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SILENCE IS ANYTHING BUT GOLDEN: LAWS OF GENERAL APPLICABILITY IN INDIAN COUNTRY

Bryan R. Lynch*

On July 8, 2012, Theresa Carsten was employed by the Inter-Tribal Council of Nevada (“ITCN”), a non-profit organization made up of twenty-six federally recognized Nevada tribes, as the director of the Women, Infants, and Children Program.¹ One day later, Carsten was fired for, as she alleged in a complaint filed against the ITCN, seeking leave under the Family and Medical Leave Act (“FMLA”) to address a “serious medical condition” from which she was suffering.² In the United States District Court for the District of Nevada, Carsten’s suit was dismissed for lack of jurisdiction, as the ITCN was covered by tribal sovereign immunity.³ While addressing the issues raised in *Carsten v. Inter-Tribal Council of Nevada* at the district court, the Ninth Circuit Court of Appeals raised one significant, unaddressed question on which Carsten’s suit turns: Does the FMLA even apply to Indian tribes?⁴

Allowing this question to remain unanswered disadvantages employees like Theresa Carsten by depriving them of the FMLA’s benefits. Signed by President Clinton in 1993, the FMLA was intended to “support families in their efforts to strike a workable balance between the competing demands of the workplace and the home.”⁵ The FMLA guarantees, for eligible employees in the United States, twelve weeks of unpaid leave in a twelve-month period to care for “newborn or adopted children, relatives with serious medical conditions,” or the employee’s health problems.⁶ Empirically, the FMLA has proven to be a beneficial tool for American workers. When an eligible employee takes FMLA leave, employers must maintain health insurance benefits for their employee as if no leave had

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1. *Carsten v. Inter-Tribal Council of Nevada*, No. 3:12-cv-00493-MMD-WGC, 2013 WL 4736709, at *1 (D. Nev. Aug. 30, 2013), *rev’d*, 599 F. App’x 659 (9th Cir. 2015).

2. *Id.*

3. *Id.* at *1-*2.

4. *Carsten*, 599 F. App’x at 660.

5. Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. ECON. PERSPECTIVES 175, 175 (1997) (quoting COMM’N ON FAMILY & MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES xiii (1996)).

6. *Id.* at 176.

been taken and must allow employees to return to work in the same or an equivalent position.⁷

While the effects of the FMLA—historically significant because it was the first federal law in the United States to require job-protected parental leave—have been minimal, they have been positive.⁸ A large majority of employers impacted by the FMLA, more than 90%, report that complying with the law’s requirements has “either no noticeable effect or a positive effect on business operations.”⁹ From the employee prospective, 16% of eligible workers utilize the leave available to them, while only 5% report being unable to take leave when needed.¹⁰ Plainly, the FMLA is not a windfall for the American worker, but it has benefited a portion of the workforce without unduly burdening employers.

Unfortunately, considering first the contours of tribal sovereignty relevant to the applicability of the FMLA to Indian tribes and second judicial interpretations of laws of general applicability like the FMLA, it remains unclear today whether these benefits extend to Indian tribes. This Comment endorses the prevailing judicial interpretation of laws of general applicability that would apply the protections of the FMLA to Indian tribes as the only interpretation that best navigates all of the interests at play in answering this question. True, this interpretation will leave employees without the ability to enforce those protections by private lawsuit, but that is a problem that only Congress can solve.

I. Tribal Sovereignty

Whether the FMLA applies to individuals employed by Indian tribes turns on two questions of tribal sovereignty. First, addressed by the parties in *Carsten*, are issues related to tribal sovereign immunity from suit.¹¹ Second, raised upon appellate review in *Carsten*, is the sovereign right of tribes to govern themselves, including exercising authority to regulate “the health and safety of workers in tribal enterprises.”¹² As these principles

7. *Id.*

8. *Id.* at 175.

9. News Release, Wage & Hour Div., U.S. Dep’t of Labor, Family and Medical Leave Act Benefits Workers and Their Families, Employers (Feb. 4, 2013), <https://www.dol.gov/opa/media/press/whd/WHD20130175.htm>.

10. Jacob Alex Klerman, et al., *Family and Medical Leave in 2012: Executive Summary*, U.S. DEP’T OF LABOR, (Sept. 13, 2013), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf>.

11. *Carsten v. Inter-Tribal Council of Nevada*, 599 F. App’x 659, 660 (9th Cir. 2015).

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

have distinct contours, they must be addressed independently. Indeed, there is a distinct difference between the “right to demand [a tribe’s] compliance” with a law and the “means available to enforce” that law.¹³

A. Immunity from Suit

Tribal sovereign immunity from suit is a controlling principle in determining the means available to enforce the FMLA. This immunity has developed as a common law doctrine and is derived from the language used in the Constitution’s Indian Commerce Clause, which treats tribes as governments.¹⁴ Over time, the doctrine has become recognized as “a necessary corollary to Indian sovereignty and self-governance.”¹⁵ Because of its prominence in questions of tribal governance, the Supreme Court has often confronted questions regarding the limits of tribal sovereign immunity from suit and found that it is a broad concept with few limitations.¹⁶

For example, in *Michigan v. Bay Mills Indian Community*, the Court noted that this immunity continues to be a vital component of tribal sovereignty.¹⁷ Therein, the state of Michigan sued the Bay Mills Indian Community over the operation of a Class III gaming facility on land purchased through a congressional land trust.¹⁸ The Court, in defining the contours of tribal sovereign immunity from suit, opined that there is no exception in this immunity “for suits arising from a tribe’s commercial activities, even when they take place off Indian lands.”¹⁹ In fact, tribal immunity extends to any “arms of the tribes.”²⁰ Likewise, immunity from suit extends to tribal officials and employees when acting within the scope

13. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998).

14. See U.S. CONST. art. 1, § 8; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(a), at 636 (Nell Jessup Newton et al. eds, 2012 & Supp. 2017) [hereinafter COHEN] (citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014)).

15. *Bay Mills*, 134 S. Ct. at 2030 (citing *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng’g, P.C.*, 476 U.S. 877, 890 (1986)).

16. Cohen notes that “[s]even Supreme Court cases since 1977 have delineated the contours of the doctrine of tribal sovereign immunity.” COHEN, *supra* note 14, § 7.05(1)(a), at 636-37.

17. 134 S. Ct. at 2030-31.

18. *Id.* at 2028-29.

19. *Id.* at 2031.

20. COHEN, *supra* note 14, § 7.05(1)(a), at 637 (noting that “arms of the tribes” analysis “considers tribal involvement in the creation and control of the entity, tribal intent to clothe the entity with immunity, and whether the entity serves tribal sovereign interests such as economic development”).

of their authority.²¹ The Court, however, has suggested that the holding of *Ex parte Young*, which permits suit against individuals in their official capacity for either declaratory or injunctive relief, extends to Indian tribes.²² Nonetheless, this exception is decidedly narrow, permitting only suits against individuals in their official capacity for declaratory or injunctive relief.²³

While the reach of tribal immunity from suit is expansive, it is not an absolute shield to all suits. For example, suits filed by the United States are never barred by this immunity.²⁴ Moreover, Indian tribes are subject to suit where “Congress has authorized the suit or the tribe has waived its immunity.”²⁵ As to the latter, there was some historical uncertainty as to whether “tribes could waive their own sovereign immunity without congressional approval.”²⁶ Today, however, tribes may waive their immunity either by law or by contract, provided they do so “clearly.”²⁷ And so, where a tribe voluntarily agrees to a binding arbitration clause and state courts have jurisdiction over the resulting arbitration, the tribe has waived its immunity.²⁸ That decision, however, in *C & L Enterprises v. Citizen Band of Potawatomi Indian Tribe* turned on two key facts: the contract in question expressly noted that the American Arbitration Association rules would govern any arbitration and the contract’s choice of law clause “made it clear that the parties had selected Oklahoma law as the applicable law.”²⁹

Clearly, tribal waiver of immunity is a fact-specific question, drawing on the actions of the tribe at issue and the nature of the suit brought. Therefore, whether tribes have waived immunity from suit under the FMLA is a question beyond the scope of this paper. Courts have addressed many novel

21. *See id.* § 7.05(1)(a), at 638 (citing *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)).

22. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

23. *Id.*

24. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). Tribes are, however, immune from suits against them by states. *See Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 (11th Cir. 1999).

25. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998).

26. COHEN, *supra* note 14, § 7.05(1)(c), at 643 & n.51 (citing *Thebo v. Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895) (“[T]he United States has never given its permission that these Indian Nations might be sued generally, even with their consent.”)).

27. *See id.* § 7.05, at 644 & n.52.

28. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001).

29. COHEN, *supra* note 14, § 7.05(1)(c), at 644 (citing *C & L Enters.*, 532 U.S. at 419).

arguments under this principle of sovereignty in relation to the FMLA, however. In *Muller v. Morongo Casino, Resort, and Spa*, a slot attendant at the Morongo Casino, Crystal Muller, alleged that the Morongo Indian Tribe had waived sovereign immunity from suit under the FMLA by entering into a gaming compact with the State of California.³⁰ The court found that the Tribe had not waived immunity under the FMLA because, although the compact did contain waivers for “different categories of claims” unrelated to the FMLA, there was no “clear waiver of immunity from suit for employment-related claims.”³¹ Even though the Tribe recognized that Muller had rights under the FMLA, it had not clearly expressed intent to waive sovereign immunity from suit and, therefore, Muller could not sue to enforce those rights.³²

Clarity is also required for the United States to authorize lawsuits against tribes. In *Santa Clara Pueblo v. Martinez*, the Supreme Court was adamant that any abrogation of tribal sovereign immunity from suit by Congress “cannot be implied but must be unequivocally expressed.”³³ Historically, Congress has been rather stingy with its ability to waive this immunity. For example, tribal immunity from suit was only partially waived in the Indian Civil Rights Act of 1968,³⁴ Indian Gaming Regulatory Act,³⁵ and other congressional acts.³⁶ The Bankruptcy Code, which waives the sovereign immunity defense of “any ‘governmental unit,’”³⁷ may even have failed to

30. *Muller v. Morongo Casino, Resort, & Spa*, No. EDCV 14-02308-VAP (KKx), 2015 WL 3824160, at *1, *6 (C.D. Cal. June 17, 2015).

31. *Id.* at *6-7.

32. *Id.*

33. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

34. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (2012)), cited in COHEN, *supra* note 14, § 705(1)(b), at 640.

35. Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (2012)), discussed in COHEN, *supra* note 14, § 705(1)(b), at 641.

36. See COHEN, *supra* note 14, § 705(1)(b), at 641 & nn. 35-38 (citing 33 U.S.C. § 1365 (2012) (Clean Water Act); 42 U.S.C. § 300j-9(i)(1)(C) (2012) (Safe Drinking Water Act); 42 U.S.C. § 6972 (2012) (Resources Conservation and Recovery Act); 49 U.S.C. §§ 5101-5125 (2012) (Hazardous Materials Transportation Act)).

37. *Id.* § 705(1)(b), at 642 (quoting 11 U.S.C. § 101(27) (2012)) (defining governmental unit as “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.”)).

waive tribal sovereign immunity from suit.³⁸ At times, Congress has considered “broader abrogation of tribal sovereign immunity,” at least in the context of regulations pertaining to contracting with tribes, but declined to enact any such proposals.³⁹

Simply, the default position regarding tribes is “immunity; and to abrogate such immunity, Congress must unequivocally express that purpose.”⁴⁰ Therefore, anything short of a clear, unequivocal expression in the FMLA that Congress intended to waive tribal immunity from suit for violations of this law will be insufficient. Congress did not merely fail to make a sufficiently clear expression; rather, it failed to make any expression as to tribal sovereign immunity at all.⁴¹ As several courts have noted, the FMLA falls well short of waiving tribal sovereign immunity, rendering individuals incapable of suing their tribal employers for failure to afford them rights under the law.⁴² Therefore, as it pertains to the FMLA, lawsuits by private individuals are not an available means for enforcing the law. Enforcing the FMLA is limited to suit by the federal government and there has yet to be such a suit. Nonetheless, “whether an Indian tribe is *subject* to a statute and whether the tribe may be sued for violating the statute are two entirely different questions.”⁴³

38. See *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012); *In re Nat’l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000).

39. COHEN, *supra* note 14, § 7.05(1)(b), at 643.

40. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) (internal quotations and alterations omitted).

41. See 29 U.S.C. §§ 2601-2654 (2012).

42. See *Carsten v. Inter-Tribal Council of Nev.*, 599 F. App’x 659, 660 (9th Cir. 2015) (“The district court correctly held that the FMLA does not abrogate tribal sovereign immunity.”); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (“The FMLA makes no reference to the amenity of Indian tribes to suit.”); *Morrison v. Viejas Enters.*, No. 11cv97WQH(BGS), 2011 WL 3203107, at *1, *3 (S.D. Cal. July 26, 2011) (“The Family Medical Leave Act is a law of general application that is silent with respect to Indian tribes.”); *Pearson v. Chugach Gov. Servs. Inc.*, 669 F. Supp. 2d 467, 477 (D. Del. 2009) (“The only courts to examine whether tribal organizations are subject to the FMLA’s employer obligations held, based on the doctrine of tribal immunity, th[at] there is not [a] private cause of action under the FMLA against tribal organizations.”); *Myers v. Seneca Niagara Casino*, 488 F. Supp. 2d 166, 169 (N.D.N.Y. 2006) (“Thus, Congress has not expressly abrogated the sovereignty of Indian Nations in the FMLA, and Congress must expressly do so for there to be an effective abrogation.”).

43. *Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999).

B. Applicability of the FMLA to Indian Tribes

Whether the requirements of the FMLA apply to Indian tribes or tribal businesses is a separate question, speaking to the right of an individual to demand a tribe's compliance with the law. As noted, regulation like the FMLA is indisputably within the purview of each tribe as a sovereign entity.⁴⁴ Tribes possess, however, only "a limited sovereignty that is subject to complete defeasance," meaning Congress may abrogate a tribe's sovereign right to regulate on this subject.⁴⁵ Unlike abrogation of tribal sovereign immunity from suit, however, it is unclear what is required of Congress to abrogate this sovereign right.

Undoubtedly, Congress may affect such abrogation with a clear expression to do so.⁴⁶ The FMLA, however, has no such expression.⁴⁷ Indeed, the FMLA makes no reference at all to Indian tribes. The issue presented by the FMLA, then, as it pertains to its applicability to Indian tribes, is whether "congressional silence" operates as "an expression of intent to exclude tribal enterprises from the scope of an act to which they would otherwise be subject."⁴⁸ That question is, as of yet, unanswered by the Supreme Court and has been inconsistently answered by the Circuit Courts of Appeals. The result is that determining whether the requirements of the FMLA extend to Indian tribes and tribal businesses largely depends on which appellate jurisdiction hears the dispute.

The various approaches to the applicability of general statutes to Indians can be grouped, however, into two prevailing strands of jurisprudence flanked by less popular variations. Most frequently employed by the courts is an approach coined by the Ninth Circuit Court of Appeals in *Donovan v. Coeur d'Alene Tribal Farm*, which presumes the applicability of these statutes to Indians subject only to three narrow exceptions.⁴⁹ On the contrary, other courts employ a presumption of non-applicability, holding that general statutes can reach only as far as the legislature expressly

44. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) ("No one doubts that the Tribe has the inherent right to regulate the health and safety of workers in tribal enterprises.").

45. *Id.* at 1115.

46. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

47. *See* 29 U.S.C. §§ 2601-2654 (2012).

48. *Coeur d'Alene*, 751 F.2d at 1115.

49. *Id.* at 1115-16.

intended.⁵⁰ A third, significantly less favored approach, determines applicability of a general statute based on the nature of the Indian activity that the statute would regulate, applying statutes that would govern “commercial enterprises” to Indians but not those that would affect traditional “governmental functions.”⁵¹ As with any decisional law doctrine, there are outliers and inconsistencies. For the most part, however, the dispute as to how the courts should adjudicate laws of general applicability centers on where the court should place the presumption.

I. Precedent

a) SCOTUS

The root of inconsistency at the appellate level is inconsistency at the Supreme Court, resulting specifically from the Court’s decision in *Federal Power Commission v. Tuscarora Indian Nation*.⁵² *Tuscarora* presented a challenge to the applicability of the Federal Power Act, which authorized power companies to condemn lands “necessary to the construction, maintenance, or operation” of a project licensed by the Federal Power Commission, to reservation lands.⁵³ In the end, the Court held that the Federal Power Act authorized the condemnation of Indian lands for licensed projects, despite the Tuscarora Indian Nation’s objections that the taking of Indian lands would require “the express consent of Congress referring specifically to those lands.”⁵⁴ *Tuscarora*’s appellate progeny, at least regarding the applicability of “a general statute in terms applying to all persons,” dovetails not from the Court’s holding, but from its dictum.⁵⁵ The Court opined that while it may once have been that “[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them’ . . . , it is now well settled by many decisions of th[e] Court that a general statute . . . includes Indians and their property interests.”⁵⁶ While the *Tuscarora* dictum has been the lodestar for many

50. This approach has been used in the Tenth Circuit Court of Appeals, *see infra* text accompanying notes 146-154 & 160-176, and Eighth Circuit Court of Appeals, *see infra* text accompanying notes 155-159.

51. *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1313 (D.C. Cir. 2007).

52. 362 U.S. 99 (1960).

53. *Id.* at 115.

54. *Id.* at 118.

55. *Id.* at 116 (quoting *Elk v. Wilkins*, 112 U.S. 94, 99 (1884)).

56. *Id.*; *see also* *Superintendent of Five Civilized Tribes v. Comm’r*, 295 U.S. 418 (1935); *Chouteau v. Comm’r of Internal Revenue*, 38 F.2d 976 (10th Cir. 1930).

courts confronting questions of general applicability, other courts have noted that this language is inconsistent with other decisions of the Supreme Court.

In *Merrion v. Jicarilla Apache Tribe*,⁵⁷ for example, the Supreme Court used language inconsistent with *Tuscarora* that suggested congressional silence “cannot signal an undermining of established tribal authority.”⁵⁸ The Court granted certiorari in *Merrion* to determine whether the Jicarilla Apache Tribe had the authority to impose a severance tax on “any oil and natural gas severed, saved, and removed from Tribal lands.”⁵⁹ The Tribe had enacted the statute that created this tax pursuant to its constitution, which afforded the tribal council the authority to “levy and collect taxes and fees on tribal members, and . . . to impose taxes and fees on non-members of the tribe doing business on the reservation.”⁶⁰ Though this tax was a proper exercise of authority by the Jicarilla Apache Tribe, the Court acknowledged that the United States federal government had the authority to divest the Tribe of this power.⁶¹ The issue, then, was whether the federal government had done so.

One argument raised by the oil and gas producers challenging the tax imposed upon them by the Jicarilla Apache Tribe was that “Congress implicitly took away” the Tribe’s power to impose this tax.⁶² The Court noted that Congress had enacted several pieces of legislation, relied upon by the parties challenging the tax, relating to taxation of this sort.⁶³ None of that legislation, however, provided a “clear indication[,]” as was required by the *Merrion* Court, that Congress intended to deprive the Jicarilla Apache Tribe of its taxing authority.⁶⁴ Congressional silence, at best, instructed the Court that there was an ambiguity as to the Tribe’s authority, and any doubt must be resolved in the Tribe’s favor to comport with “traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”⁶⁵ Indeed, the Court provided a helpful summation of *Merrion* on this question: “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area

57. 455 U.S. 130 (1982).

58. KAIGHN SMITH, JR., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY 53 (2011).

59. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982).

60. *Id.* at 135.

61. *Id.* at 149 (noting “Congress may limit tribal sovereignty”).

62. *Id.*

63. *Id.*

64. *Id.* at 152.

65. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

cautions that we tread lightly in the absence of clear indications of legislative intent.”⁶⁶ Unfortunately, the Court stopped short of indicating whether the caution of *Merrion* abrogated *Tuscarora*’s broad language.

The Court had another opportunity to nullify the *Tuscarora* dictum in *Iowa Mutual Insurance Co. v. LaPlante*.⁶⁷ There, the Court addressed whether a federal district court could exercise diversity jurisdiction over a dispute involving both members of the Blackfeet Indian Tribe and events that occurred within the Blackfeet Tribal Reservation without first allowing the tribal court system to determine its own jurisdiction.⁶⁸ Edward LaPlante brought suit in Blackfeet Tribal Court against Iowa Mutual Insurance Company alleging the Company acted in bad-faith when it refused to settle his claims arising from a traffic accident in which LaPlante was driving his employer’s vehicle.⁶⁹

LaPlante’s suit turned on his employer’s liability, which would be imputed to Iowa Mutual, the employer’s insurer.⁷⁰ Iowa Mutual sought to have the insurance dispute heard in federal court based, in part, on the assertion that the existence of a federal diversity statute displaces, by implication, deference to tribal courts in matters involving tribal members or tribal lands.⁷¹

As in *Merrion*, the *LaPlante* Court rejected the notion that a statute silent as to its implications for Indian tribes could operate as a limit on tribal sovereignty.⁷² Though the United States federal government did have the authority to limit the jurisdiction of tribal courts, the Court declined to “read the *general* grant of diversity jurisdiction” by federal statute—absent either an explicit reference to Indians or evidence in the legislative history that Indians were considered in crafting the legislation—as having done so.⁷³ Admittedly, the historical backdrop of the federal diversity statute

66. *Id.* at 149 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)).

67. 480 U.S. 9 (1987).

68. *Id.* at 11 (“The question before us is whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction.”).

69. *Id.*

70. *Id.*

71. *Id.* at 17-18 (“Although Congress undoubtedly has the power to limit tribal court jurisdiction, we do not read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty . . .”).

72. *Id.* at 18 (“In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner’s invitation to hold that tribal sovereignty can be impaired in this fashion.”).

73. *Id.* at 17 (emphasis added).

made Iowa Mutual's position unlikely to prevail because nearly no tribal courts existed when the statute was enacted.⁷⁴ Moreover, the application of the federal diversity statute turns on citizenship and for much of American history Indians were not considered citizens of either states or sovereign tribes, rendering the diversity statute inapplicable.⁷⁵ Nonetheless, the Court spoke broadly in *LaPlante* and declared that "[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of tribal courts, . . . tribal sovereignty can[not] be impaired in this fashion."⁷⁶ Unlike in *Tuscarora*, the *LaPlante* Court found no significance in the combination of a statute's generality and silence as to its applicability to Indians.

*b) Presumption of Applicability*⁷⁷

One of the earliest attempts at sorting out the effect of statutes of general applicability to Indian tribes is the Ninth Circuit Court of Appeals decision in *Donovan v. Coeur d'Alene Tribal Farm*, finding that the Occupational Safety and Health Act⁷⁸ ("OSHA") "applie[d] to the commercial activities carried on by the Coeur d'Alene Tribal Farm."⁷⁹ *Coeur d'Alene* pitted an Indian-owned commercial grain farm that sold its product on the open market against the United States Department of Labor, which had conducted a "consensual inspection of two grain elevators on the Farm."⁸⁰ Having been cited for twenty-one violations of OSHA, which were accompanied by a proposed \$185 fine, the Coeur d'Alene Tribal Farm challenged the applicability of OSHA to Indians.⁸¹

Of course, Congress can expressly apply a statute to Indians.⁸² Laws of general applicability that are silent as to their application to Indians, however, present a problem. The Ninth Circuit was not shy about its endorsement of the Supreme Court's dictum in *Tuscarora*, that "a general statute in terms applying to all persons includes Indians and their property

74. *Id.* at 17-18.

75. *Id.* at 18.

76. *Id.* (emphasis added).

77. This term was first used by Alex T. Skibine. See Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 123, 130 (2016).

78. 29 U.S.C. §§ 651-678 (2012).

79. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1114 (9th Cir. 1985).

80. *Id.*

81. *Id.* at 1114-15.

82. *Id.* at 1116.

interests.”⁸³ The court did, however, recognize three exceptions to *Tuscarora*’s general principle, which were borrowed from an earlier Ninth Circuit case regarding the applicability of federal criminal laws to activities on reservation lands.⁸⁴ And so, within the jurisdiction of the Ninth Circuit, federal laws of general applicability are valid against Indians unless (1) the statute would affect “exclusive rights of self-governance in purely intramural matters,” (2) the law would “abrogate rights guaranteed by Indian treaties,” or (3) there is evidence that Congress “intended [the law] not to apply to Indians.”⁸⁵ The Ninth Circuit has continually affirmed this rule.⁸⁶

The Second Circuit Court of Appeals followed suit, incorporating the *Coeur d’Alene* framework in a dispute over the applicability of OSHA to an Indian-run business, *Mashantucket Sand and Gravel*.⁸⁷ There the court was urged by *Mashantucket Sand and Gravel* to apply a framework similar to what now controls in the Eighth and Tenth Circuit Courts of Appeals, wherein a law applies to tribes only if Congress expressly intended to abrogate tribal sovereignty.⁸⁸

Notably, *Mashantucket Sand and Gravel* proposed a hybrid test resulting from the Supreme Court’s opinions since *Tuscarora*,⁸⁹ specifically *United States v. Dion*⁹⁰ and *LaPlante*.⁹¹ The result of *Dion* and *LaPlante*, the Tribe argued, is that “[i]f an act would interfere with rights of tribal self-governance in internal matters then the court must conclude that the act does not apply”—a conclusion that “can only be overcome if it is clear . . .

83. *Id.* at 1115-16 (quoting *Federal Power Comm’n v. Tuscarora*, 362 U.S. 99, 116 (1960)) (“In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here.”).

84. *Id.* at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).

85. *Id.* at 1114 (quoting *Farris*, 624 F.2d at 893-94).

86. *See Solis v. Matheson*, 563 F.3d 425 (2009); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (1991) (“In general, in the absence of an expressed exemption for Indians, ‘a general statute in terms applying to all persons includes Indians and their property interests.’”); *U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n*, 935 F.2d 182 (1991).

87. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996).

88. *Id.* at 177 (“MSG would have us start with the presumption that federal statutes of general applicability touching upon sovereign rights of Indians do *not* apply to tribes, absent a clear indication of Congress’s intent that the statute override tribal sovereignty.”).

89. *Federal Power Comm’n v. Tuscarora*, 362 U.S. 99 (1960).

90. 476 U.S. 734 (1986).

91. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

that Congress intended that the act apply in spite of this interference.”⁹² In the end, the court rejected this proposed standard as too broad, and adopted the view that a statute of general applicability is presumed to apply to Indians, barring the three *Coeur d’Alene* exceptions.⁹³ The only exception at issue was the first, by which a general statute is not applicable to Indians if it affects “exclusive rights of self-governance in purely intramural matters.”⁹⁴ Because Mashantucket Sand and Gravel conducted activities that were commercial, employed non-Indians—which the court held should “weigh[] heavily against” Mashantucket Sand and Gravel—and was involved in the construction of a casino to engage in interstate commerce, the court felt that applying OSHA did not affect rights of self-governance in purely intramural matters.⁹⁵

So, too, did the Eleventh Circuit Court of Appeals in *Florida Paraplegic Ass’n v. Miccosukee Tribe of Indians of Florida*.⁹⁶ There, the Florida Paraplegic Association and the Association for Disabled Americans alleged that a restaurant owned by the Miccosukee Tribe of Florida failed to meet the standards of accessibility for disabled persons required by the Americans with Disabilities Act (“ADA”).⁹⁷ The Miccosukee Tribe moved to dismiss the action under claims of sovereign immunity from suit.⁹⁸ To be fair, the Tribe was correct that the ADA had not waived sovereign immunity from suit.⁹⁹ However, the Eleventh Circuit adopted the *Coeur d’Alene* framework and determined that application of the ADA to the Miccosukee Tribe was neither an abrogation of “rights guaranteed under an Indian treaty,” contradiction of “Congress’s intent,”¹⁰⁰ nor interference “with purely intramural matters touching exclusive rights of self-

92. Reich v. Mashantucket Sand & Gravel, 95 F.3d at 178 (citing Appellee’s Brief at 20, Reich v. Mashantucket Sand & Gravel (No. 95-4200)).

93. *Id.* at 182.

94. *Id.* at 176 (citation omitted).

95. *Id.* at 179-81.

96. 166 F.3d 1126, 1129 (11th Cir. 1999) (“As the district court recognized, a general statute applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress’s intent.”).

97. *Fla. Paraplegic*, 166 F.3d at 1127 (citing 42 U.S.C. § 12181 (2012)(a) (2012)).

98. *Id.*

99. *Id.* at 1135 (“Because we find that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity from private suit under Title III of the ADA, we hold that the Associations may not pursue this action against the Miccosukee Tribe.”).

100. *Id.* at 1129 (“The Associations and the Miccosukee Tribe agree that no treaty relevant to this case exists and that Congress has not specifically expressed its intent that the ADA not apply to Indian tribes.”).

government.”¹⁰¹ The court focused on the last of the three exceptions, finding that interstate commercial activities conducted by tribes do not constitute intramural matters of self-governance.¹⁰² This rule remains a vital component of the Eleventh Circuit’s approach to laws of general applicability.¹⁰³

The Sixth Circuit Court of Appeals adoption of the *Coeur d’Alene* approach has been more contentious than its counterparts. In *NLRB v. Little River Band of Ottawa Indians Tribal Government*, a divided panel of the Sixth Circuit adopted the *Coeur d’Alene* presumption of applicability¹⁰⁴ over the boisterous dissent of Judge McKeague, which can be distilled into a single rhetorical question: “How does one statement of dictum, in a 1960 Supreme Court opinion, grow into a ‘doctrine,’ contrary to traditional principles of Indian law, yet justifying federal intrusion upon tribal sovereignty in 2015?”¹⁰⁵ The dissent is neither alone nor without merit, as other courts have adopted the view that resolves the judge’s concerns, *infra*. Nonetheless, the majority of the Sixth Circuit panel found that “the *Coeur d’Alene* framework accommodates principles of federal and tribal sovereignty,” “reflects the teachings” of the Supreme Court, and supplies “Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them.”¹⁰⁶ The court held that the National Labor Relations Act¹⁰⁷ (“NLRA”) did “not undermine the Band’s right of self-governance in purely intramural matters,” that Congress did not “intend[] the NLRA not to apply to a tribal government’s operation of tribal gaming,” and that the Little River Band of Ottawa Indians had no treaty at issue.¹⁰⁸ The Little River Band, then, could not “regulate labor-organizing

101. *Id.* at 1129-30 (“We hold, therefore, that because the ADA is a generally applicable law and because no exception to the presumption that such statutes apply to Indian tribes controls this case, Title III of the ADA governs the Miccosukee Tribe in its operation of its gaming and restaurant facility.”).

102. *Id.* at 1129 (“[T]ribe-run business enterprises acting in interstate commerce do not fall under the ‘self-governance’ exception to the rule that general statutes apply to Indian tribes.”).

103. *See Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312 (11th Cir. 2016).

104. 788 F.3d 537, 551 (6th Cir. 2015) (“We therefore adopt the *Coeur d’Alene* framework to resolve this case.”).

105. *Id.* at 565 (McKeague, C.J., dissenting).

106. *Id.* at 551.

107. 29 U.S.C. §§ 151-169 (2012).

108. *Little River Band*, 788 F.3d at 555.

activities and collective bargaining” in a way inconsistent with the NLRA.¹⁰⁹

One month later, another Sixth Circuit panel addressed the applicability of the NLRA on appeal by the Saginaw Chippewa Indian Tribe of Michigan.¹¹⁰ A casino operated by this Tribe, the Soaring Eagle Casino and Resort, had terminated an employee allegedly in violation of provisions of the NLRA.¹¹¹ When the employee sought redress through the NLRB, the Tribe objected on sovereignty grounds.¹¹² While more sympathetic to the Tribe’s argument than the last Sixth Circuit panel to address the issue, delivering a multi-page criticism of the *Coeur d’Alene* framework, the court was nonetheless bound by the *Little River Band* precedent and upheld the applicability of the NLRA to the Soaring Eagle Casino and Resort.¹¹³

A number of courts that have addressed whether a general statute, silent as to its relationship with Indians, applies nonetheless to Indians have implemented the *Tuscarora* presumption of applicability subject only to the *Coeur d’Alene* exceptions. The chronology of these cases, moreover, reflects *Coeur d’Alene*’s growing vitality over time. The Seventh Circuit, however, has moved away from its endorsement of *Coeur d’Alene*, at least insofar as it has altered the exception to that rule.

109. The court described the Tribe’s regulation in the following way:

In 2005, the Tribal Council enacted the Band’s Fair Employment Practices Code (FEPC), which it amended most recently on July 28, 2010. In pertinent part, . . . [a]s amended, Article XVI, *inter alia*, grants to the Band the authority to determine the terms and conditions under which collective bargaining may or may not occur; prohibits strikes, work stoppage, or slowdown by the Band’s employees and, specifically, by casino employees Further, Article XVI prohibits the requirement of membership in a labor organization as a condition of employment. It also prohibits the deduction of union dues, fees, or assessments from the wages of employees unless the employee has presented, and the Band has received, a signed authorization of such deduction. As amended, Article XVII prohibits Band employers, such as the casino, from giving testimony or producing documents in response to requests or subpoenas issued by non-tribal authorities engaged in investigations or proceedings on behalf of current or former employees, when such employees have failed to exhaust their remedies under the FEPC.

Id. at 540-41.

110. *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

111. *Id.* at 653.

112. *Id.*

113. *Id.* at 675.

The Seventh Circuit Court of Appeals appears to be marred by uncertainty as to what standard governs decisions surrounding inquiries into laws of general applicability.¹¹⁴ In 1989, only four years after the Ninth Circuit Court of Appeals issued *Coeur d'Alene*, the Seventh Circuit was asked to determine whether the Employee Retirement Income Security Act ("ERISA")¹¹⁵ applied to the Lac Du Flambeau Band of Lake Superior Chippewa Tribe such that its provisions governed whether State Farm Insurance Company could be made to pay a claim for particular treatments that it believed were related to a preexisting condition.¹¹⁶ The district court determined that the dispute between Alton Smart, whose claim had been denied, and State Farm arose under ERISA such that the company's decision was reversible only upon finding it was "arbitrary and capricious."¹¹⁷

The court employed *Tuscarora* and *Coeur d'Alene*. As to whether there existed any treaty rights that precluded the presumption of applicability, the court found that "[s]imply 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."¹¹⁸ Indeed, under this exception, "[t]he critical issue is whether application of the statute would jeopardize a right that is secured by the treaty."¹¹⁹ In *Smart v. State Farm Insurance Co.*, it did not.¹²⁰ Nor was there any evidence of congressional intent that ERISA would not apply to Indians.¹²¹ Finally, and most importantly for understanding the Seventh Circuit's evolution, the court held that an argument that application of ERISA would affect tribal "self-governance as broadly conceived" was insufficient under the exception that would preclude applicability where "the statute threatens the Tribe's ability to govern its intramural affairs."¹²² Therefore, ERISA applied to the Lac Du Flambeau Band of Lake Superior Chippewa Tribe.¹²³

Subsequently, however, when asked whether a federal district court had the authority to enforce a subpoena against the Great Lakes Indian Fish and

114. SMITH, *supra* note 58, at 59-61.

115. 29 U.S.C. §§ 1001-1461 (2012).

116. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989).

117. *Id.* at 930.

118. *Id.* at 934-35.

119. *Id.* at 935.

120. *Id.*

121. *Id.* at 936.

122. *Id.* at 935.

123. *Id.* at 938.

Wildlife Commission under the Fair Labor Standards Act (“FLSA”),¹²⁴ the Seventh Circuit analyzed the question outside of the *Coeur d’Alene* framework and held that it did not.¹²⁵ The Great Lakes Indian Fish and Wildlife Commission (“Great Lakes Commission”) is a “consortium” of more than a dozen Chippewa Indian tribes from the Great Lakes region.¹²⁶ Tasked with enforcing the usufructuary rights of these tribes, the Great Lakes Commission creates and enforces regulations regarding fishing, hunting, and harvesting wild plant life on behalf of the tribes.¹²⁷ During hunting and fishing seasons within the Great Lakes Commission’s regulatory umbrella, employees work “virtually round the clock,” for a number of reasons.¹²⁸ The Department of Labor sought to enforce a provision, which may have been no more than a loophole, which would require the Great Lakes Commission to pay “time and a half” for any hours beyond forty worked in a single week.¹²⁹ Because the Great Lakes Commission “admit[ted] that it d[id] not pay time and a half for overtime,” the Seventh Circuit needed only to answer “the question of statutory coverage.”¹³⁰

The Seventh Circuit’s decision relied heavily on the conclusion that the Great Lakes Commission was covered by tribal sovereignty such that Congress would have to “give[] a stronger indication than it ha[d in the FLSA] that it wants to intrude.”¹³¹ A motivating factor in the court’s classification of the Great Lakes Commission’s work as a sovereign function of tribal government was the understanding that Indians are allowed to regulate their police, and the employees at the Commission were essentially officers policing hunting and fishing.¹³²

124. 29 U.S.C §§ 201-219 (2012).

125. *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 495 (7th Cir. 1993).

126. *Id.* at 492.

127. *Id.* at 492-93.

128. *Id.* at 492 (noting long hours result “not only because the hours of daylight are long and hunting and fishing take place throughout them, but also because the Indians like to spear fish at night, by torchlight”).

129. *Id.* at 492-93 (“Because the Fair Labor Standards Act does not mention Indians, the Department of Labor takes the position that the[] exemptions [available to state or local governments] are inapplicable to the warden-policemen of the Great Lakes Indian Fish and Wildlife Commission.”).

130. *Id.*

131. *Id.* at 495.

132. *Id.*

The dissent in *Reich v. Great Lakes Indian Fish & Wildlife Commission*, however, was unpersuaded that the Great Lakes Commission was engaged in policing sufficient to constitute a sovereign function of tribal government, citing the fact that the employees in question were “not employees of a public agency” and “d[id] not have the general arrest powers of policemen,” though there had been opportunities for the Great Lakes Commission employees to be “bestow[ed] full police powers.”¹³³

In the end, the court differentiated *Reich* from cases where federal statutes of general applicability had been applied to Indian agencies because the latter had the effect of imposing regulation merely on “routine activities of a commercial or service character.”¹³⁴ This decision has been characterized as aligning with the Tenth Circuit’s position that, “absent a clear expression of congressional intent, federal courts must presume that Congress would not undermine” the exercise of sovereign functions of tribal government.¹³⁵ In the Seventh Circuit, then, *Reich* would suggest that congressional intent is the arbiter of disputes regarding the effect of statutes of general applicability on the sovereign functions of tribal government.

In recent years, however, the Seventh Circuit has retreated somewhat from the sovereignty-leaning approach it promulgated in *Reich*. In *Menominee Tribal Enterprises v. Solis*, the court had to determine whether OSHA applied to the Menominee Indian Tribe’s sawmill in Wisconsin.¹³⁶ Following the Supreme Court’s reasoning in *Tuscarora*, the court held that “statutes of general applicability that do not mention Indians are nevertheless usually held to apply to them,” subject to three exceptions that differ in part from *Coeur d’Alene*.¹³⁷ First, as in *Coeur d’Alene*, a statute of general applicability is inapplicable to Indians if there is “persuasive evidence that Congress did not intend” it to so apply.¹³⁸ Second, again in accord with the Ninth Circuit, a statute of general applicability is inapplicable to Indians if its application would “clash with rights granted Indians by other statutes or by treaties with Indian tribes.”¹³⁹

Finally, the court found that general statutes would be inapplicable to Indians if their application would “interfere with tribal governance,” diverging from the “intramural matters” approach of the other courts that

133. *Id.* at 504 (Coffey, J., dissenting).

134. *Id.* at 495.

135. SMITH, *supra* note 58, at 60.

136. *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010).

137. *Id.* at 670.

138. *Id.* at 671.

139. *Id.*

have adopted this framework.¹⁴⁰ Notably, in *Menominee*, the court cast *Reich* as an example of this exception: that a statute of general applicability “will be held inapplicable to Indians if it would interfere with tribal governance.”¹⁴¹

However, outside of the dissent, the Seventh Circuit’s decision in *Reich* did not even mention *Tuscarora*, let alone allude to it as a governing principle in disputes over statutes of general applicability. *Menominee* is, then, at least a minor retreat from the abrogation of *Tuscarora* and *Coeur d’Alene*. The retreat may be purely rhetorical in nature, however, because other courts have limited this exception to require the statute of general applicability to affect “exclusive rights of self-governance in purely intramural matters.”¹⁴² The Seventh Circuit’s phrasing, which requires any “interfere[nce] with tribal governance,” is more deferential to tribal sovereignty, especially as it pertains to the type of “regulatory functions exercised by the [Great Lakes] Commission” in *Reich*.¹⁴³ The Seventh Circuit, perhaps, remains dedicated to exercising “forbearance in construing legislation as having invaded the central regulatory functions of a sovereign entity.”¹⁴⁴ While the presumption of applicability survives in the Seventh Circuit, it does so in a softened form, providing more wiggle room for challenges to the applicability of general statutes to Indians.

c) *Presumption of Non-applicability*¹⁴⁵

While the Seventh Circuit Court of Appeals crafted a more generous modification of *Tuscarora* than the Ninth Circuit, the Tenth Circuit Court of Appeals rejected *Tuscarora* altogether. *Donovan v. Navajo Forest Products Industries*, similar to *Coeur d’Alene* in the Ninth Circuit, addressed the applicability of OSHA to the activities of Navajo Forest Products Industries, a company controlled by the tribal government.¹⁴⁶ An Occupational Safety and Health Commission compliance officer cited Navajo Forest Products Industries for “one serious and 53 other-than-serious violations,” proposing a penalty of more than \$4,000.¹⁴⁷ *Navajo*

140. *Id.*

141. *Id.*

142. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (emphasis added).

143. SMITH, *supra* note 58, at 61 (quoting *Solis*, 601 F.3d at 671).

144. *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d at 495.

145. Once more, first used by Alex T. Skibine. See Skibine, *supra* note 77, at 130.

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

147. *Id.* at 710.

Forest Products is, essentially, an opinion in two parts.¹⁴⁸ In the first part, the court opined a holding consistent with the second exception recognized by the Ninth Circuit—that statutes of general applicability are nonetheless not applicable to Indian tribes if the law would “be in derogation of Indians’ treaty rights.”¹⁴⁹ Indeed, the Navajo Tribe of Indians was party to a treaty with the United States that limited the right of entry onto Navajo land to those individuals entering “in discharge of duties imposed by law.”¹⁵⁰ The court found that the history and purpose of this treaty language has effectively dictated “that the only federal personnel authorized to enter the reservation are those *specifically* so authorized to deal with Indian affairs.”¹⁵¹ OSHA included no such specific authorization. Within the Ninth Circuit’s *Coeur d’Alene* framework, this conclusion alone would support the determination that OSHA did not apply to the activities of Navajo Forest Products Industries. The court, however, went further, holding that the Supreme Court’s opinion in *Merrion* “limit[ed] or, by implication, overrule[d] *Tuscarora* [] at least to the extent . . . ‘that a general statute in terms applying to all persons includes Indians and their property interests.’”¹⁵² The court acknowledged that “[t]he United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty,” and reasoned that “[a]bsent some expression of such legislative intent, however, . . . divestiture of tribal power to manage reservation lands” should not be permitted solely on a legal presumption that general statutes apply to Indians.¹⁵³

The presumption of applicability, in the Tenth Circuit, has been turned on its head. In *EEOC v. Cherokee Nation*, the court clarified the rule that follows from *Donovan*,

We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA’s silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to

148. SMITH, *supra* note 58, at 56-57.

149. *Navajo Forest Prods.*, 692 F.2d at 711.

150. *Id.*

151. *Id.* (emphasis added).

152. *Id.* at 713 (quoting *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)).

153. *Id.* at 714.

apply the special canons of construction to the benefit of Indian interests.¹⁵⁴

In tow by the Tenth Circuit, the Eighth Circuit Court of Appeals has held that *Tuscarora*'s language was inapplicable when the Equal Employment Opportunity Commission brought action under the Age Discrimination in Employment Act¹⁵⁵ against the Fond du Lac Heavy Equipment and Construction Company, owned by the Fond du Lac Band of Lake Superior Chippewa Tribe.¹⁵⁶ The Age Discrimination in Employment Act is assuredly a statute of general applicability and makes no mention of its applicability to Indians.¹⁵⁷ Nonetheless, the court was unpersuaded in regards to the applicability of *Tuscarora* because the case presented an issue of the statute's applicability to "a specific right reserved to the Indians," though not one based in treaty.¹⁵⁸ The Eighth Circuit requires, then, "some affirmative evidence of congressional intent, either in the language of its statute or its legislative history," to apply statutes of this type to Indian tribes.¹⁵⁹

The Tenth Circuit does have some jurisprudential outliers, however, such as *Nero v. Cherokee Nation of Oklahoma*.¹⁶⁰ R.H. Nero was one of many descendants of slaves owned by the Cherokee Nation who brought suit, alleging that they were afforded "the rights and privileges of Cherokee citizenship, although they are not of Cherokee blood," by an 1866 treaty between the United States and the Cherokee Nation.¹⁶¹ The Cherokee Nation asserted sovereignty as a defense to the suit, to which the descendants responded by noting a number of statutory schemes that they believed authorized the action.¹⁶² The court analyzed the statutes under the *Coeur d'Alene* framework, holding that because "no right is more integral to a tribe's self-governance than its ability to establish its membership,"

154. EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989).

155. 29 U.S.C. §§ 621-634 (2012).

156. EEOC v. Fond du Lac Heavy Equip. & Const. Co., Inc., 986 F.2d 246 (8th Cir. 1993).

157. SMITH, *supra* note 58, at 58-59.

158. *Fond du Lac*, 986 F.2d at 248 ("Both parties acknowledge that Fond du Lac Band of Lake Superior Chippewa is a federally recognized Indian tribe. Inherent in the tribe's quasi-sovereignty is the tribe's power to 'make their own substantive law in internal matters and to enforce that law in their own forums.'").

159. *Id.* at 250.

160. 892 F.2d 1457 (10th Cir. 1989).

161. *Id.* at 1458.

162. *Id.* at 1458-59.

applying the statutes in question to the Cherokee Nation would “affect the Tribe’s right to self-governance in a purely internal matter.”¹⁶³ While the language used to assess one of the exceptions is different, the fact remains that in *Nero* the court strayed from its assessment of *Tuscarora* as having been abrogated by the Supreme Court.

The court corrected its course toward, but not directly in accord with, a presumption of inapplicability in *NLRB v. Pueblo of San Juan*.¹⁶⁴ *Pueblo of San Juan* was first heard by the Tenth Circuit in 2000 and later heard on rehearing *en banc* in 2002. The dispute asked whether the Pueblo of San Juan, an Indian Tribe, “ha[d] the authority to enact and enforce a right-to-work tribal ordinance prohibiting union security agreements from companies engaged in commercial activity on tribal lands,” which the NLRB challenged as a violation of the NLRA.¹⁶⁵ In the first hearing, the court dismissed the appellants’ reliance on *Tuscarora*, noting first that “the NLRA by its terms is not a statute of general application [because] it excludes states and territories” and second that *Donovan* acknowledged that the Supreme Court had “limit[ed] or, by implication, overrule[d] *Tuscarora*.”¹⁶⁶

In many ways, the Tenth Circuit doubled down on this approach in the *en banc* rehearing. In others, however, it retreated, saving the *Tuscarora* approach that prevails in the Ninth and Second Circuits from complete extinction. First, the court reinforced its holding in *Navajo Forest Products Industries*, noting that “Congress’ silence as to the tribes can . . . hardly be taken as an affirmative divestment of [Indian’s] existing ‘general authority, as sovereign[s], to control economic activity’ on territory within their jurisdictions.”¹⁶⁷ Indeed, this is contrary to the dictum in *Tuscarora* that was central in *Coeur d’Alene*. However, when the *Pueblo of San Juan* court turned to *Tuscarora*, it fell short of concluding that it had been abrogated, relying instead on its inapplicability to the facts at hand.¹⁶⁸ Although, in *Navajo Forest Products Industries*, the Tenth Circuit decided that

163. *Id.* at 1463.

164. 280 F.3d 1278 (10th Cir. 2000).

165. *Id.* at 1279.

166. *Id.* at 1283.

167. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198 (10th Cir. 2002) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)).

168. *Id.* at 1199 (“Thus *Tuscarora* is not persuasive here. We are convinced it does not apply where an Indian tribe has exercised its authority as a sovereign—here, by enacting a labor regulation—rather than in a proprietary capacity such as that of employer or landowner.”).

Tuscarora had been abrogated, twenty years later the court concluded that *Tuscarora* persists, but only in a narrow form.

The status of the Tenth Circuit's position on *Tuscarora* and *Coeur d'Alene* is made less clear by the court's decision in *Shivwits Band of Paiute Indians v. Utah*.¹⁶⁹ The Shivwits Band purchased land near a highway in Utah and leased it to a developer who was utilizing the space for billboard advertising.¹⁷⁰ The state sought to prevent the advertising on the grounds that it violated state and local law.¹⁷¹ The state was driven in part by financial incentives offered through the Highway Beautification Act¹⁷² ("HBA") to states that provide "for effective control of the erection and maintenance along the Interstate System . . . of outdoor advertising."¹⁷³ The dispute regarded, in relevant part, whether the Shivwits Band of Paiute Indians were subject to the HBA, which dictates that "outdoor advertising . . . in areas adjacent to the Interstate System . . . should be controlled . . . to promote the safety and recreational value of public travel, and to preserve natural beauty."¹⁷⁴

However, as the concurrence noted, the majority disregarded the question of whether the HBA applied to Indians, focusing instead on the conclusion that if "the HBA does apply to Indian lands, it is subject to federal, not state, enforcement."¹⁷⁵ The concurring opinion, however, engaged in an analysis of the HBA as a general statute and applied the *Coeur d'Alene* framework.¹⁷⁶ And so, the standing of *Tuscarora* and *Coeur d'Alene* in the Tenth Circuit is unclear. The totality of the court's decisions, however, is plainly leaning toward presuming inapplicability in dealing with general statutes. So, too, is the Eighth Circuit Court of Appeals.

d) Applicability as a Sliding Scale

Confronted by the inconsistencies between its sister courts, the D.C. Circuit Court of Appeals has coined a novel approach to laws of general applicability that draws on the totality of the available jurisprudence.¹⁷⁷ As many of the other cases have, *San Manuel Indian Bingo & Casino v. NLRB*

169. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005).

170. *Id.* at 969.

171. *Id.* at 970.

172. 23 U.S.C. § 131 (2012).

173. *Shivwits Band*, 428 F.3d at 979 (quoting 23 U.S.C. § 131(b) (2012)).

174. *Id.* (quoting 23 U.S.C. § 131(a)).

175. *Id.* at 984 (Lucero, J., concurring).

176. *Id.* at 984-86 (Lucero, J., concurring).

177. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

involved the applicability of the NLRA to a casino operated by the San Manuel Band of Serrano Mission Indians on its reservation.¹⁷⁸ The proceeding arose from a competition between the Communication Workers of America and the Hotel Employees and Restaurant Employees International (“HERE”) unions, each vying to unionize the employees of the casino.¹⁷⁹ HERE alleged that the Tribe had “interfered with, coerced and restrained employees in the exercise of their [collective bargaining] rights” by denying HERE access to Casino employees.¹⁸⁰ Moreover, HERE contended that the Tribe had “dominated and discriminatorily supported” the competing union by allowing it access to the employees to “distribute leaflets,” “communicate with Casino employees on Casino property during working hours,” and otherwise attempt to “organiz[e] Casino employees.”¹⁸¹ As is the usual course of these disputes, the Tribe challenged the authority of the NLRB to adjudicate the allegations brought by HERE.¹⁸²

The D.C. Circuit acknowledged, much like the Tenth and Eighth Circuits, “conflicting Supreme Court canons of interpretation that are articulated at a fairly high level of generality,” before crafting a test that it believes accommodates each of those canons.¹⁸³ The court reconciled *Tuscarora*’s presumption of applicability with later decisions of the Court—those that other Circuits suggest overrule *Tuscarora*—by “recognizing that, in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty.”¹⁸⁴ The rule employed in *San Manuel*, then, is that if “constraint [of the tribe with respect to its governmental functions] will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary.”¹⁸⁵ However, “if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, . . . then application of the law might not impinge on tribal sovereignty” and, presumably, it may be applied without

178. *Id.* at 1308-09.

179. *Id.*

180. *Id.* at 1309.

181. *Id.*

182. *Id.*

183. *Id.* at 1310.

184. *Id.* at 1312.

185. *Id.* at 1313.

a clear expression of congressional intent.¹⁸⁶ In the end, the court held that the NLRA presented a “negligible” impact on tribal sovereignty, such that there was no “demand [for] a restrictive construction” of the law.¹⁸⁷ And so, the D.C. Circuit provides the final approach to interpreting laws of general applicability and their relationship with Indians: the sliding scale approach.

2. Application to the FMLA

a) FMLA as a Law of General Applicability

Before applying any of the existing tests to the FMLA, it must, as a threshold matter, be shown that the law is one of general applicability that is silent as to its application to Indians. That the FMLA is silent regarding Indians has already been noted.¹⁸⁸ More difficult is the question of whether the statute is sufficiently general as to qualify as a law of general applicability. While, in many instances, courts treat this as an assumed characteristic of the statutes they are interpreting, some courts have provided a general rubric. For example, in *Reich*, the Seventh Circuit Court of Appeals considered whether courts have construed the law “liberally, to apply to the furthest reaches consistent with congressional direction, recognizing that broad coverage is essential to accomplish its goals.”¹⁸⁹ Similarly, in *Florida Paraplegic*, the Eleventh Circuit Court of Appeals characterized this inquiry as turning on whether the statute is one that “Congress intended to have broad applicability,” as evidenced by the language of the law and the definitions it employs.¹⁹⁰

By these standards, which are representative of the analysis employed by other courts, the FMLA is most assuredly a law of general applicability. The stated purpose of the FMLA was one without limits, noting that Congress intended “to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”¹⁹¹ Moreover, Congress considered the “legitimate interests of employers,”

186. *Id.* (noting that the court “use[s] the term ‘governmental’ in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope”).

187. *Id.* at 1315.

188. *See* 29 U.S.C. §§ 2601-2654 (2012).

189. *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 499 (7th Cir. 1993) (quoting *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985)) (internal quotation marks omitted).

190. *Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1128 (11th Cir. 1999).

191. 29 U.S.C. § 2601(b) (2012).

attempted to “minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender neutral basis,” and “promote[d] the goal of equal employment opportunity for women and men.”¹⁹² While the FMLA is limited in its reach by restricting which businesses would be required to abide its demands, this type of limit has never been sufficient, on its own, to thwart a law’s status as generally applicable. For example, the FLSA applies only to certain enterprises, as defined by the statute.¹⁹³ Nonetheless, the Seventh Circuit found it to be a law of general applicability. Indeed, this determination generally turns on congressional intent, not on the number of exceptions found within a law, with one notable exception—the NLRA as interpreted in *Pueblo of San Juan* because the law exempts states and territories.¹⁹⁴ The FMLA, however, unlike the NLRA, does not include any broad exceptions in the coverage for government entities.¹⁹⁵ Therefore, the FMLA is most likely a law of general applicability in any appellate jurisdiction.

b) Silence as a Presumption of Non-Applicability

In those jurisdictions interpreting laws of general applicability that are silent in their application to Indians as presumptively inapplicable thereto, the fate of the FMLA is evident. At their most strict, these jurisdictions refuse to view congressional silence as a “divestment” of a tribe’s sovereign right to “control economic activity on territory within their jurisdictions.”¹⁹⁶ The FMLA, at least in its relationship with Indians, has been nothing more than silent.¹⁹⁷ In the Eighth Circuit Court of Appeals, where the language has been somewhat less direct, there must only be “some affirmative evidence of congressional intent, either in the language of the statute or its legislative history,” for a law to apply to Indians.¹⁹⁸ Even under this lax standard, however, the FMLA would not apply to Indians because there is no evidence in its legislative history that Indians were even considered by

192. *Id.*

193. 29 U.S.C. § 202 (2012).

194. *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1283 (10th Cir. 2000).

195. *See* 29 U.S.C. §§ 2601-2654 (2012).

196. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198 (10th Cir. 2002) (internal quotation marks omitted).

197. *See* Family and Medical Leave Act, 29 U.S.C. §§ 2601-54 (2012).

198. *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250-51 (8th Cir. 1993).

Congress, let alone that the law was accompanied by any affirmative intent.¹⁹⁹

c) FMLA on the Sliding Scale

Unlike in the jurisdictions in which laws of general applicability are presumed not to reach Indians, the plight of the FMLA under the D.C. Circuit Court of Appeals sliding scale approach is difficult to predict. In the one instance in which this approach has been employed, the decision turned on the degree to which applying the statute would constrain governmental functions.²⁰⁰ In that case, which involved the application of the NLRA to casino workers, the D.C. Circuit concluded that the law would only be impacting “extra-governmental activities” and, specifically, “activities involving non-Indians.” And so, the outcome of a challenge to the applicability of the FMLA within this approach to the law would turn on what employer/employee relationship precipitated the suit. Were the employee one directly involved in implementing governmental programs—Theresa Carsten, the non-profit employee and director of the Women, Infants, and Children Program for the ITCN, for example—then the conclusion would likely be that the FMLA constrains tribal government.²⁰¹ An employee of a casino or other commercial arm of an Indian tribe, however, may be capable of receiving the benefits of the FMLA without similarly constraining governmental functions.²⁰² Indeed, the outcome could vary even by employee of the same tribe, depending on their employer or role in an organization. Notably the employer distinction is fluid, with no bright-line rules having been promulgated by the court.

d) Silence as a Presumption of Applicability

The most often employed approach to laws of general applicability may be the most difficult to predict, as the *Coeur d'Alene* presumption of applicability accounts for several variables. From the outset, however, a challenge to the FMLA in a jurisdiction following this approach would be uniquely situated because the law would presumptively cover employees of Indian tribes. Moreover, one of the three exceptions to that presumption—triggered by evidence that Congress intended a law to not apply to

199. See generally COVINGTON & BURLING, FAMILY AND MEDICAL LEAVE ACT OF 1993 (1993).

200. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007).

201. *Id.* at 1313.

202. *Id.* at 1315.

Indians—would be irrelevant for any review of the FMLA, as both the law itself and the statutory history are without reference to Indians.²⁰³ Evidence of this silence would evoke a presumption of applicability within this approach, not an exception to that presumption.

Whether the FMLA would affect any exclusive rights of self-governance in purely intramural matters is a more difficult question to answer. It seems evident, however, that commercial activities are unlikely to affect intramural self-governance. For example, the court in *Reich v. Mashantucket Sand & Gravel* found that a commercial activity could be regulated under OSHA based on the activity's status as commercial, the fact that the activity intended to create interstate commerce, and that the tribe employed non-Indians in the undertaking of that activity.²⁰⁴ It is likely that few for-profit enterprises will fail to fulfill these requirements. To be sure, however, the Eleventh Circuit Court of Appeals narrowed the scope even further, concluding that commercial activities— independent of any other variable—are not intramural matters of self-governance.²⁰⁵

The Seventh Circuit Court of Appeals provided a substantive example of an activity that does constitute intramural governance—policing.²⁰⁶ In *Reich*, the Seventh Circuit was clear that the right to manage policing is a tribal right that is beyond the reach of a silent statute of general applicability.²⁰⁷ That there was disagreement, moreover, as to whether *Reich* actually presented a case of such policing makes a meaningful substantive point—while government based policing is assuredly intramural, non-profit or agency based policing (as was the Great Lakes Commission) occupies a grey area.²⁰⁸ The contours of this exception become more clear, then: (1) purely for-profit commercial activities are non-intramural, (2) government activities are likely intramural, and (3) non-profit and government-delegated activities may be intramural. Of course, in the Seventh Circuit, as *Reich* demonstrates, the outcome is slightly different because any impact on even non-intramural governmental activities will

203. See 29 U.S.C. §§ 2601-2654 (2012).

204. 95 F.3d 174, 179-81 (2d Cir. 1996).

205. Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999).

206. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993).

207. *Id.*

208. See *id.* at 504 (Coffey, J., dissenting).

fulfill this exception; hence the conclusion that the Great Lakes Commission was exempt from the FLSA.²⁰⁹

The final exception—whether any treaty rights would be abrogated by applying the statute of general applicability to Indians—is the least predictable, as it is concerned not with broad concepts, but with specific treaty language. However, “[s]imply 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.”²¹⁰ The issue of treaty rights is often disposed of through an agreement between the parties.²¹¹ When treaty rights are at issue in a suit, they tend to be on very specific topics.²¹² The result, then, is that this exception is rarely the death knell for the application of a general statute to Indians. The nature of the FMLA and the circumstances in which it would arise make it likely to be deemed applicable if challenged in a jurisdiction that follows a version of the *Coeur d’Alene* presumption of applicability.

II. Conclusion

While the relationship between Indians and laws of general applicability remains unclear—and will remain unclear so long as the Supreme Court continues to deny certiorari on cases that raise the question²¹³—there is a trend among the lower courts toward the *Coeur d’Alene* presumption of applicability approach, with the Second, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals adhering to some version of it. While this approach offers a fair likelihood that the FMLA will be found to apply to Indians, that finding is likely to be without benefit to employees like Theresa Carsten. Once more, whether an individual has the right to demand a tribe’s compliance with a federal statute and the means by which they can enforce that statute are separate issues. Therefore, a finding that employees have a right to demand compliance with the FMLA will not circumvent the reality that those same employees would have no meaningful path to

209. *Id.* at 495.

210. *Smart v. State Farm Ins., Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989).

211. *See Fla. Paralegic Ass’n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999).

212. *See Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711; *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1458 (10th Cir. 1989).

213. *See NLRB v. Little River Band*, 788 F.3d 537 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2508 (2016); *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 652 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

enforcement because the FMLA definitively does not waive tribal sovereign immunity from suit.

Nonetheless, the relationship between Indians and laws of general applicability needs to be addressed, and the *Coeur d'Alene* presumption of applicability is the best solution currently available. First, presuming applicability provides due deference to congressional acts that are intended to be of broad applicability. Second, the treaty rights exception enables a court to determine whether any particular tribe has a right to decline compliance with a law of general applicability based on agreement with the United States. Third, the intramural self-governance exception ensures that Congress cannot incidentally impinge on tribal sovereignty. Finally, the intent exception ensures that tribes will not be accidentally subjected to federal regulation against the wishes of Congress. The flexibility of this approach and the manner in which it balances the interests of those individuals who would benefit from federal regulation against the interests of those tribes whose activities would be regulated makes it an ideal solution for all parties.