tribes. The original enactment of the Age Discrimination in Employment Act ("ADEA"), drafted as a result of congressional debate over whether to include age as a protected category under Title VII,²⁴⁰ defined "employer" virtually identically to the definition of "employer" then in effect under Title VII, except that the ADEA did not and has never mentioned Native American tribes.²⁴¹ Nor is there any mention of Native American tribes in the legislative history of the ADEA.²⁴² Like the ADA, however, the ADEA was modeled after Title VII.²⁴³

The two circuits that have considered the question have interpreted the ADEA's definition of "employer" not to include Native American tribes; however, each panel contained a dissenter. In *EEOC v. Cherokee Nation*,²⁴⁴ the Tenth Circuit reversed the lower court's enforcement of an EEOC subpoena and held that the ADEA did not authorize the EEOC to investigate a charge of age discrimination against the Cherokee Nation's Director of

indicates that the claim involved a vocational rehabilitation program rather than an employment relationship.

The author is conducting further research on the status of tribes as federal contractors and their potential liability for violating Equal Employment Opportunity provisions under federal contracts. However, since there have been no reported cases, that topic is beyond the scope of this Article.

239. See, e.g., *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 374 (10th Cir. 1986) (sex discrimination case; "Clearly this language exempts a single Indian tribe from the definition of 'employer' and therefore from the legal requirements of Title VII.")

240. See generally, MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW 506* (PRACTITIONER'S ED. 1988). Congress directed the Secretary of Labor to report specifically on age discrimination in the workplace. This report, *The Older American Workers—Age Discrimination in Employment*, (1965), provided the basis for the ADEA. See *id.*

241. The definition of "employer" in Title VII as originally enacted read:

The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof

Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253. The definition of "employer" in the ADEA as originally enacted read:

The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605.

The above comparison appears in *EEOC v. Cherokee Nation*, 871 F.2d 937, 942 n.3 (10th Cir. 1989) (Tacha, J., dissenting).

242. *Cherokee Nation*, 871 F.2d at 939.

243. See *id.* at 941 n.2 (Tacha, J., dissenting).

244. 871 F.2d 937 (10th Cir. 1989).

reports:

Scope of Coverage

... Consistent with title VII of the Civil Rights Act of 1964, the term "employer" under this legislation does not include (i) the United States, or an Indian tribe

Definitions

Several of the definitions set out in title VII of the Civil Rights Act of 1964 are adopted or are incorporated by reference in this legislation — i.e., the terms Commission, employer, person, labor organization, employment agency, commerce and industry affecting commerce. The term "employee" means an individual employed by an employer. The exception set out in title VII of the Civil Rights Act of 1964 for elected officials and their employees and appointees has been deleted.

H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 306 (emphasis added).

Title I prohibits discrimination in employment against a qualified person with a disability. The title borrows much of its procedural framework from title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, by incorporating title VII's enforcement provisions, notice posting provisions, and employer coverage provisions. . . .

Section 101. Definitions

A number of definitions from Title VII of the Civil Rights Act of 1964 are incorporated by reference in this title ("person," "labor organization," "employment agency," "commerce," and "industry affecting commerce"). Other terms, such as "Commission" and "employer" use the same concepts as contained in title VII. The definition of "employer" differs from title VII only to allow a phase-in for the first two years the law is in effect for employers employing less than 25 employees. "Employee" means an individual employed by an employer. The exception set out in title VII for elected officials and their employees and appointees is not incorporated in the ADA.

Id. pt. 3, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 454-55 (citation omitted) (emphasis added).

The reader may recall that the Rehabilitation Act of 1974 covers employers that receive federal contracts over \$10,000 and federal grants, which conceivably includes tribal employers. See *supra* note 190. Research indicates no litigation under that Act involving a tribe as an employers. In one case, the plaintiff sued the tribe under § 794a of the Rehabilitation Act and the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1971-1974e (1988 & Supp. IV 1992). *Cruz v. Yselta del Sur Tribal Council*, 842 F. Supp. 934, 934 (W.D. Tex. 1993). The court held that the Rehabilitation Act waived tribal sovereign immunity, construing the statute in the following cursory manner:

This statute provides that no handicapped person be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. § 794(a). The term "program or activity" is defined to include a local government or local government agency. 29 U.S.C. § 749(b)(1)(A) [sic]. The term "local agency" is defined to include an indian [sic] tribe. 29 U.S.C. § 706(9). Finally, 29 U.S.C. § 794a provides remedies for persons aggrieved, including equitable relief, attorney's fees and costs. This constitutes a waiver of tribal immunity.

Cruz, 842 F. Supp. at 935.

However, the actual language of § 706(9) defines "local agency" as:

an agency of a unit of general local government or of an Indian tribe (or combination of such units or tribes) which has an agreement with the State agency designated pursuant to section 721(a)(1) of this title to conduct a vocational rehabilitation program under the supervision of such State agency in accordance with the State plan approved under section 721 of this title.

29 U.S.C. § 706(9) (1988) (emphasis added). The facts of *Cruz* do not indicate the nature of the claims other than that they arose under the Rehabilitation Act and the Voting Rights Act. Invocation of § 706(9)

Health and Human Services because the ADEA does not apply to Native American tribes.²⁴⁵ The court acknowledged that the ADEA was modeled after Title VII and that the two statutes' definitions of "employer" were virtually identical except for the omission of tribes in the ADEA exclusionary provision.²⁴⁶ However, in accordance with federal law, the court refused to apply "normal rules of [statutory] construction" that would lead to the conclusion that Congress was aware of the difference and intended the ADEA to apply to tribes.²⁴⁷ Rather, congressional silence on the question led the court to find the statute ambiguous with respect to whether it included tribes.²⁴⁸ Citing *Dion*, the court reasoned:

Like the Supreme Court, we have been "extremely reluctant to find congressional abrogation of treaty rights" absent explicit statutory language. We are also mindful that we should not "construe statutes as abrogating treaty rights in a 'backhanded way'; in the absence of explicit statement, 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' Indian treaty rights are too fundamental to be easily cast aside."²⁴⁹

The court found specific treaty language granting the Cherokee Nation the right to self-government²⁵⁰ and pointed out that "normal rules of [statutory] construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue."²⁵¹ Because sovereign tribal rights were involved and the court could find no clear indication in the legislative history of the ADEA nor "a comprehensive statutory plan" evincing congressional intent to abrogate tribal rights by imposition of the ADEA, the court applied "the special canons of construction" applicable to tribes and reasoned that the ambiguity should be resolved in favor of tribes by excluding them from coverage.²⁵²

In dissent, Judge Tacha read the majority opinion as erroneously requiring explicit language in either the statute or its legislative history to satisfy the "clear indication of congressional intent" requirement of *Dion*.²⁵³ She criticized the majority for ignoring the "comprehensive statutory plan" apparent from a comparison of the language of the ADEA to that of Title

245. *Id.* at 939.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 938 (quoting *United States v. Dion*, 476 U.S. 734, 739 (1986)) (citation omitted).

250. *Id.* at 938 n.2.

251. *Id.* at 939.

252. *Id.*

253. *Id.* at 940 (Tacha, J., dissenting).

VII²⁵⁴ and cited evidence indicating “that Congress had an acute awareness of Title VII’s provisions when promulgating the ADEA.”²⁵⁵ Therefore, she reasoned, because Congress “relied upon” Title VII when it drafted the ADEA, and because the statutes share a “common purpose of proscribing employment discrimination,” the ADEA and Title VII must be construed together.²⁵⁶ Congress’ inclusion of Indian tribes in Title VII’s definition of “employer”, but its omission of Indian tribes from the ADEA’s definition, Judge Tacha concluded, makes it “clear that any impingement upon tribal sovereignty by enforcement of the ADEA was intended by Congress.”²⁵⁷ Judge Tacha bolstered this conclusion by citing *Mancari* for the proposition that the reason for excluding Indian tribes from Title VII’s definition of “employer” was “to enable Indian tribes to be free to give preference to Indians in tribal government employment.”²⁵⁸

The Eighth Circuit recently followed the reasoning of *Cherokee Nation’s* majority in affirming the dismissal of an age discrimination case by one of the tribe’s members against a tribally owned and operated business. In *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*,²⁵⁹ the majority first found that the ADEA suit constituted a strictly intramural matter because it involved a dispute between a tribal member and a tribal employer doing business on the tribe’s reservation:

Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe. The consideration of a tribe member’s age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions.²⁶⁰

Therefore, the majority reasoned, because applying the ADEA would abrogate a sovereign right, the general “rule” of *Tuscarora* did not apply and therefore the rule set out in *Dion* must be applied to determine whether Congress intended the ADEA to apply to the tribe.²⁶¹ The court applied *Dion* in the same manner as the Tenth Circuit in *Cherokee Nation* and concluded, “we do not find that a clear and plain intention of Congress should

254. *See id.* at 941.

255. *Id.* at 941 n.2. The cited evidence consisted of the fact that amendments to include age as a protected category under Title VII were rejected and the Secretary of Labor was directed to prepare a report on age discrimination in the workplace, as well as commentators’ observations that the drafters of the ADEA incorporated the enforcement and proof schemes of Title VII into the ADEA. *Id.*

256. *Id.* at 941.

257. *Id.*

258. *Id.* at 942 (citing *Mancari*, 417 U.S. at 548; 110 CONG. REC. 13,701-03 (1964)).

259. 986 F.2d 246 (8th Cir. 1993).

260. *Id.* at 249.

261. *Id.*

be extrapolated from the omission of the phrase 'an Indian tribe' from the definition of 'employer' in the ADEA."²⁶² The majority, however, characterized its holding as applicable only to the "narrow facts of this case which involve a member of the tribe, the tribe as an employer, and on the reservation employment."²⁶³

Judge Wollman dissented, citing the reasoning of Judge Tacha's dissent in *Cherokee Nation* regarding the ADEA's legislative history and her conclusion that application of the ADEA would not impinge on the tribes' sovereign power of self-government.²⁶⁴ Regarding the latter, Judge Wollman found:

no evidence that Indian tribes [and the Fond du Lac Band in particular] have any long-standing cultural practices that favor the employment of younger rather than older members of the tribe In the absence of such a showing, I see the ADEA as posing no more of a threat to the sovereign prerogatives of tribal government, or to the control of that government over its internal affairs, than it posed to the separate, independent existence and sovereignty of state governments.²⁶⁵

Judge Wollman concluded that applying the ADEA to tribes had no more impact on their sovereignty than the application of OSHA and ERISA, both of which the Ninth Circuit had already held to apply to tribes.²⁶⁶

The Tenth Circuit has likewise dismissed claims brought against tribes under § 1981, a more general antidiscrimination statute, based on the determination that application of § 1981 to tribes would impermissibly infringe upon sovereign rights. *Wardle v. Ute Indian Tribe*²⁶⁷ involved a claim of race discrimination in employment under § 1981 and other civil rights statutes against the Ute Indian Tribe.²⁶⁸ The plaintiff did not allege a Title VII claim because of Title VII's exclusion of tribes from its coverage; however, the court held that the specific provisions of Title VII prohibiting discrimination in employment and excluding Indian tribes from its coverage controlled over the general antidiscrimination statutes invoked and precluded a cause of action.²⁶⁹

262. *Id.* at 251.

263. *Id.*

264. *Id.* (Wollman, J., dissenting).

265. *Id.* (Wollman, J., dissenting) (citing *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989) (ERISA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (OSHA)). *See infra* text accompanying notes 302-10, 329-38 for discussion of these cases.

266. *Fond du Lac Heavy Equip.*, 986 F.2d at 251; *see infra* text accompanying notes 302-10, 329-38.

267. 623 F.2d 670 (10th Cir. 1980).

268. *Id.* at 671-72.

269. *See id.* at 672-73. Similarly, in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989), the Tenth Circuit dismissed a § 1981 claim against the Cherokee Nation and its officials for refusing plaintiffs' rights of membership. The *Nero* court found that application of § 1981 to the Tribe in this

However, at least two cases hold that antidiscrimination statutes may be applied to tribes when a non-member is asserting the claim. The Southern District of Florida, without discussion, refused to dismiss a § 1981 claim against the Seminole Tribe of Florida alleging national origin discrimination in termination of employment.²⁷⁰ More recently, in *Myrick v. Devils Lake Sioux Manufacturing Corp.*,²⁷¹ the District of North Dakota asserted jurisdiction over Title VII and ADEA claims brought by a non-member native against a corporation owned 51% by the Devils Lake Sioux Tribe.²⁷² The court distinguished *Cherokee Nation* as not having “consider[ed] the present situation of non-tribal reservation employees”²⁷³ and found further, without discussion, that “the tribe or an arm of the tribe is not a party.”²⁷⁴ Indeed, the Eighth Circuit’s narrow characterization of its holding in *Fond du Lac Heavy Equipment* as applying only to a case involving “a member of the tribe, the tribe as an employer, and on the reservation employment”²⁷⁵ implies that it might not reach the same conclusion if a non-member of the tribe brought the ADEA claim.

The reasoning of the ADEA cases’ dissenters, as well as that of the cases that would differentiate between cases brought by tribal members and non-members, is flawed in a number of ways. First, the ADEA dissenters misconstrue the “comprehensive statutory scheme” of the antidiscrimination statutes. Judge Tacha’s statement of the “purpose” for the exclusion of tribes from Title VII’s coverage being “to enable Indian tribes to . . . give preference to Indians in tribal government employment”²⁷⁶ misreads Title VII and *Mancari*. If the sole purpose of the exclusion provision were to enable tribes to hire natives on a preferential basis, there would be no need for the exclusion of tribes from Title VII coverage under the § 701(b)²⁷⁷ definition of “employer”; tribal employers would be covered under the

membership dispute would directly “affect [its] right to self-governance in a purely intramural matter.” *Nero*, 892 F.2d at 1463 (citing *Santa Clara Pueblo*, 436 U.S. at 72).

270. *Stroud v. Seminole Tribe of Florida*, 574 F. Supp. 1043, 1046 (S.D. Fla. 1983).

271. 718 F. Supp. 753 (D.N.D. 1989).

272. *Id.* at 755.

273. *Id.* at 754 n.1.

274. *Id.* at 755. A factual explanation for this finding may possibly be found in an earlier case involving the Devils Lake Sioux Manufacturing Company and the National Labor Relations Board, *Devils Lake Sioux Manufacturing Corp.*, 243 N.L.R.B. 163, 101 L.R.R.M. (BNA) 1380 (1979). Assuming the corporate structure of the Company remained the same from the time of the Board case to *Myrick*, we learn from the Board case that Brunswick Corporation, the 49 percent stock owner, essentially controlled the Company, “especially with regard to labor relations policies.” 243 N.L.R.B. at 164, 101 L.R.R.M. (BNA) at 1380.

275. *Fond du Lac Heavy Equip.*, 986 F.2d at 251.

276. *Cherokee Nation*, 871 F.2d at 942 (Tacha, J., dissenting).

277. 42 U.S.C. § 2000e(b).

employment preference provision in § 703(i)²⁷⁸ of Title VII by the term “enterprise on or near an Indian reservation.” Judge Tacha’s statement implies further that Congress intended to allow tribes to discriminate only against non-Native Americans, presumably on the basis of race.²⁷⁹ That argument ignores the fact that Title VII exempts tribes from discrimination claims in all protected categories, not just race.²⁸⁰ If Congress had wished to allow tribes to discriminate only to favor Native American ancestry, it could have written an exception like that which allows religious organizations to discriminate on the basis of religion.²⁸¹ Moreover, *Mancari* held that the preference provision in Title VII was based on political affiliation, not race.²⁸² Finally, the express exclusion of tribal employers from coverage by the Americans with Disabilities Act (“ADA”)²⁸³ belies any meaningful distinction between exclusion of tribes from coverage by Title VII and exclusion of tribes from coverage by the ADEA or the other antidiscrimination statutes. The “comprehensive statutory scheme” underlying the antidiscrimination statutes thus indicates that Congress did *not* intend these statutes to apply to tribal employers.²⁸⁴

Most importantly, as will be discussed more fully below, the reasoning of the cases that would apply the antidiscrimination statutes to tribes runs counter

278. 42 U.S.C. § 2000e-2(i). See *supra* note 220 for text of statute.

279. See *Cherokee Nation*, 871 F.2d at 942 (Tacha, J., dissenting).

280. See 42 U.S.C. § 2000e(b). Indeed, Judge Tacha authored a previous opinion in a sex discrimination case brought under Title VII in which it was found that an employer that was a consortium of tribes constituted an “Indian tribe” exempt from coverage of Title VII. *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 374-76 (10th Cir. 1986).

281. This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a). See also *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

282. *Mancari*, 417 U.S. at 553 n.24.

283. See *supra* note 202 for text of statute.

284. Further anecdotal evidence that Congress did not intend the antidiscrimination statutes to apply to tribes—or at least did not envision them as employers—appears in the remarks of Emanuel Celler, the Chairman of the Judiciary Committee, and one of the original architects of the Civil Rights Act of 1964, who expressed surprise that nondiscrimination matters would have anything to do with Indian tribes. During debate on the Act, Representative E. Y. Berry offered as a proposed Title VIII his bill H.R. 900 entitled “Equal Employment Opportunity for Indians through Industrial Development.” The purpose of this bill was “to improve conditions among Indians on reservations and in other communities.” Representative Celler responded that the proposed amendment was “about as germane to a civil rights bill as an elephant is to a pussy cat. . . . [P]ray tell me how in thunder an Indian reservation is relevant to a labor organization, or how financing Indian factories is relevant to discrimination on the grounds of race, color, national origin, or sex. If you approve this amendment you will approve a most gauche method of bringing bills before the House.” CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 119 (1985).

to federal law and policy regarding Native American tribes.²⁸⁵ First, the reasoning trivializes the effect these statutes would have on tribes' sovereignty and ignores federal law regarding interpretation of statutes that affect tribal interests. The facts that a tribal business engages in interstate commerce (and it would be virtually impossible not to do so under the broad interpretations of interstate commerce in the labor and employment statutes) and may employ non-members do not diminish the tribe's sovereignty nor make the management of its business operations any less a function of self-government. Judge Wollman's reasoning in his dissent to *Fond du Lac Heavy Equipment*, which equates sovereignty with "longstanding cultural practices,"²⁸⁶ characterizes sovereign rights in a narrow, anachronistic way. Second, the reasoning of the ADEA cases' dissenters misapplies canons of construction in interpreting the antidiscrimination statutes. The use of "ordinary" canons of construction ignores the dictate of the Supreme Court that, when construing statutes affecting Native American tribes, such statutes must be interpreted liberally and ambiguous provisions must be resolved in the tribes' favor.²⁸⁷ The ADEA and § 1981 are indeed "ambiguous" with respect to their applicability to Native American tribes, as nothing in the statutes or their legislative histories indicates that they should so apply.

The reasoning of the ADEA dissenters, however, forms the basis of recent Ninth and Seventh Circuit cases that hold federal health and safety laws (OSHA) and pension management laws (ERISA) applicable to Native American tribes and indicate in dictum that wage and hour laws (FLSA) would apply to tribal jobs that do not involve certain governmental functions.

2. Statutes Regulating Terms and Conditions of Employment

a. Safety and Health: OSHA

The Occupational Safety and Health Act's ("OSHA") applicability to tribes has been analyzed with respect to whether OSHA would interfere with treaty rights and sovereign rights. The courts have not uniformly decided whether a treaty right of exclusive use precludes entry onto tribal land to enforce the statute, or the extent that sovereign rights preclude such entry. In the first case that tested OSHA's applicability to Indian tribes, *Donovan v. Navajo*

285. See *infra* text accompanying notes 417-46.

286. See *supra* text accompanying note 265.

287. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). See *supra* text accompanying notes 143-45.

Forest Products Industries,²⁸⁸ the Tenth Circuit held that application of OSHA would violate a specific treaty right retained by the Navajo Nation, as well as the Nation's sovereign right to exclude outsiders from its territory, and that Congress did not intend to infringe upon these rights in enacting OSHA.

The Secretary of Labor sought to enforce a citation issued against the Navajo Forest Products Industries ("NFPI"), a logging and manufacturing facility engaged in interstate commerce, owned and managed by the Navajo Nation and operated on its reservation.²⁸⁹ Although the court found NFPI to fall within OSHA's broad definition of "employer," it also found that OSHA's authorization of the Secretary to enter workplace facilities²⁹⁰ would conflict with the following treaty provision expressing the Navajo Nation's right to exclude all persons not authorized to enter the reservation:

[T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employ[ees] of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.²⁹¹

Employing the canon of construction that requires treaties with tribal nations to be interpreted generously, the Tenth Circuit interpreted this treaty language as "plain[ly]" and "unambiguous[ly]" requiring *express* authorization to enter the reservation.²⁹² The court then found no evidence that Congress intended OSHA to abrogate this treaty right.²⁹³

The court stated as an alternative ground for its conclusion that the application of OSHA to tribes would violate inherent sovereign rights.²⁹⁴ Citing *Merrion v. Jicarilla Apache Tribe*,²⁹⁵ the court reasoned that Indian tribes may exclude persons from tribal lands solely by virtue of tribal sovereign powers, regardless of whether the power to exclude is expressly

288. 692 F.2d 709 (10th Cir. 1982).

289. *Id.* at 710.

290. The provision authorizing entry by Department of Labor officials onto employers' workplaces is contained at 29 U.S.C. § 657(a)(1):

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

291. *Navajo Forest Prods.*, 692 F.2d at 711 (citing Treaty between the United States of America and the Navajo Tribe of Indians, art. II, 15 Stat. 667, 668 (1868)).

292. *Id.* at 712.

293. *Id.*

294. *Id.* at 712-14.

295. 455 U.S. 130 (1982).

reserved by treaty:

The Court observed [in *Merrion*] that *an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management.* Significantly, the Court did not limit this power to those cases where the Indian Reservation is occupied under exclusionary language similar to that contained in Article II of the Navajo Treaty.²⁹⁶

Merrion addressed the question of the source of a tribe's power to tax non-Indians doing business on its reservation.²⁹⁷ The Court held that this power did not derive solely from a tribe's sovereign ability to exclude non-Indians from its lands, but rather from the tribe's sovereign "power to govern and to raise revenues to pay for the costs of self-government."²⁹⁸ Alternatively, the Court held that even if a tribe's power to tax derived exclusively from its power to exclude, the tax in question was proper as a manifestation of "the lesser power to place conditions on entry, on continued presence, or on reservation conduct."²⁹⁹ In *Navajo Forest Products*, the Tenth Circuit focused on the Supreme Court's remark in *Merrion* that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands,"³⁰⁰ which, the Tenth Circuit further reasoned, "limits or, by implication, overrules" *Tuscarora's* general statement that general statutes applying to all persons include Indians.³⁰¹

The Ninth Circuit, in dictum, rejected the Tenth Circuit's alternative reasoning that OSHA's application to tribes would interfere with inherent sovereign rights. In *Donovan v. Coeur d'Alene Tribal Farm*,³⁰² the Ninth Circuit held that, absent specific treaty language granting the tribe the right to exclude persons from its land, OSHA is applicable to Indian tribes.³⁰³ Because the Coeur d'Alene Tribe had no treaty with the United States, and no other document set out any agreement between the Tribe and the United States that the Tribe could exclude persons from its reservation, the court found that the "treaty rights" exception did not apply and reached its conclusion by analyzing whether application of OSHA to the Tribe would interfere with the Tribe's self-governance.³⁰⁴ First, the court discounted the relevance of

296. *Navajo Forest Prods.*, 692 F.2d at 712 (citing *Merrion*, 455 U.S. at 141).

297. *Merrion*, 455 U.S. at 133.

298. *Id.* at 144.

299. *Id.*

300. *Navajo Forest Prods.*, 692 F.2d at 713 (citing *Merrion*, 455 U.S. at 141).

301. *Id.*

302. 751 F.2d 1113 (9th Cir. 1985).

303. *Id.* at 1117 n.3. ("To whatever extent the Tenth Circuit's decision is not tied to the existence of an express treaty right, we disagree with it.")

304. *Id.* at 1116.

Merrion to the question of whether OSHA applied to tribes because *Merrion* did not involve the applicability of a general federal statute.³⁰⁵

The Ninth Circuit then noted that the Coeur d'Alene Tribe owned and operated the Tribal Farm within its reservation.³⁰⁶ The Tribe sold its crops in interstate commerce and employed some non-natives.³⁰⁷ Operation of such a commercial enterprise, the court held, did not involve the exercise of self-government.³⁰⁸ The court limited the self-government exception to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations,"³⁰⁹ and reasoned that:

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 commercial farming enterprise, we believe that its operation free of federal health and safety regulations is "neither profoundly intramural . . . nor essential to self-government."³¹⁰

The Ninth Circuit subsequently returned to the precise question discussed by the Tenth Circuit in *Navajo Forest Products*; i.e., whether a treaty that did not expressly include the power to exclude persons from the reservation would prevent OSHA from being applied to the tribe. In *United States Department of Labor v. Occupational Safety & Health Review Commission*,³¹¹ the Secretary of Labor attempted to levy a fine against Warm Springs Forest Products Industries, a lumber mill owned and operated by the Confederated Tribes of Warm Springs on the Warm Springs Reservation.³¹² The mill employed 327 workers, over half of whom were tribal members or persons who had married into the Tribe; 45% were non-natives, and the remainder were members of other tribes.³¹³ The mill purchased timber from tribally owned forests, harvested by member-owned logging companies; the processed

305. *Id.* at 1117 ("[*Merrion*] in no way addressed Congress' ability to modify [tribes' exclusion] rights through the exercise of its plenary powers. Unlike the Secretary in this case, the non-Indian petitioners in *Merrion* could point to no statute of general applicability that even appeared to modify the tribe's sovereign power to tax or exclude.").

Note that this same argument applies in criticizing the use of the "*Tuscarora* rule" in cases involving statutes that are silent as to their applicability to Native American tribes, as the statute at issue in *Tuscarora* did indeed expressly contemplate treatment of tribes. See *supra* text accompanying note 100.

306. *Id.* at 1114.

307. *Id.* at 1114, 1116.

308. *Id.* at 1116.

309. *Id.*

310. *Id.* (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981)).

311. 935 F.2d 182 (9th Cir. 1991).

312. *Id.* at 183.

313. *Id.*

lumber was sold outside the reservation.³¹⁴

The court first dismissed the argument that OSHA interfered with tribal self-government, citing its reasoning from *Coeur d'Alene*.³¹⁵ It cited the facts that "[t]he mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce."³¹⁶ The court admitted that "revenue from the mill is critical" to the tribal government,³¹⁷ however, the court adhered to *Coeur d'Alene's* narrow definition of "purely intramural matters" as involving "conditions of tribal membership, inheritance rules, and domestic relations,"³¹⁸ and found that application of the Act does not touch on the Tribe's "exclusive rights of self-governance in purely intramural matters."³¹⁹

The court then addressed the Tribes' primary argument that enforcement of the OSHA fine would violate the following treaty language setting out the Tribes' exclusive use of the reservation, which was argued to give them the right to exclude persons from that land: "All of which tract shall be set apart, and . . . surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent."³²⁰ Although the court found that the Treaty created a general right of exclusion, it rejected the reasoning of *Navajo Forest Products* that such a right could operate to bar OSHA inspections.³²¹ The court derived this conclusion from Ninth Circuit decisions in *United States v. Farris*³²² and *Confederated Tribes of the Warm Springs Reservation v. Kurtz*,³²³ in which it had held that treaties containing right of exclusion clauses did not bar enforcement against the Tribes of a federal criminal statute³²⁴ and federal tax laws,³²⁵ respectively. The court noted that the statute held to be applicable to tribes in *Kurtz* provided for entry onto premises where taxable articles were kept, and the court analogized such entry to the kind of entry required to enforce OSHA.³²⁶ The court concluded:

314. *Id.*

315. *Id.* at 184.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* (quoting Treaty with the Tribes of Middle Oregon, art. 1, 12 Stat. 963, 964 (1855)).

321. *Id.* at 185.

322. 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

323. 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

324. The Organized Crime Control Act of 1970, 18 U.S.C. § 1955 (1988).

325. *See Kurtz*, 691 F.2d at 879-80.

326. 935 F.2d at 186.

[W]e do not find the conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the Occupational Safety and Health Act to be sufficient to bar application of the Act to the Warm Springs mill. The conflict must be more direct to bar the enforcement of statutes of general applicability. Were we to construe the Treaty right of exclusion broadly to bar application of the Act, the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the *Tuscarora* rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision.³²⁷

The court failed to acknowledge, however, that federal law has long recognized federal jurisdiction over tribes in criminal and tax matters.³²⁸

b. Pension and Benefit Plans: ERISA

The Ninth Circuit's conclusion that OSHA's regulation of the tribal workplace does not affect tribes' internal sovereign rights has been carried over to cases concerning the extent of federal regulation under ERISA of pension and benefit plans offered by tribal employers.

The Seventh and Ninth Circuits have held the Employee Retirement Income and Security Act ("ERISA") applicable to tribes because its application would not interfere with rights of internal sovereignty. In *Smart v. State Farm Insurance Co.*,³²⁹ the plaintiff, a member of the Bad River Band of the Chippewa Tribe, was an employee of the Chippewa Health Center, which the Tribe owned and operated within its reservation.³³⁰ He sued, contesting denial of a claim under a health plan offered by the Tribe and administered by State Farm Insurance Company.³³¹ The lower court found that ERISA, rather than state insurance law, governed the suit; therefore, a court could reverse State Farm's decision to deny benefits only if it was arbitrary and capricious.³³² On appeal, the plaintiff claimed ERISA did not apply because it would modify the Tribe's treaty rights, and because its application would interfere with the Tribe's right of self-government.³³³ The Seventh Circuit found that the treaty in question did not reserve any specific rights, but rather "simply convey[ed] land within the exclusive sovereignty of the Tribe."³³⁴

327. *Id.* at 186-87.

328. *Skibine*, *supra* note 4, at 107-08.

329. 868 F.2d 929 (7th Cir. 1989).

330. *Id.* at 930.

331. *Id.* at 931.

332. *Id.* at 930.

333. *Id.* at 931.

334. *Id.* at 935.

The court rejected the sovereignty argument as well, reasoning that application of ERISA would occur only if the Tribe chose to offer a benefit plan, and then ERISA would only prescribe certain reporting and recordkeeping methods.³³⁵ Adhering to *Coeur d'Alene's* narrow definition of "purely intramural matters,"³³⁶ the Seventh Circuit found ERISA's requirements were less intrusive than federal tax withholding requirements and OSHA requirements, both of which had been applied to tribes.³³⁷ The court also rested its reasoning on the fact that the relationship ERISA governed was actually between State Farm, a non-tribal entity, and the employee beneficiaries.³³⁸

The Ninth Circuit case involved a suit directly against a tribal entity. In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*,³³⁹ the tribal employer was a party to a collective bargaining agreement that required it to contribute on behalf of its employees to the Lumber Industry Pension Fund.³⁴⁰ The Fund sued to recover contributions when the Tribe, acting pursuant to a mandate of a tribal ordinance, stopped contributing to the Fund on behalf of tribal member employees and instead contributed on their behalf to a tribal pension fund.³⁴¹

The court reversed the district court's finding that application of ERISA would interfere with the Tribe's sovereignty rights by limiting the "self-government exception" to situations "where the tribe's decision-making power is usurped."³⁴² The court held that application of ERISA did not affect the Tribe's ability to decide whether to form and operate its own plan or to transfer its member employees to the tribal plan at the expiration of the collective bargaining agreement, nor would application of ERISA prevent employees from joining the tribal plan.³⁴³ Significantly, the court found that the Tribe's exposure to money damages under ERISA did not infringe upon its sovereignty.³⁴⁴

c. Wages and Hours: FLSA

Application of the Fair Labor Standards Act ("FLSA") to wage and hour scheduling of a tribal employer has been distinguished from application of

335. *Id.* at 935-36.

336. *Id.* at 935 n.5.

337. *Id.* at 935-36, 936 n.6.

338. *Id.* at 936.

339. 939 F.2d 683 (9th Cir. 1991).

340. *Id.* at 684.

341. *Id.* at 684-85.

342. *Id.* at 685.

343. *Id.*

344. *Id.*

OSHA and ERISA, but in a narrow factual context. In *Reich v. Great Lakes Indian Fish and Wildlife Commission*,³⁴⁵ the Seventh Circuit held that the overtime provisions of the FLSA did not apply to game warden police employed by the Great Lakes Indian Fish and Wildlife Commission. The Commission is a consortium of thirteen Chippewa tribes holding treaty rights to off-reservation hunting, fishing, and gathering.³⁴⁶ It regulates these activities and employs the game warden police to enforce the regulations.³⁴⁷ The Secretary of Labor sought to enforce a subpoena for the Commission's wage and hour records of the wardens to investigate whether the Commission's method of calculating the wardens' wages complied with the overtime provisions of the FLSA.³⁴⁸

The district court had held that application of the statute to these tribal employees would interfere with the Tribes' internal sovereignty.³⁴⁹ It characterized the Commission's authority as follows: "Under delegation by its member tribes, respondent holds sovereign authority to enforce tribal laws regulating off-reservation treaty rights and to manage the resources reserved in the treaties. These responsibilities are carried out by respondent's employees, under the tribes' authority and on terms approved by them."³⁵⁰

Therefore, the court reasoned, application of the FLSA to the employment of the wardens would interfere with both the Tribes' powers of self-government and with their treaty rights.³⁵¹ Distinguishing cases that held ERISA applicable to tribes, the court found, "unlike ERISA, which has only an indirect effect on tribal operations," the overtime payment requirements of the FLSA "would have a direct, significant effect on both treaty rights and self-

345. 4 F.3d 490 (7th Cir. 1993).

346. *Id.* at 492.

347. The Court described the wardens' duties as follows:

[They] consist[] not only of assuring that Indian hunters, fishers, and gatherers do not exceed the authorized catch, use unauthorized methods, or fish, hunt, or gather out of season, but also of protecting the Indians from interference by white hunters, fishers and gatherers. Many white people in the Great Lakes region as elsewhere in the United States either do not understand or do not accept the privileges that the Indian treaties grant Indians. Forbidden themselves to spear fish, for example, white fishermen resent the fact that Indians are permitted to do so. This resentment sometimes boils over into violence. Hence the field employees of the Commission are not only uniformed but also armed. They are in fact a combination of game wardens and policemen. The State of Wisconsin has deputized them to exercise state as well as tribal law enforcement functions in the areas that they patrol.

Id.

348. *Id.* at 491.

349. *Martin v. Indian Wildlife Comm'n*, 1 Wage & Hour Cas. 2d (BNA) 58, 64 (W.D. Wis. 1992), *aff'd sub nom. Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993).

350. *Martin*, at 59.

351. *Id.* at 63.

governance”³⁵²: treaty rights to hunt and fish would be “affected directly and critically” if, in order to comply with the FLSA, the Tribes had to cut back on the periods during which hunting, spearing, or fishing activities could occur because the Tribes lacked adequate trained staff.³⁵³ The court then characterized the right “to manage and regulate [the Tribes’] exercise of their treaty rights” as “one of the tribes’ most essential aspects of self-governance.”³⁵⁴ Application of the FLSA to the positions in question, the court held, would significantly intrude into tribal organization and internal affairs so as to impede the Tribes’ “ability to carry out all of the tasks necessary for biologically effective resource regulation.”³⁵⁵

The Seventh Circuit affirmed the district court’s holding that the FLSA did not apply to the Commission.³⁵⁶ Its holding was based on sovereignty principles, but instead of applying the reasoning of *Dion*, *Farris*, and those cases interpreting the ADEA, OSHA, and ERISA, as did the district court, the Seventh Circuit found the principle of comity to dictate that the FLSA not be applied to the wardens’ positions.³⁵⁷ First, it analogized the wardens to public-sector police officers, based on their similar duties and around-the-clock shifts, and noted that the FLSA exempts state and local law enforcement officers from its requirements.³⁵⁸ “The case for exempting the tribal policemen is stronger than that for exempting ordinary police,”³⁵⁹ the court concluded, because the wardens’ duties involve “the central regulatory functions of a sovereign entity”:³⁶⁰

[E]ven though there is no treaty right to employ law enforcement officers on whatever terms the tribal organization sets and the officers are willing to accept, *it has been traditional to leave the administration of Indian affairs for the most part to the Indians themselves. They have their own courts, their own tribal governments, their own police.* It is true that these

352. *Id.*

353. *Id.*

354. *Id.* at 64.

355. *Id.* The court distinguished the situation before it from *Coeur d’Alene Tribal Farm*, where OSHA was held to apply to the farm:

This is not a case . . . in which the tribal business was a farm engaged in the sale of produce on the open market, employing non-Indians as well as Indians, and “in virtually every respect a normal commercial farming enterprise.” This case involves the exercise of treaty rights and the tribes’ ability to maintain the right to manage the exercise of those rights.

Id. (citation omitted). This distinction would lead to the conclusion that the court would have held the FLSA applicable to a business such as the *Coeur d’Alene Tribal Farm*.

356. *Great Lakes Indian Fish and Wildlife Comm’n*, 4 F.3d at 496.

357. *Id.* at 494-95.

358. *Id.* at 492-93.

359. *Id.* at 494.

360. *Id.*

institutions are mainly for the regulation of the reservations, but the exercise of usufructuary rights off the reservation is as important to the Indians as the exercise of their occupancy rights within the reservations and maybe more so, since only about a third of all Indians live on reservations. *An effective system of property rights, we have long been reminded by skeptics about laissez-faire, depends upon regulations establishing and enforcing those rights.* The warden-policemen of the Great Lakes Indian Fish and Wildlife Commission are an important element of the scheme for regulating Indian property rights. *The courts have spoken of the "inherent sovereignty" of Indian tribes and have held that it extends to the kind of regulatory functions exercised by the Commission with respect to both Indians and non-Indians. The idea of comity—of treating sovereigns, including such quasi-sovereigns as states and Indian tribes, with greater respect than other litigants—counsels us to exercise forbearance in construing legislation as having invaded the central regulatory functions of a sovereign entity.*³⁶¹

The court noted that in holding that the FLSA did not apply to the Commission's employment of its wardens, it was "rectifying an oversight," as did the Tenth Circuit when it held in *Cherokee Nation* that Congress did not intend the ADEA, like Title VII, to apply to tribes.³⁶² "We do the same [as the Tenth Circuit] today," the Seventh Circuit stated, "*actuated by the same purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow.*"³⁶³

The Seventh Circuit distinguished this case from its holding in *Smart* that ERISA applies to tribes, as well as from the Ninth Circuit's holdings that OSHA applies to tribes, by pointing out that the other cases involved employees "engaged in routine activities of a commercial or service character . . . rather than of a governmental character."³⁶⁴ Thus, the court stated that it would not extend its holding to all tribal employment and expressly limited it to "employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act."³⁶⁵

Judge Coffey's dissent criticized the majority for failing to apply the *Smart* analysis.³⁶⁶ First, he disputed the majority's treatment of the Commission's wardens as public agency law enforcement officers under the FLSA, stating

361. *Id.* at 494-95 (citations omitted) (emphasis added).

362. *Id.* at 495-96.

363. *Id.* at 496 (emphasis added).

364. *Id.* at 495.

365. *Id.*

366. *Id.* at 499 (Coffey, J., dissenting).

that the statute could not be read so expansively.³⁶⁷ Then, relying on *Smart*, he determined that application of the FLSA to the wardens would not “touch[] exclusive rights of self-governance in purely intramural matters”³⁶⁸ for two reasons: the Tribes’ right to police off-reservation activities was not “exclusive,” as it was shared with the state,³⁶⁹ and that right was not “purely intramural” because it involved policing the activities of Indians and non-Indians.³⁷⁰ Next, he stated that application of the FLSA to the wardens would abrogate no treaty rights because no express provision in any treaty document created the right to employ wardens, and the record indicated no treaty rights that would be abrogated by application of the FLSA.³⁷¹

The only distinction between the reasoning of the majority and that of the dissent in this case is their disagreement about the public nature of the wardens’ jobs. The majority’s limiting of its holding to tribal government employment analogous to that which is expressly protected under the FLSA indicates that it would likely adopt the reasoning of *Smart* and the Ninth Circuit cases and hold the FLSA applicable to other types of tribal employment:

3. Labor/Management Relations

The National Labor Relations Act (“NLRA”) cases have, for the most part, been decided on grounds of tribal sovereignty; they focus on the tribe as an employer, not on the job of the employee group in question, and accord tribal employers the status of governing entities. Although the NLRA defines “employer” similarly to the other statutes,³⁷² the National Labor Relations Board (“Board”), which interprets the Act in the first instance, has determined Native American tribes generally to be exempt from coverage under the NLRA’s exclusion of governmental entities as employers.³⁷³ This reasoning, like that of the Tenth Circuit, emphasizes the sovereignty of tribes rather than the commercial nature of their business activities. Under the Board’s analysis, whether the NLRA applies to a tribal employer depends primarily on whether

367. *Id.* at 498 (Coffey, J., dissenting).

368. *Id.* at 501 (Coffey, J., dissenting).

369. *Id.* (Coffey, J., dissenting).

370. *Id.* at 502 (Coffey, J., dissenting).

371. *Id.* at 500 (Coffey, J., dissenting). Coffey warned, “[t]he courts must not cave in to the ever-growing, all-expansive claim that treaty rights are affected unless the claimants initially identify what specific treaty right is at stake and how it is affected.” *Id.* at 504.

372. *See supra* note 203.

373. *See infra* text accompanying notes 375-407.

a tribal government owns and operates the employer on its reservation.³⁷⁴

The leading case is *Fort Apache Timber Co.*³⁷⁵ In that case, the Board held that it lacked jurisdiction over a lumber mill engaged in interstate commerce and owned and operated by the White Mountain Apache Tribe's Tribal Council on the Fort Apache Indian Reservation.³⁷⁶ The mill's workers were employees of the Tribe itself, as were workers in other tribal enterprises.³⁷⁷ The Board found the Tribal Council to be a "government" even though the Tribal Council was not the type of "government"³⁷⁸ the statute specifically names:

[I]t would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole, and as such specifically excluded from the Act's Section 2(2) definition of "employer." We deem it unnecessary to make that finding here, however, as we conclude and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.³⁷⁹

The Board extended *Fort Apache Timber* in dismissing a representation petition in *Southern Indian Health Council*.³⁸⁰ The Southern Indian Health Council is a "health care clinic operated by a consortium of seven Indian tribes" that "provides health services for its members and the Indian community in south San Diego County."³⁸¹ The clinic is located on the Barona Indian Reservation, which belongs to one of the member tribes.³⁸² The clinic purchased goods through interstate commerce and most of its nonprofessional employees at that time were natives.³⁸³ The Council is governed by a board of directors appointed by the governing bodies of each of the member tribes.³⁸⁴ The board of directors sets employment policies

374. The Board and courts hold that the NLRA does apply to *non-tribally* affiliated employers operating businesses on Indian land. See, e.g., *Devils Lake Sioux Mfg. Corp.*, 243 N.L.R.B. 163, 164, 101 L.R.R.M. (BNA) 1380, 1380 (1979); *Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961); *Simplot Fertilizer Co.*, 100 N.L.R.B. 771, 772-74, 30 L.R.R.M. (BNA) 1346, 1347 (1952).

375. 226 N.L.R.B. 503, 93 L.R.R.M. (BNA) 1296 (1976).

376. *Id.* at 506, 93 L.R.R.M. (BNA) at 1300.

377. *Id.* at 504, 93 L.R.R.M. (BNA) at 1297.

378. 29 U.S.C. § 152(2) (1988) (defining "government" as "the United States or any wholly owned government corporation . . . or any state or political subdivision thereof").

379. 226 N.L.R.B. at 506, 93 L.R.R.M. (BNA) at 1300 (footnotes omitted).

380. 290 N.L.R.B. 436, 437, 129 L.R.R.M. (BNA) 1013, 1014-15 (1988).

381. *Id.* at 436, 129 L.R.R.M. (BNA) at 1013.

382. *Id.* at 436, 129 L.R.R.M. (BNA) at 1014.

383. *Id.*

384. *Id.*

and approves the hiring and firing of Council employees.³⁸⁵ Because the governing bodies of the member tribes control the board of directors, which in turn controls the employment policies of the Council, the Board found the Council to be a "governmental entity" within the meaning of *Fort Apache Timber* despite the fact that it operated as a separate entity from the member tribes.³⁸⁶

In *Roberson v. Confederated Tribes*,³⁸⁷ the Federal District Court of Oregon agreed with the holding of *Fort Apache Timber*, but the court distinguished between tribal employers operating in their governmental capacities through organization under section 16 of the 1934 Indian Reorganization Act³⁸⁸ and tribal employers operating as tribal corporations chartered under section 17 of that Act.³⁸⁹ Roberson sued his union for breach of the duty of fair representation and alleged a claim of conspiracy against the union and his tribally run employer, Warm Springs Forest Products Industries ("WSFPI").³⁹⁰ The court agreed that under *Fort Apache Timber* WSPFI would not be an "employer" under the NLRA if the Tribe operated WSPFI in its section 16 governmental capacity.³⁹¹ However, the court stated that if the Tribe operated WSPFI under a section 17 charter as a separate entity from the tribal government, WSPFI would be an "employer" under the Act and could be sued to the extent of its charter's "sue and be sued" clause.³⁹² The court held WSPFI's status to be a question of fact and denied the Tribe's motion for summary judgment.³⁹³

Most recently, in *Sac & Fox Industries*,³⁹⁴ the Board distinguished *Fort Apache Timber* and *Southern Indian Health Council* when it held that a business operated by a tribal governmental agency at an off-reservation facility was subject to Board jurisdiction.³⁹⁵ In *Sac & Fox Industries*, a union local petitioned to organize the workers at the Commerce, Oklahoma, facility of Sac & Fox Industries, Ltd., a nonprofit corporation wholly owned by the Sac and Fox Tribe and operated by the Sac and Fox Industrial Development Commission, an agency of the Tribe.³⁹⁶ The Commerce facility was located off the

385. *Id.*

386. *Id.* at 437, 129 L.R.R.M. (BNA) at 1014-15.

387. 103 L.R.R.M. (BNA) 2749 (D. Or. 1980).

388. 25 U.S.C. § 476 (1988).

389. *Id.* § 477.

390. 103 L.R.R.M. (BNA) at 2750.

391. *Id.* at 2751.

392. *Id.*

393. *Id.* at 2752.

394. 307 N.L.R.B. 241, 140 L.R.R.M. (BNA) 1054 (1992).

395. *Id.* at 242, 140 L.R.R.M. (BNA) at 1057.

396. *Id.* at 241, 140 L.R.R.M. (BNA) at 1055.

Tribe's original land³⁹⁷ and was purchased to enable the Tribe to perform a contract with the United States government when the former owner of the facility was debarred from competing for government contracts.³⁹⁸ In this situation where the tribally owned facility was not located on tribal land, the Board rejected the reasoning of *Fort Apache Timber* and *Southern Indian Health Council* that the Tribe was a governmental entity exempt from the meaning of "employer" under the NLRA.³⁹⁹ In holding that application of the NLRA would not interfere with the Tribe's self-governance, the Board based its conclusion on the facts that the Commerce facility was a normal manufacturing operation doing business with the United States government, that only a handful of its employees were tribal members,⁴⁰⁰ and that the imposition of the NLRA's statutory right to engage in collective bargaining would not "broadly and completely define the relationship between [Sac & Fox Industries] and its employees" because the NLRA does not "compel any agreement between the employer and the employees; nor does the NLRA regulate the substantive terms incorporated in an agreement."⁴⁰¹ Moreover, the Board reasoned, application of the NLRA would not extend "to regulate purely intramural matters such as Tribal membership, inheritance rules, or domestic relations."⁴⁰² This latter reasoning indicates a shift away from the Board's recognition of tribes as sovereigns in their own rights to the narrow reading of tribal sovereignty rights used by the Seventh and Ninth Circuits in finding OSHA and ERISA applicable to tribes.⁴⁰³

One Board member dissented, finding no distinction between this case and *Fort Apache Timber* and *Southern Indian Health Council*.⁴⁰⁴ He saw no logical reason to conclude that the Tribe was any less a governmental entity because it was operating a tribally owned facility on non-tribal lands.⁴⁰⁵ He further found it impractical to hold that one facility was subject to Board jurisdiction, while other facilities under the same ownership and control were not, simply because of their locations.⁴⁰⁶ Finally, he cited a policy reason, based on tribal sovereignty principles, for not asserting Board jurisdiction over

397. The Tribe's other three facilities were located on original tribal land. *See id.* at 241 n.5, 140 L.R.R.M. (BNA) at 1056 n.5.

398. *Id.* at 242, 140 L.R.R.M. (BNA) at 1056.

399. *Id.* at 242, 140 L.R.R.M. (BNA) at 1057.

400. *Id.* at 244, 140 L.R.R.M. (BNA) at 1058. The Tribe retained the already-trained workers of the former facility owners and expected to eventually replace these workers with tribal members. *Id.* at 242, 140 L.R.R.M. (BNA) at 1056.

401. *Id.* at 244, 140 L.R.R.M. (BNA) at 1058.

402. *Id.*

403. *See supra* text accompanying notes 302-44.

404. 307 N.L.R.B. at 245-47, 140 L.R.R.M. (BNA) at 1059-60 (Devaney, dissenting).

405. *Id.* at 246, 140 L.R.R.M. (BNA) at 1060 (Devaney, dissenting).

406. *Id.* at 247, 140 L.R.R.M. (BNA) at 1061 (Devaney, dissenting).

the Commerce location: "The spirit of the Board's *Fort Apache* decision clearly is to allow tribal enterprises to operate freely without Board intervention. I do not believe the majority view complies with the spirit of that decision."⁴⁰⁷

Assuming tribal employers would not wish to be covered by the NLRA, the result of *Sac & Fox Industries* will be that tribes will not operate off-reservation facilities. The reasoning of the case, however, indicates that the Board may abandon *Fort Apache Timber* in the next case involving a tribal employer operating a facility on its reservation. This is evidenced by the majority's reliance on facts such as the number of non-members on the workforce, as well as the majority's reasoning that application of the NLRA would not define the employer-employee relationship because that Act does not compel any specific agreement, and that application of the NLRA would not regulate any "purely intramural" matters.⁴⁰⁸ This rationale is basically the same as that used in the Seventh and Ninth Circuit cases finding OSHA and ERISA to be applicable to tribes.⁴⁰⁹ As the dissent in *Sac & Fox Industries* points out, the majority ignored the essence of *Fort Apache Timber* by failing to take into account the sovereign status of the tribe.⁴¹⁰

Given the labor and employment statutes' similar purposes, scope, and remedies, they should be interpreted consistently rather than on a statute-by-statute, case-by-case basis. The Ninth and Seventh Circuits have engaged in such an ad hoc analysis and have trivialized the impact of these punitive statutes on tribal sovereignty.⁴¹¹ The Tenth Circuit majorities and the National Labor Relations Board (except in the Board's most recent case) have taken an approach consistent with federal law and policy that recognizes tribes' existence as independent sovereigns.⁴¹² The following section discusses this inconsistency in the reasoning of these labor and employment cases.

C. Inconsistency in Case Law

A primary flaw in the reasoning of the Seventh and Ninth Circuit OSHA and ERISA cases,⁴¹³ as well as that of the ADEA dissents,⁴¹⁴ is that the reasoning fails to distinguish tribally owned businesses from private-sector

407. *Id.* (Devaney, dissenting).

408. *See id.* at 244, 140 L.R.R.M. (BNA) at 1057-58.

409. *See supra* text accompanying notes 302-44.

410. 307 N.L.R.B. at 247, 140 L.R.R.M. (BNA) at 1061 (Devaney, dissenting).

411. *See supra* text accompanying notes 302-44.

412. *See supra* text accompanying notes 288-301, 372-93.

413. *See supra* text accompanying notes 302-44.

414. *See supra* text accompanying notes 253-58, 264-66.

businesses (this reasoning is also apparent in dicta in the FLSA case).⁴¹⁵ In failing to make that distinction, courts ignore federal law and policy favoring tribal sovereignty and incorrectly determine that no sovereign rights are being affected by application of the statute in question.⁴¹⁶ Such reasoning ignores the fact that the operation of a business by a tribe is a critical aspect of that tribe's sovereignty, allowing the courts to sidestep the first exception to the "Tuscarora rule": that Congress must "expressly" state that a statute applies to a tribe if the statute "touches 'exclusive rights of self-governance in purely intramural matters.'"⁴¹⁷

These flawed cases all rationalize that because the businesses reach beyond geographical tribal boundaries into interstate commerce and may employ non-tribal members, the tribes are no longer engaged in "a purely intramural matter" and therefore no tribal rights are affected by the application of the statutes.⁴¹⁸ But a tribe cannot do business with itself, nor solely with other tribes. The cases ignore the fact that tribal businesses function as major sources of income for the tribes, perhaps the only source other than federal funds. As discussed previously,⁴¹⁹ tribal businesses play a central role in the continuation of the very existence of the tribe. Tribes' economic activities are therefore inextricably tied to their sovereign status. The benefits generated to the tribe by the business, through income and employment opportunities, provide the means of attaining and retaining the tribe's ability to function as a sovereign government. For that reason, the operation of a business by a tribe is indeed a matter of internal self-governance and therefore an "intramural" matter, and tribal businesses should not be treated as ordinary private-sector, for-profit businesses under the labor and employment statutes.

Similarly, when determining tribal coverage under the statutes, courts improperly identify the basis of tribal sovereignty if they distinguish between claims brought by tribal members and those brought by non-members.⁴²⁰

415. See *supra* text accompanying note 352.

416. See *supra* text accompanying notes 28-56.

417. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981)); see *supra* text accompanying notes 117-19.

418. See, e.g., *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116; see also *supra* text accompanying notes 311-44.

419. See *supra* text accompanying notes 61-77.

420. See, e.g., *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 ("Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . or essential to self-government.'") (emphasis added) (quoting *Farris*, 624 F.2d at 893). Similarly, the Eighth Circuit implies that whether an employee is a tribal member is key to a finding of application of the ADEA when the Eighth Circuit limited its holding that the ADEA did not apply to a tribe "to the narrow facts of this case which involve a member of the tribe, the tribe as an employer, and on the reservation employment." *Fond du Lac Heavy Equip.*, 986 F.2d at 251 (emphasis added).

Such reasoning suggests that because tribes employ non-members in their businesses, the operation of the business is no longer a "purely intramural matter." Simply because a tribe employs non-members, however, its operation of a business enterprise for the economic benefit of the tribe is no less a matter falling within the scope of the tribe's internal sovereignty. Just as a tribe cannot do business solely with itself, it cannot look solely to its own members to create a workforce with skills, knowledge, or experience necessary to the operation of a given business. A tribe does not relinquish sovereignty over its business operations by employing non-members.⁴²¹ This point can be illustrated by the fact that tribal governments retain civil jurisdiction—an important aspect of their sovereignty—over the activities of non-members within tribal boundaries and over the conduct and activities of those doing business with the tribe.⁴²² Tribes often make this point explicit in their laws.⁴²³ When a tribe employs non-members, those non-members' employment-related activities fall within the scope of the tribe's sovereignty over internal matters. Certainly a tribe's ability to supervise and set terms and conditions of employment for its non-member employees is an aspect of its power to regulate conduct that "has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁴²⁴

Thus, application of labor and employment statutes to tribes necessarily affects their "exclusive right of self-governance in purely intramural matters,"⁴²⁵ and a court is therefore required to apply the statute only if it finds "clear and reliable" evidence that Congress intended the statute to apply to tribes.⁴²⁶

No such "clear and reliable" evidence is found in the reasoning of the cases that fail to find labor and employment issues within a tribe's internal sovereignty. Such reasoning therefore contradicts the doctrine of sovereign immunity, as expressed in *Citizen Band Potawatomi* and *Santa Clara Pueblo*: these cases require "unequivocally expressed" waivers of tribal sovereign immunity by Congress before a court can hold that immunity is waived.⁴²⁷ Subjecting Native American tribes to suits for damages under the labor and

421. See, e.g., *Merrion*, 455 U.S. at 147 ("Indian sovereignty is not conditioned on the assent of a non-member; to the contrary, the non-member's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

422. See COHEN, *supra* note 13, at 253-57 and cases cited therein.

423. See, e.g., STATUTES OF THE NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS, ch. 3, preamble § 3 (not dated); CONST. AND BYLAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, ch. 1, § 1.1(a) (not dated).

424. *Montana*, 450 U.S. at 566.

425. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

426. *Id.*; *Dion*, 476 U.S. at 739.

427. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 508 (1991) (citing *Santa Clara Pueblo*).

employment statutes constitutes a judicial waiver of the tribes' sovereign immunity from suits under the statutes, an erosion of sovereignty. As discussed previously, the Supreme Court protects the sovereignty of state and local governments with similar "clear statement" rules.⁴²⁸ Congress has provided explicit statements in the federal labor and employment statutes with regard to their applicability to federal, state, and municipal governments.⁴²⁹ This is in accordance with "longstanding [federal] precedent" dictating that "a right to damages against the United States must be expressly provided by Congress, not judicially constructed from more flexible sources of statutory meaning."⁴³⁰

Tribal governments merit no less consideration. *Santa Clara Pueblo*, *Citizen Band Potawatomi*, *Dion*, and the *Farris* line of cases reinforce this requirement of "unequivocally expressed" congressional language to waive tribal sovereign immunity.⁴³¹ Waiver of tribal immunity by statutes whose silence negates any "unequivocally expressed" waiver requirement contradicts the Court's continual reinforcement of the longstanding federal doctrine of tribal sovereign immunity. Furthermore, *Citizen Band Potawatomi* negates the validity of any distinction between claims brought against tribal entities operated directly by tribal governments and those operated as tribal corporations,⁴³² as was made by a district court interpreting the reach of the NLRA in *Roberson v. Confederate Tribes*.⁴³³ As discussed above,⁴³⁴ the Supreme Court refused to distinguish between tribal governments and tribal businesses for the purpose of determining sovereign immunity, citing various congressional acts aimed toward tribal economic development and self-sufficiency.⁴³⁵ Sovereign immunity is a critical aspect of self-governance; judicial interpretation of statutes to waive such immunity in the absence of "unequivocally expressed" congressional intent amounts to an impermissible incursion into tribal self-governance.

Therefore, application to tribally owned businesses of labor and employment

428. See *supra* text accompanying notes 169-71.

429. See *supra* note 203.

430. Frickey, *supra* note 54, at 1152. Professor Frickey notes that this requirement of express congressional intent to waive statutory immunity against the federal government is an "elementary" principle of law: "It is elementary that one may not sue the federal government for damages without a congressional waiver of sovereign immunity. Indeed, such a waiver must be 'unequivocally expressed' rather than inferred from unclear statutory language." *Id.* at 1151.

431. See *e.g.*, *supra* text accompanying notes 40-50.

432. *Citizen Band Potawatomi*, 498 U.S. at 510.

433. See *Roberson*, 103 L.R.R.M. (BNA) at 2751.

434. See *supra* text accompanying notes 71-77.

435. See also *Limas*, *supra* note 1, at 374-75 (discussing the relationship between tribal corporations formed under § 17 of the Indian Reorganization Act, 25 U.S.C. § 477 (1988), and the Supreme Court's holding in *Citizen Band Potawatomi*).

statutes, all of which carry the potential for severe monetary and administrative costs, directly affects sovereign rights of self-government.⁴³⁶ When Congress has placed federal, state, and municipal sovereigns under the coverage of these laws, it has done so expressly.⁴³⁷ Such consideration must also be given to tribal sovereigns, and courts should refrain from applying these statutes to tribes unless Congress has expressly indicated its intent to do so. The Board's construction of the NLRA, at least with respect to tribal employers on reservations, is consistent with federal law recognizing tribes as sovereign governments,⁴³⁸ as is the Tenth Circuit's recognition that application of anti-discrimination statutes and OSHA to tribes would directly affect their sovereignty.⁴³⁹ Congress explicitly recognized that application of Title VII to tribes would directly interfere with tribal sovereignty.⁴⁴⁰ Similarly, Congress recognized the adverse administrative and economic impacts that application of the NLRA would impose on governmental entities if their employees were afforded rights granted under the NLRA, particularly the right to strike.⁴⁴¹ There is no distinction between tribal governments and other governments, except that tribal governments are likely much less able to withstand these impacts.⁴⁴²

436. Another writer stressed this point almost two decades ago, with regard to federal statutory regulation of tribes in general:

Too often clashes over regulatory jurisdiction in Indian country have been settled in the courts, rather than in the halls of Congress. Most federal statutes are silent about their effect on Indian lands. This is an entirely unsatisfactory way to deal with the problem. It drains a huge amount of funds from tribes that can ill afford high legal fees; the process leads to obscure and often conflicting results in the courts, and it constitutes a dishonorable abnegation of the federal government's recognized obligation to protect the Indians' right to live life their own way.

Joseph J. Brecher, *Federal Regulatory Statutes and Indian Self-determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285, 291-92 (1977) (footnote omitted).

437. See *supra* note 203 which summarizes the coverage of the pertinent labor and employment laws.

438. See *supra* text accompanying notes 372-93.

439. See *supra* text accompanying notes 288-301.

440. See *supra* text accompanying notes 219-24.

441. See *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604 (1971) (citing 78 CONG. REC. 10351-53 (1934); *Hearings on Labor Disputes Act before the House Committee on Labor*, 74th Cong., 1st Sess. 179 (1935); 93 CONG. REC. 6441 (1947) (Sen. Taft)).

442. This is not to say that, as a matter of policy, Congress should not expressly apply labor and employment statutes to tribes. Congress must, however, make a considered decision, with input from tribes themselves, and manifest that consideration in the language of the statute itself or in recorded deliberations reflecting the statute's legislative history.

Federal policies in favor of worker protection, as expressed in the labor and employment statutes, are not incompatible with policies favoring tribal sovereignty and self-determination. Indeed, some tribes have written comparable labor and employment laws into their tribal codes or constitutions. For example, the Constitution of the Oglala Sioux Tribe of the Pine Ridge Reservation extends protection to its employees that is more generous than that afforded under Title VII:

We exclude non-members of the Tribe, but we cannot discriminate among or between our Tribal members. No person in the service of the Oglala Sioux Tribe or person seeking admission into the service shall be appointed, promoted, demoted, removed, or in any way discriminated against

As was pointed out previously, the reasoning of the ADEA dissents and the Seventh and Ninth Circuit OSHA and ERISA cases flouts federal law governing the interpretation of Native American treaties and statutes. When applied to a treaty right, this reasoning contradicts the second limitation to “the *Tuscarora* rule”: that absent an express indication by Congress, a statute will not be applied to a tribe if “the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties.’”⁴⁴³ These flawed cases misapply federal canons of construction in interpreting treaties. Not only do these cases narrowly interpret treaty language, as did the Ninth Circuit when considering the extent of a treaty’s exclusionary rights,⁴⁴⁴ they ignore sovereign rights that flow from treaties. These cases also misapply canons of statutory construction in interpreting the labor and employment statutes themselves. They ignore the ambiguity created by congressional silence as to coverage of tribes—made even more apparent by Congress’s express exclusion of tribes under Title VII and the ADA⁴⁴⁵—and interpret the statutes adversely to tribes. Such reasoning flies in the face of longstanding tenets dictating that ambiguities be interpreted in tribes’ favor.⁴⁴⁶

Finally, the reasoning of these cases misapprehends the common relationship among the various labor and employment statutes. Reasoning that (1) distinguishes claims brought under statutes that are silent as to their applicabil-

because of his race, creed, color, sex or because of his political or religious opinions or affiliations.

CONST. AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA art. XVII, § 81. See also NAVAJO TRIB. CODE tit. 1, § 3 (1988) (prohibiting sex discrimination). The Navajo Nation has enacted laws granting the right of its employees to organize and bargain collectively, but not the right to strike or picket. NAVAJO TRIB. CODE tit. 15, § 6 (1990).

One author suggests, in the context of OSHA, that if Congress does decide tribal employers should be covered, it should first consult with tribes about the particular needs of their workers and about effective means of administration and enforcement:

Before the amendment, however, Congress should conduct hearings to give Indians an opportunity to explain how they think the Act should apply to them. Such hearings would recognize that tribes, as sovereigns, have a right to express their opinions about inspections on their land, and about health and safety laws that will affect their people. . . .

A major issue for Indians to discuss with Congress is whether the tribes could administer the Act to Indian businesses. . . .

Congress and the Indian tribes need to decide how financially troubled Indian businesses would pay for the cost of complying with the Act’s regulations. . . . The importance of Indian businesses dictates that financially troubled tribal enterprises should not have to bear the cost of compliance with the Act.

Crough, *supra* note 115, at 499-501 (footnotes omitted).

443. *Coeur d’Alene Tribal Farm*, 751 F.2d at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981)).

444. *U.S. Dept. of Labor v. Occupational Safety & Health Review Comm’n*, 935 F.2d at 186-87.

445. See *supra* note 202.

446. See *supra* text accompanying notes 143-45.

ity to tribes and claims brought under Title VII and the ADA, which expressly exclude tribes from coverage, (2) distinguishes between claims brought against a tribe by members from those brought by non-members, and (3) places tribal businesses operating in interstate commerce outside the scope of tribes' "rights of self-governance," results in ad hoc and inconsistent interpretations of statutes whose coverage is otherwise carefully spelled out and basically similar in all of the statutes.

VI. CONCLUSION

Any federal regulation of tribally sponsored employment that subjects tribes to litigation, damages, administrative proceedings, or fines necessarily thwarts the goals of tribal self-determination and economic development and, therefore, abrogates sovereign rights of Native American tribes. Application of the above statutes to tribes carries all these potential effects and would result in severe economic and administrative hardship. When Congress has failed to address the effects of its legislation on tribes, courts should not be willing to subject tribes to the effects of the legislation. Congress must identify those entities that will be affected. Congress must recognize that Native American tribes operate businesses and employ workers, and consistent with its trust responsibilities to those tribes, affirmatively indicate that it has considered the effects of its labor and employment legislation on tribal employers.

In the absence of such affirmative indication, federal law and policy pertaining to Native American tribes compels deference by the courts to tribal sovereignty. That deference, in turn, compels an interpretation of federal statutes that reflects consistency with such laws and policy, as well as consistency with the overriding goals—federal and tribal—of tribal self-sufficiency and economic development.