Not So Clear and Plain: Exploring the Circuit Split on the Applicability of Federal Labor & Employment Laws to Tribes

Introduction

As tribes have increased their economic independence over the last few decades, tribal governments have started to hire more employees than ever before. In Oklahoma alone, tribes employed over 54,000 Indian-and non-Indian workers, and paid out 5.4 billion in wages and benefits to those employees in 2019[1] And, in Washington, Minnesota, and Idaho, tribal employers accounted for about 27,300, 41,700, and 12,840 jobs, respectively in 2017.[2] Yet, as the size of tribal workforces has increased, so to has the need for greater clarification on which federal labor and employment laws apply to tribal employers. But unfortunately, statutes like the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the National Labor Relations Act ("NLRA"), and the Occupational Safety and Health Act ("OSHA") are all completely silent on whether they apply to tribes or exempt them from their requirements.[3] As a result, circuits are split on how to interpret these laws and whether they apply to tribes and their employees.

To evaluate this silence, three different groups of federal courts developed their own tests to determine if the federal law applies to a tribe.

The first group applies the "clear and plain rule," which presumes that a generally applicable land and employment statute *does not apply* to tribes unless there is clear evidence that Congress intended to abrogate tribal sovereignty.[4] The clear and plain rule has been adopted by the Eighth and

1. KYLE D. DEAN, OKLAHOMA NATIVE IMPACT, THE ECONOMIC IMPACT OF TRIBAL NATIONS IN OKLAHOMA: FISCAL YEAR 2019, at 4 (2022), https://www.oknativeimpact.com/wp-content/uploads/2022/03/All-Tribe-Impact-Report-2022-Final.pdf ("Oklahoma tribes employed 54,201 Oklahoma workers in 2019, paying out wages and benefits of $2.5 billion to Oklahomans.").

2. *Demographics*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/about-tribes/demographics (last updated June 1, 2020).

3. Though there are other federal labor and employment statutes, this Comment limits its discussion to the ADEA, FLSA, NLRA, and OSHA.

4. *See* Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, FED. LAW., Sept. 2015, at 64, 66.

Tenth Circuits[5] and is supported by Supreme Court rulings in cases outside the labor and employment context.[6]

The second group applies the *Coeur d'Alene* test.[7] This test presumes generally applicable labor and employment statutes *apply* to tribes unless the tribe can meet at least one of three exceptions that touch on self-governance, treaty rights, or other conflicting federal law.[8] Though the Ninth Circuit created this test,[9] it has subsequently been adopted by the Second, Sixth, Seventh, and Eleventh Circuits as well.[10]

The D.C. Circuit created the final test, which is called the *San Manuel* "sliding scale" test.[11] This test asks a court to examine how much a statute infringes on tribal sovereignty by examining the regulated conduct on a sliding scale.[12] At one end of the scale is the tribe's "traditional customs and practices."[13] On the other end of the scale are "commercial enterprises that tend to blur any distinction between tribal government and a private corporation."[14] If the statute infringes too far upon a tribe's customs and practices, then the statute is too restrictive and does not apply. However, if the statute infringes only upon these activities, the statute is more likely to be applicable to tribes.

So, depending on the circuit, some tribes and their employees may be subject to one set of labor and employment laws, while tribes and employees in another circuit may not be. Furthermore, for many tribes, a tribally-owned casino, farm, or construction company may be the tribe's only form of economic development, and any added cost imposed by a federal statute on that enterprise would impact the tribe's ability to provide critical health, education, and other social services to its members. As a result, it is essential

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5. *See* EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982).

6. *See generally* United States v. Dion, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain.").

7. Intermill, *supra* note 4, at 67–68 (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)).

8. *See infra* Part II.B.

9. *See id.*

10. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 673 (6th Cir. 2015) ("In sum, the Second, Seventh, Ninth, Eleventh, and now the Sixth, Circuits apply the *Coeur d'Alene* framework to determine whether statutes of general applicability apply to the tribes . . . .").

11. *See* Intermill, *supra* note 4, at 68–69.

12. *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1314 (D.C. Cir. 2007).

13. *Id.*

14. *Id.*

that federal courts use the appropriate test to ensure its interpretation is consistent with congressional intent for that statute and with Congress's commitment to tribal self-determination.[15]

As a result, this Comment will argue that the clear and plain rule is the most consistent with these two policy concerns. Part I of this Comment provides a brief overview of the Supreme Court's relevant federal Indian law jurisprudence. In doing so, this Part identifies two key takeaways for understanding the legal relationship between Congress, tribes, and the individuals who live and work within their reservations. Part II of this Comment explores the history of the three tests and how circuit courts apply them to labor and employment statutes. Finally, Part III argues that federal courts should adopt the clear and plain rule over the *Coeur d'Alene* and *San Manuel* tests. Doing so is more consistent with Supreme Court precedent, more consistent with Congress's goal to increase tribal self-determination, and would ensure that federal courts exercise judicial restraint when interpreting Congress's intentions.

I. An Overview of the Federal-Tribal Relationship and the Problem of Congressional Silence

This Part provides a brief overview of the Supreme Court's relevant federal Indian law jurisprudence. In doing so, this Part identifies two key takeaways for understanding the legal relationship between Congress, tribes, and the individuals who live and work within their reservations. This Part also identifies which labor and employment laws are silent on their applicability to tribes.

A. The Supreme Court's Recognition of Tribes as Distinct Sovereigns

From the early days of the United States, the Supreme Court has recognized that Indian tribes are "distinct, political sovereigns"[16] who have the authority to govern their own economic activities and commercial relations.[17] These powers arise not from the U.S. Constitution or from Congress, but instead stem from the inherent sovereignty that tribes have

15. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-3631; Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721.

16. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities.").

17. *See* United States v. Kagama, 118 U.S. 375, 381–82 (1886) ("[Tribes are] a separate people, with the power of regulating their internal and social relations . . . ."); *see also* Vicki J. Limas, *The* Tuscar*organization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467, 471.

possessed as sovereign nations that have existed since before the formation of the United States. Since announcing this principle in *Worcester v. Georgia* in 1832[18], the Court has consistently reaffirmed this idea. For example, in *Talton v. Mayes* in 1896, the Court held that tribes were not subject to the Bill of Rights, and thus, were not required to comply with the Fifth Amendment when prosecuting their own members.[19] Similarly, the Court held in *United States v. Wheeler* that tribes and the federal government can prosecute a tribal member for crimes arising out of the same incident without triggering double jeopardy.[20] In holding so, the Court reasoned that "tribal and federal prosecutions are brought by separate sovereigns," and were not "for the same offence."[21] Furthermore, the Court concluded that a tribe's power to prosecute its members for minor crimes was not a delegation of federal authority, but instead, a power that stemmed from the tribe's inherent sovereignty.[22]

But, despite this sovereignty, the Court has also recognized that the Indian Commerce Clause[23] and Treaty Clause[24] of the U.S. Constitution, as well as the guardian-ward relationship the United States purportedly has with tribes,[25] grant Congress "plenary and exclusive"[26] powers to "enact legislation that both restricts, and in turn, relaxes those restrictions on tribal sovereign authority."[27] However, though tribes no longer possess their "full attributes of sovereignty,"[28] the Court has also stated that "until Congress Acts . . . 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."[29]

So, assuming Congress has not acted, what inherent authority do tribes have over tribal members and nonmembers within their reservations? For civil matters, tribes have broad authority to regulate the internal and social

18. *Worcester,* 31 U.S. at 520.
19. 163 U.S. 376, 384 (1896).
20. 435 U.S. 313, 328–30 (1978).
21. *Id.* at 329–30.
22. *Id.* at 328–29.
23. U.S. CONST. art. I, § 8, cl.3.
24. U.S. CONST. art. II, § 2, cl.2.
25. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).
26. United States v. Lara, 541 U.S. 193, 200 (2004) (citing Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979)).
27. *Id.* at 202.
28. United States v. Kagama, 118 U.S. 375, 381 (1886).
29. United States v. Wheeler, 435 U.S. 313, 323 (1978).

relations of their own members,[30] including the ability to make their own laws and enforce those laws upon their own members in their own forum.[31] But, when it comes to nonmembers, the Supreme Court held in *Montana v. United States* that "the inherent sovereign powers of an Indian tribe [generally] do not extend to the activities of nonmembers of the tribe."[32] As a result, tribal civil authority over nonmembers is much more limited.

However, *Montana* also carved out two exceptions, the first of which is more significant to this discussion, that allow tribes to exercise some forms of civil jurisdiction over nonmembers within their reservations. This first exception is called the *consensual commercial relationship exception*, which states that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, or its members, through commercial dealing, contracts, leases, or other arrangements."[33] Essentially, this exception recognizes that tribes can "enter into contractual relationships with nonmember individuals and entities for work on reservation property, whether Indian owned or not, and to place conditions on those contracts."[34] Furthermore, those conditions apply "to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they entered into."[35] Importantly for this analysis, this exception potentially means that members and nonmembers who seek or enter into employment contracts with a tribe "should expect to be governed by tribal law, and the tribe may exercise jurisdiction over such individuals or businesses" governed by that law.[36]

So, the following principles are the key takeaways from this short summary of the relationship between tribes, Congress, and individuals living and working within Indian reservations. First, Congress has plenary and exclusive power to restrict a tribe's sovereignty,[37] but until it does so, tribes

30. *See id.* at 322 n.18.

31. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

32. 450 U.S. 544, 565 (1981).

33. *Id.* at 565–66.

34. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 668 (6th Cir. 2015) (citing *Montana*, 450 U.S. at 565–66).

35. Nevada v. Hicks, 533 U.S. 353, 372 (2001).

36. *See* Ezekiel J.N. Fletcher, *De Facto Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 452–53.

37. United States v. Lara, 541 U.S. 193, 200 (2004) (citing Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979)).

still possess broad inherent sovereignty over its own members.[38] Second, unless Congress has acted to expand or restrict tribal power, tribes can only regulate a nonmember within the reservation if that nonmember has consensually entered into a commercial relationship with the tribe.[39] For both of these principles, the key presumption is that Congress has not yet acted or chose not to act. But, in the labor and employment context how do we decide if *Congress did act*? As Part II explains, the answer to this question is much more complex, and much more divisive, than the Supreme Court may have realized.

B. The Effect of Congressional Silence Within the Labor and Employment Context

As stated above, Congress can "limit, modify[,] or eliminate"[40] tribal authority over members and nonmembers through federal statute, and Congress has done so within the labor and employment context. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") was originally silent on its applicability to tribes. In 2006, however, Congress passed the Pension Protection Act ("PPA") which *expressly* integrated retirement plans created by tribal governments into the ERISA framework.[41] This amendment limited a tribe's authority to make its own benefit plans reflecting the tribe's cultural values and potentially hindered economic development and self-sufficiency.[42]

But, Congress has also exempted tribes from federal labor and employment statutes. For example, Title VII of the Civil Rights Act of 1964 expressly exempts tribes from the definition of "employer."[43] Title VII also clearly permits employers on Indian reservations to favor tribal citizens in employment decisions.[44] Similarly, when it enacted the Americans with

38. United States v. Wheeler, 435 U.S. 313, 323 (1978).

39. *Montana*, 450 U.S. at 565–66.

40. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

41. 29 U.S.C. § 1002 (b)(32).

42. *See* Fletcher, *supra* note 36, at 446–47 ("This may end up hurting the returns on such benefit plans as the number of employees and the amount pooled together will be reduced. In fact, the whole scheme seems to run contrary to the overall intent of ERISA, which is supposed to protect the benefit plans of employees.").

43. 42 U.S.C. § 2000e(b) ("The term 'employer' . . . does not include . . . an Indian tribe.").

44. *Id.* § 2000e-2(i) ("Nothing contained in this subchapter 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.").

Disabilities Act ("ADA"), Congress expressly excluded Indian tribes from the definition of "employer."[45]

In the ERISA, Title VII, and the ADA, Congress expressly stated whether the statute applied to tribes or expressly exempted them from their provisions. But unfortunately, Congress is not always so clear. In regard to other generally applicable labor and employment statutes like the ADEA, the FLSA, the NLRA, and the OSHA, Congress is completely silent on whether these laws apply to tribes or not.[46] As a result, circuits are split on how to interpret these laws and whether they apply to tribes. One group of circuits applies the clear and plain rule, which interprets Congress's silence as an intent to exclude the tribe from the statute's reach. However, another group of circuits believes the opposite—Congress's silence means that it intended all employers, tribes included, to abide by the federal statute. And, a third interpretation from one circuit attempts to accommodate both tests while introducing problems with its own interpretation. While each of these interpretations or "tests" will be explained below, this Comment ultimately argues that the first of these tests—the clear and plain rule—is the most appropriate test for interpreting Congress's silence.

II. Overview and History of the Three Tests

Now that the applicable Indian law principles have been summarized, this next Part will explore the Supreme Court's comments on the relationship between generally applicable laws and Indian tribes. Additionally, this part also outlines the history and application of the three interpretation tests developed by the lower courts: (1) the clear and plain rule, (2) the *Coeur d'Alene* test, and (3) the *San Manuel* test.

A. A Brief History of The Supreme Court's Comments Concerning Generally Applicable Statutes and Indians

One of the Supreme Court's earliest comments on the relationship between generally applicable statutes and Indians comes from the 1884 case *Elk v. Wilkins*.[47] Though that case was ultimately about whether an Indian who voluntarily left his tribe was a United States citizen under the Fourteenth

45. 42 U.S.C. § 12111(5)(B)(i) ("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.").

46. Though there are other federal labor and employment statutes, this Comment limits its discussion to the ADEA, FLSA, NLRA, and OSHA.

47. 112 U.S. 94 (1884).

Amendment,[48] the Court found that, historically,[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[49]

Following this rule, the Supreme Court made little mention of the relationship between Indians and generally applicable statutes until 1960 in *Federal Power Commission v. Tuscarora Indian Nation*.[50] In *Tuscarora*, the Supreme Court considered whether the Federal Power Act allowed the Federal Power Commission to condemn off-reservation land owned in fee simple by the Tribe.[51] Though the statute was silent as to whether it applied to tribally-owned fee land, the agency argued the statute's general application authorized it to condemn the Tribe's land.[52] In response, the Tribe cited *Elk* and argued that the statute did not apply to the Tribe because it did not mention tribes at all.[53] However, the Court rejected this argument stating "[h]owever that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[54] Essentially, the Court inverted *Elk*'s rule by presuming that a generally applicable federal statute applies unless congressional evidence of a "clear expression to the contrary" exists.

However, the decisions that the Court relied upon for this dictum concerned the property rights of *individual* Indians, not the sovereign right of *tribes* to govern relationships with members and nonmembers.[55] For example, the Court referenced a case that analyzed whether an *individual* Indian's investment income was subject to federal income tax under the 1928 Revenue Act.[56] In addition, the Court also relied on another case that held Oklahoma had the authority to impose a non-discriminatory estate tax on both Indians and non-Indians.[57] But neither case examined whether a statute of general applicability applied to tribal governments or enterprises. Thus, *Tuscarora* does not stand for the rule that generally applicable statutes restrict the inherent sovereignty of tribes to regulate members and nonmembers. Yet,

48. *Id.* at 99.
49. *Id.* at 100.
50. 362 U.S. 99 (1960).
51. *Id.* at 110.
52. *Id.* at 115.
53. *Id.*
54. *Id*. at 116.
55. Intermill, *supra* note 4, at 67.
56. *Tuscarora*, 362 U.S. at 116 (citing Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935)).
57. *Id.* at 117 (citing Oklahoma Tax Commission v. United States, 319 U.S. 598, 600 (1943).

as explained in Section C, multiple circuits have interpreted *Tuscarora*'s dicta to do just that.[58]

So, instead of relying on *Tuscarora*'s dicta, this Comment argues that lower courts should follow some of the more recent Supreme Court cases dealing with abrogation of tribal sovereignty. These cases, and how some of the circuits courts have applied the principles from these cases, will be outlined next.

B. The Clear and Plain Rule—Presuming that Silent Statutes Don't Apply

The first test is the clear and plain rule, which states that a federal statute of general applicability does not apply to tribes unless there is clear evidence that Congress intended to abrogate tribal sovereignty.[59] This rule is based on the principle that "[l]imitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances and legislative history."[60] Though the Supreme Court has never used the clear and plain rule to determine whether a federal labor and employment statute applies to tribes, the Court has applied this rule of interpretation for over a century in cases involving other Indian law-related issues.[61] Therefore, courts applying the clear and plain rule are more consistent with Supreme Court precedent than those whose tests are based on less established jurisprudence.

1. Supreme Court's Usage of the Clear and Plain Rule in Cases Involving Restrictions on Tribal Sovereignty and Treaty Rights

Over the last half-century, the Supreme Court has consistently required an express intention from Congress in cases involving the abrogation of tribal treaty rights and tribal sovereignty. For example, just eight years after *Tuscarora*, the Supreme Court restated *Elk*'s clear intent principle in a 1968 treaty rights case, *Menominee Tribe of Indians v. United States*.[62] In *Menominee*, the Court analyzed whether the Menominee Termination Act,

58. *See, e.g.*, Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996).

59. Fletcher, *supra* note 36, at 437.

60. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 712 (10th Cir. 1982) (first citing Bryan v. Itasca Cnty., 426 U.S. 373 (1976); and then citing Morton v. Mancari, 417 U.S. 535 (1974)).

61. *See, e.g.*, Elk v. Wilkins, 112 U.S. 94 (1884); United States v. Dion, 476 U.S. 734, 739 (1986); Intermill, *supra* note 4, at 66 (first citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); then citing *Dion*, 476 U.S. at 738; and then citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)).

62. 391 U.S. 404 (1968).

which ended federal supervision of the Menominees, also submitted the hunting and fishing rights of the tribal members to state regulation.[63] Though the Termination Act did not expressly state that the tribe retained its hunting and fishing rights, the Court "decline[d] to construe the Termination Act as a backhanded way of abrogating the . . . rights of these Indians."[64] The Court then noted that "'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress' . . . . We find it difficult to believe that Congress, without explicit statement, would subject the United States for compensation by destroying property rights conferred by treaty . . . ."[65]

Ten years later, the Supreme Court in *Santa Clara Pueblo v. Martinez* reaffirmed the clear and plain rule when it interpreted whether Title I of the Indian Civil Rights Act ("ICRA") allowed federal courts to hear cases against a tribe or its officers.[66] ICRA does not expressly authorize a party to bring an action against a tribe under the statute unless it is for habeas corpus relief.[67] Because ICRA was ambiguous as to whether it waived a tribe's sovereign immunity from suit, the Court looked for *"any unequivocal expression of contrary legislative intent*" that tribes were immune.[68] Finding no clear evidence of congressional intent outside of the habeas corpus context, the Court concluded that the Tribe was immune from suit.[69]

The clear and plain rule appeared again in the 1987 Supreme Court case *Iowa Mutual Insurance Company v. LaPlante*.[70] In that case, a tribal member sued an insurance company in tribal court, but before exhausting its remedies, the company tried to file a diversity action against the member in federal court under 28 U.S.C. § 1332.[71] On appeal, the company tried to argue that Congress's statutory grant of diversity jurisdiction in § 1332 overrode the federal policy of giving a tribal court a full opportunity to adjudicate the matter.[72] However, the Court essentially applied the clear and plain rule to hold that the Tribe's authority to adjudicate the matter over the nonmember would not be reduced:

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63. *Id.* at 407.

64. *Id.* at 412.

65. *Id.* at 413 (quoting Pigeon River Improvement, Slide & Boom Co. v. Cox, Ltd., 291 U.S. 138 (1934)).

66. 436 U.S. 49, 58 (1978).

67. *See* 25 U.S.C. § 1303.

68. *Santa Clara Pueblo*, 436 U.S. at 59 (emphasis added).

69. *Id.*

70. 480 U.S. 9 (1987).

71. *Id.* at 11–12.

72. *Id.* at 17.

> 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 . . . .The diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government . . . . 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]

Finally, one of the most important applications of the Court's clear and plain rule came in the 1989 case called *United States v. Dion*.[74] In, *Dion*, the Court considered whether the Endangered Species Act and the Bald Eagle Protection Act ("BEPA") applied to members of a tribe whose treaty guaranteed them the exclusive right to hunt and fish on their reservation.[75] To determine whether Congress intended for the Acts to apply, the Court preferred an "[e]xplicit statement by Congress . . . for the purposes of ensuring legislative accountability for the abrogation of treaty rights."[76] If Congress made no explicit statement, "an intent [could] also be found by a reviewing court from clear and reliable evidence in the legislative history of the statute."[77] "What is essential," the Court emphasized, is "that Congress actually considered the conflict between its intended action . . . and Indian treaty rights . . . and chose to resolve that conflict by abrogating the treaty."[78]

Applying this framework, the Court first looked at the language of the BEPA, which expressly required Indians to obtain a permit before hunting eagles for religious purposes.[79] The Court believed this provision reflected Congress's understanding that the BEPA would abrogate an Indian's treaty

73. *Id.* at 17–18.

74. 476 U.S. 734, 739 (1986) ("We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated.").

75. *Id.* at 735–36.

76. *Id.* at 739.

77. *Id.* (quoting FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 223 (Rennard S. Strickland et al. eds., 1982)).

78. *Id.* at 740.

79. *Id.* (quoting 16 U.S.C. § 668(a)).

right to hunt bald eagles.[80] Additionally, the legislative history supported this interpretation.[81] Taken together, the Court believed this evidence clearly indicated that Congress intended to abrogate the tribe's treaty rights.[82]

Dion is important for its discussion of the clear and plain rule for two reasons. First, although, *Dion* made it easier for a facially ambiguous statute to apply to a tribe in comparison to previous iterations of the clear and plain rule,[83] *Dion* still starts from the presumption that a statute does not affect a tribe's treaty rights unless there is *some* evidence of congressional intent. Therefore, complete silence is not enough for the statute to apply.

Second, *Dion* is the most recent articulation of the Court's clear and plain rule, and it has not been overturned or limited by the Supreme Court. In fact, as recently as 2014, the Court in *Michigan v. Bay Mills Indian Community* reaffirmed *Dion*'s rule, stating that "such a congressional decision must be clear. . . . Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."[84] Thus, the Court's reaffirmation of the clear and plain principle in *Bay Mills* strongly implies that the Court would favor tribal sovereignty over applying a silent federal statute.

In conclusion, over the past half-century, the Supreme Court has consistently required evidence that Congress intended for a statute to apply to a tribe before the Court abrogated the tribe's sovereignty. The only exception in this line of cases was one sentence of Termination-Era dicta from *Tuscarora*.[85] But, many of the Supreme Court cases that came after

80. *Id.* ("The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.").

81. *Id.* at 741–43.

82. *Id.* at 745.

83. Until *Dion*, the Court often required an express statement from Congress, which gave little or no room for an ambiguous statute to apply to tribes. However, the *Dion* standard requires that a party only show that Congress *considered* treaty rights—as evidenced in either the legislative history or the statute itself—and passed the statute anyway.

84. 572 U.S. 782, 790 (2014) (citing *Dion*, 476 U.S. at 738–39).

85. *See generally* Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1181 (1983) ("Congress adopted termination—the abolition of Indian reservations and the removal of all governmental power from Indian tribes—as the United States' Indian policy in the 1950's and applied the policy to numerous tribes."); Karim M. Tiro, *Claims Arising: The Oneida Nation of Wisconsin and the Indian Claims Commission, 1951-*

Tuscarora use the clear and plain rule, so *Tuscarora*'s reliability may be in jeopardy. Future courts would do well to follow these more recent Supreme Court cases.

2. Circuits' Use of the Clear and Plain Rule Within the Labor and Employment Context

Although the Supreme Court has not applied the clear and plain rule to tribes within the labor and employment context, the Eighth and Tenth Circuits have done so. Each circuit's reasoning is explained below.

a) The Tenth Circuit

Using the clear and plain rule, the Tenth Circuit has held that the OSHA, ADEA, and NLRA do not apply to tribes. In each opinion, the Tenth Circuit expressly rejected *Tuscarora* either because it had been diminished by subsequent Supreme Court cases or because it only applies to individual Indians exercising a property interest.

The Tenth Circuit first applied the clear and plain rule within the labor and employment context in 1982 in *Donovan v. Navajo Forest Production Industries*.[86] In *Donovan*, the federal government argued that the OSHA should apply to tribally-owned businesses operating within the reservation.[87] To support its argument, the government cited to *Tuscarora's* dicta that "a general statute in terms applying to all persons includes Indians and their property interests."[88] However, the Tribe argued that the general statute should not apply because it had a treaty right guaranteeing that only federal employees who were specifically authorized to deal with Indian affairs would enter its reservation.[89] Thus, according to the Tribe, applying *Tuscarora* would impermissibly abrogate its express treaty right to exclude nonmembers from its lands.[90]

Ultimately, the Tenth Circuit sided with the Tribe for a few reasons. First, the court pointed out that unlike the present case, which involved the

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1982, 32 AM. INDIAN L. REV. 509, 511 (2007-2008) ("Termination promised to definitively end relations between the government and Native Americans."); Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 578 (1994) (describing the Termination Era as "thoroughly repudiated").

86. 692 F.2d 709 (10th Cir. 1982).

87. *Id.* at 710.

88. *Id.* at 711 (quoting Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)).

89. *Id.*

90. *Id.*

abrogation of a *tribe*'s treaty rights, *Tuscarora* involved the property rights of *individual Indians*.[91] Thus, *Tuscarora* only stood "for the rule that under statutes of general application[,] Indians are treated as any other person" and would not be applicable to tribes "if the application of the general statute would be in derogation of the [their] treaty rights."[92]

Second, the Tenth Circuit believed that *Tuscarora* was limited or overruled by later Supreme Court case named *Merrion v. Jicarilla Apache Tribe*.[93] *Merrion* recognized that tribes have an inherent power to exclude non-Indians from their federally-reserved lands if the tribe's actions are consistent with federal laws, and the tribe "does not infringe any vested rights of persons now occupying reservation lands under lawful authority."[94] Importantly, because this right to exclude is "*an inherent attribute of tribal sovereignty*," tribes possess this power, regardless of whether it was promised to them by treaty, until it is limited by Congress.[95] And, because "limitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances,"[96] applying a silent statute to abrogate the inherent rights of a tribe would have been inconsistent with *Merrion*'s holding. Therefore, after finding no clear expression of congressional intent, the Tenth Circuit held that the OSHA did not apply to tribes.[97]

A few years later, the Tenth Circuit in *EEOC v. Cherokee Nation* also held that the ADEA did not apply to tribes.[98] In its reasoning, the court reiterated its reluctance for finding abrogation of tribal sovereignty absent explicit statutory language or an explicit statement in its legislative history.[99] Additionally, the court pointed out that "normal rules of construction do not apply when Indian treaty rights . . . are at issue."[100] Instead, the court stated that "in cases where ambiguity exists . . . and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights . . . , the court is to apply the special canons of construction to the benefit of Indian interests."[101]

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91. *Id.*
92. *Id.*
93. 455 U.S. 130 (1982)).
94. *Navajo Forest Prods. Indus.*, 692 F.2d at 713 (citing *Merrion*, 455 U.S. at 145 n.12).
95. *Id.* at 712–13 (citing *Merrion*, 455 U.S. at 141).
96. *Id.* at 712.
97. *See id.* at 712–14.
98. 871 F.2d 937, 938 (10th Cir. 1989).
99. *Id.* at 938 (citing United States v. Dion, 476 U.S. 734, 739 (1986)).
100. *Id*. at 939.
101. *Id.*

Applying these canons, the court held the burden of clear congressional intent was not met, and the ADEA did not apply to tribal governments.[102]

Finally, in 2002 the Tenth Circuit held in *NLRB v. Pueblo of San Juan* that the NLRA also did not apply to tribes.[103] In that case, the Tribe passed an ordinance prohibited tribal agreements from containing union-security clauses that would cover tribal member and nonmember employees.[104] The National Labor Relations Board ("NLRB") argued that the NLRA's "plain language" meant it should preempt the tribe's ordinance, even though the NLRA was silent as to its applicability to tribes, but the court disagreed.[105] However, the court observed that "appeals to 'plain language' or 'plain meaning' must give way to [Indian] canons of statutory construction" and that "it is congressional intent, and not merely the naked words of a statute, that controls."[106] Furthermore, the court pointed out that "*Tuscarora* dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. Proprietary interests and sovereign interests are separate . . . ."[107] Thus, *Tuscarora* did not apply when a tribe was exercising its authority as a sovereign.[108] Therefore, because *Tuscarora* did not carry any weight and the NLRB could not present clear evidence of Congress's intent, the court held that the NLRA did not apply to the Tribe's ordinance.[109]

b) The Eighth Circuit

In addition to the Tenth Circuit, the Eighth Circuit used the clear and plain rule to hold the ADEA and the OSHA did not apply to tribes. However, though the court ultimately applied the correct standard—the clear and plain meaning rule—in both cases, its opinions misinterpreted and reinforced the reach of *Tuscarora*'s dicta.

The Eighth Circuit first considered whether the ADEA applied to tribes in *EEOC v. Fond du Lac Heavy Equipment & Construction Co*.[110] In *Fond du Lac*, a tribal employer allegedly declined to hire a tribal member because of

102. *Id.*
103. 276 F.3d 1186, 1200 (10th Cir. 2002).
104. *Id.* at 1189.
105. *Id.* at 1196 ("We disagree, however, with the implied contention that silence establishes the statute's plain intent to preempt tribal authority.").
106. *Id.*
107. *Id.* at 1198.
108. *Id.* at 1199.
109. *Id.* at 1200.
110. 986 F.2d 246 (8th Cir. 1993).

his age, so the EEOC brought a discrimination claim under the ADEA.[111] Though the court ultimately applied the clear and plain rule to hold that the ADEA did not apply to the tribe,[112] two aspects of the court's opinion weakened the rule.

First, instead of citing the more recent *Dion* standard as the general rule—which presumes that general acts of Congress do *not* apply unless there is a clear expression to the contrary,[113] the court began its analysis by citing the *Tuscarora* dicta, which presumes that general acts of Congress *do* apply absent a clear expression to the contrary.[114] The court went on to observe, however, that *Tuscarora* "does not apply when the interest sought to be affected is a specific right reserved to the Indians."[115] Because automatically applying *Tuscarora* would affect the tribe's right of self-government, the court ultimately chose to apply *Dion*'s clear and plain rule instead.[116] Though the Court applied the correct standard, its opinion nonetheless reinforced the legitimacy of *Tuscarora*'s dicta by citing it approvingly.

Second, the opinion has a narrow field of application because *Fond du Lac* limited its holding to "the narrow facts of [the] case which involve[d] a member of the tribe, the tribe as an employer, and on the reservation employment."[117] As some authorities have noted, however, "Those 'narrow facts' should not have even been part of the discussion."[118] Whenever an applicant seeks employment with the tribe, the applicant seeks to enter into a "consensual commercial relationship" with the tribe itself.[119] In fact, as mentioned in Part I's discussion of *Montana v. United States*, when an applicant seeks to enter a consensual commercial relationship with the tribe, that applicant is subject to the tribe's laws, regardless of whether the applicant is a tribal member or not.[120] Yet, the *Fond du Lac* court never cited

111. *Id.* at 248.

112. *See id.* at 249–51.

113. United States v. Dion, 476 U.S. 734, 738 (1986).

114. *Fond du Lac*, 986 F.2d at 248 (quoting Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960)).

115. *Id.* (citing United States v. Winnebago Tribe of Neb., 542 F.2d 1002, 1005 (8th Cir. 1976)).

116. *See id.* at 248.

117. *Id.* at 251.

118. Fletcher, *supra* note 36, at 452.

119. Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

120. *See id.*

to *Montana*. Consequently, the court mistakenly limited its application of the clear and plain rule for when a tribal member brings a claim against a tribal employer within the reservation.[121]

Neither of these issues from *Fond du Lac* seem to be going away any time soon. As recently as 2020, the Eighth Circuit in *Scalia v. Red Lake Nation Fisheries, Inc.* followed *Fond du Lac*'s reasoning and held the OSHA did not apply to Red Lake Tribe's fishery enterprise.[122] Just like *Fond du Lac*, the *Red Lake Nation* court emphasized *Tuscarora* was the gold standard for consistently applying federal statutes.[123] But again, just like *Fond du Lac*, the *Red Lake Nation* court declined to apply *Tuscarora* because doing so "would dilute the principles of tribal sovereignty and self-government recognized in the treaty."[124] And finally, just like *Fond du Lac*, the court pointed out this case also dealt with tribal employees and tribal commercial businesses located on tribal land.[125] The court concluded that "[e]ven if OSHA applied to Indian activities in other circumstances, OSHA does not apply to an enterprise owned by and consisting solely of members of perhaps the most insular and independent sovereign tribe."[126]

As mentioned above, the clear and plain rule should not, in light of Supreme Court precedent, be limited to fact patterns involving tribal employees, tribal employers, and tribal land. But the Eighth Circuit's conclusion establishes a hierarchy of when it will apply the clear and plain rule. Essentially, if the facts "have enough Indians," the rule applies. But if the employee is a nonmember, the rule may not apply. But, this framework is too ambiguous for tribes and their employees to consistently rely on for knowing whether a federal statute applies or not. Instead, courts should take the Tenth Circuit's approach, which completely disregards *Tuscarora* in cases where the tribe's authority to regulate its employment relationships is at risk, and apply the simpler clear and plain rule. Doing so is more consistent with Supreme Court precedent, more consistent with separation of powers, and makes it easier for tribes and employees to predict whether they would be governed by a federal statute.

121. *See Fond du Lac*, 986 F.2d at 251.
122. 982 F.3d 533, 536 (8th Cir. 2020).
123. *See id.* at 534.
124. *Id.* at 535 (quoting *Fond du Lac*, 986 F.2d at 248).
125. *Id.*
126. *Id.* at 536.

C. The Coeur d'Alene *Test: Presuming Federal Laws Apply to Indian Tribes*

Unlike the clear and plain rule, the *Coeur d'Alene* test is a relatively recent development in federal Indian law jurisprudence. At its core, the *Coeur d'Alene* test is an inversion of the clear and plain rule. While the clear and plain rule presumes that a silent statute *will not apply* unless there is congressional intent, the *Coeur d'Alene* test presumes the opposite; a silent statute *will apply* unless (1) there is evidence that Congress intended it not to, (2) the law would abrogate treaty rights, or (3) the law would interfere with a tribe's ability to manage its "purely intramural matters."[127] As a result, multiple authorities criticize the *Coeur d'Alene* test for prioritizing the application of the federal statute over preserving tribal sovereignty.[128] But, despite this criticism, the *Coeur d'Alene* test has become increasingly popular in federal courts over the past few decades.

To better understand this test, this section will trace its origins, its development in the Ninth Circuit, and its subsequent applications in the Second, Sixth, Seventh, and Eleventh Circuits. In doing so, this section points out the potential flaws and inconsistencies in applying this test.

1. The Foundation for the Coeur d'Alene *Test*—Federal Power Commission v. Tuscarora Indian Nation

The core presumption of the *Coeur d'Alene* test is based on dicta from the Supreme Court's *Federal Power Commission v. Tuscarora Indian Nation* in 1960.[129] For a brief summary, the central question in *Tuscarora* was whether the Federal Power Act allowed the Federal Power Commission to condemn off-reservation land owned in fee simple by the Tribe.[130] Because the statute was silent as to whether it authorized the agency to condemn off-reservation fee land owned by tribal members, the Tribe argued it could not.[131] However, the Court disagreed, stating: "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[132] But, if *Tuscarora*'s dicta even holds

127. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980)).

128. *See* Fletcher, *supra* note 36, at 438 (discussing caselaw rejecting the *Tuscarora* dictum); Intermill, *supra* note 4, at 68; Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 718 (2004).

129. *See* 362 U.S. 99, 116 (1960).

130. *Id*. at 110.

131. *Id.* at 115.

132. *Id.* at 116.

authority, it merely stands for the rule individual Indians are subject to generally applicable rules—not tribal governments or their enterprises. Yet, multiple circuits now cite *Tuscarora*'s dicta as a basis for abrogating tribal sovereignty.[133] The reasoning from each of these circuits will be analyzed next.

2. The Emergence of the Cour d'Alene *Test in the Ninth Circuit*

Twenty-five years after *Tuscarora*, the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm* used *Tuscarora*'s dicta to establish what has now become the major test among the federal circuits.[134] In *Coeur d'Alene*, the Ninth Circuit considered whether the OSHA protected employees who worked on a farm owned and operated by the Tribe[135] Because the OSHA was silent on its applicability to tribes,[136] the court considered whether this silence "should be taken as an expression of intent to exclude tribal enterprises from the scope of [the] Act to which they would otherwise be subject."[137]

However, unlike the Tenth Circuit three years before, which held that the OSHA did not apply,[138] the Ninth Circuit held the OSHA did indeed apply to the Tribe.[139] In doing so, the court relied on *Tuscarora* as the leading rule, stating that the dictum "guided many of its decisions."[140] But although the Ninth Circuit had previously held that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations,"[141] the Ninth Circuit had never actually applied statutes of general applicability to Indian *tribes*.[142] Regardless, the *Coeur d'Alene* court conflated its previous precedent to mean that "Indian" also meant "Indian tribe." As a result, the *Coeur d'Alene* court mistakenly used its own precedent, which itself did not interpret *Tuscarora* to hold that silent general statutes could restrict tribal sovereignty, to presume that the OSHA would apply to Indian tribes.[143]

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133. *See, e.g.*, Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996).
134. 751 F.2d 1113.
135. *Id.* at 1115.
136. *See* 29 U.S.C. §§ 651–678.
137. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1115.
138. Donovan v. Navajo Nation Forest Indus., 692 F.2d 709 (10th Cir. 1982).
139. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1114.
140. *Id.* at 1115 (citing United States v. Farris, 624 F.2d 890 (9th Cir. 1980)).
141. *Farris,* 624 F.2d at 893.
142. *See* Intermill, *supra* note 4, at 67.
143. *Coeur d'Alene Tribal Farm*, 751 F.2d at 1115–16.

The *Coeur d'Alene* court then listed three exceptions that if met, would overcome this presumption.[144] This presumption would be overcome if:

> (1) the [federal] law touche[d] "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 . . . ."[145]

Applying this test, the *Coeur d'Alene* court rejected each of these exceptions in turn. First, the Court defined "intramural matters" with examples like conditions of tribal membership, inheritance rules, and domestic relations.[146] The court determined that the purpose of the farm was unrelated to any of these intramural matters, so the OSHA regulations would not interfere with tribal self-governance.[147] Holding otherwise, the court reasoned, would bring all tribal business and commercial activity under the umbrella of "tribal self-government."[148] The second exception did not apply because the tribe and the United States had no relevant treaty.[149] Finally, the third exception did not apply because Congress never expressly, in the legislative history or otherwise, intended to exclude tribes from the OSHA's coverage.[150] As none of the three exceptions applied, the Ninth Circuit presumed that the OSHA should apply to the Tribe.

In the decades following *Coeur d'Alene*, the Ninth Circuit continually used this framework to restrict a tribe's authority to regulate its relationship with its employees.[151] For example, in 1991, the Ninth Circuit held that the ERISA applied to a tribally owned and operated sawmill located on the tribe's reservation.[152] Even though the Tribe already had its own pension plan, the court did not believe application of the federal law would interfere with the Tribe's right of self-governance because "application of ERISA

144. *Id.* at 1116.

145. *Id.* (quoting *Farris*, 624 F.2d at 893–94) (alterations in original).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1117.

150. *Id.* at 1118.

151. *See* CFPB v. Great Plains Lending, LLC, 846 F.3d 1049, 1053 (9th Cir. 2017) ("We have consistently applied *Coeur d'Alene* and its progeny to hold that generally applicable laws may be enforced against tribal enterprises.").

152. Lumber Indus. Pension Fund v. Warm Spring Forest Prods. Indus., 939 F.2d 683, 685–86 (9th Cir. 1991).

[would] not inhibit tribal employees of the mill from joining the tribal plan."[153] More recently, the Ninth Circuit also applied this framework to hold that the FLSA applied to a business owned by a tribal member located on trust land.[154]

The Ninth Circuit most recently applied this test in *Pauma v. NLRB*.[155] In *Pauma*, the court considered whether the NLRB could use the NLRA to "regulate the relationship between employees working in commercial gaming establishments on tribal land and the tribal governments that own and manage those establishments."[156] The court found that the NLRB could regulate the relationship because the NLRA's application did not affect "'purely intramural matters' or the tribe's 'self-government.'"[157] The court believed this to be the case because the casino was "simply a business entity that happens to be run by a tribe or its members."[158] Furthermore, the court reasoned that the regulation concerned disputes between a tribally owned business and its employees, most of whom were not members of any tribe.[159] Factored together, the casino was "in virtually every respect a normal commercial . . . enterprise" that should be subject to federal regulation like any other privately owned business under the NLRA.[160]

But just like many of its prior cases, the Ninth Circuit failed to consider that the regulation of the employer-employee relationships within government-owned casinos was a form of economic development, and therefore, a valid exercise of self-governance. Further, the court failed to consider that the exercise was also an intramural matter because it concerned the tribe's ability to regulate the relationship between its government (the owners of the casinos) and its own employees. Whether or not the employees were tribal citizens should not have mattered to the court because, under the first *Montana* exception, "the Tribe as a sovereign itself may choose to place conditions on its contractual relationships with those nonmembers, and the court [should not] annul the private dealings of the Tribe with nonmembers absent clear statements of Congress's desire to abrogate those dealings."[161]

153. *Id.*

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

155. 888 F.3d 1066 (9th Cir. 2018).

156. *Id.* at 1070.

157. *Id.* at 1077 (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)).

158. *Id.* (quoting EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080 (9th Cir. 2001)).

159. *Id.*

160. *Id.* (quoting *Coeur d'Alene*, 751 F.2d at 1116).

161. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 668 (6th Cir. 2015) (applying the first exception from Montana v. United States, 450 U.S. 544, 565–66 (1981)).

To be fair, the Ninth Circuit has refrained from abrogating tribal sovereignty in certain instances. For example, the court has held that the ADEA did not apply to a tribe's housing authority "because [the statute] touche[d] on 'purely internal matters' related to the tribe's self-governance."[162] In its reasoning, the court pointed out that the employer of the housing authority was the tribal government acting as a provider of a governmental service[163] and was "not simply a business entity that happen[end[to be run by a tribe or its members."[164] Following a similar line of reasoning, the Ninth Circuit held in a second case that the FLSA did not apply to the Navajo Nation's law enforcement agency because officers were employed by the tribal government "to promote the welfare of the tribe and its members."[165]

But, these two cases constitute the only times that a tribe has successfully met "the exclusive rights of self-governance in purely intramural matters" exception under the *Coeur d'Alene* test.[166] The court itself has noted how rare it was to meet one of these exceptions:

> While we have not cabined the intramural exception to those listed in *Coeur d'Alene Tribal Farm*, we have been careful to allow such exemptions only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.[167]

The Ninth Circuit's explanation of the "intramural exception" illustrates one of the most significant issues with the *Coeur d'Alene* test; many forms of tribal conduct and economic development and will not meet this standard, even if the tribe was "clearly" exercising traditional forms of self-government. For many tribes, a tribally owned casino, farm, or construction company may be the tribe's only form of economic development, and any detrimental effect on that enterprise would certainly have "immediate ramifications . . . primarily within the reservation."[168] Yet, the Ninth Circuit has said, without specifying much more, that only the most internal acts of tribal self-governance will go unaffected. Doing so disregards decades of

162. *Karuk Tribe Housing Auth.*, 260 F.3d at 1080.
163. *Id.*
164. *Id.*
165. Snyder v. Navajo Nation, 382 F.3d 892, 896 (9th Cir. 2004).
166. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980)).
167. *Snyder*, 382 F.3d at 895.
168. *Id.*

Supreme Court precedent, disregards Congress's recent goal to promote tribal self-determination, and disproportionally impacts tribes whose enterprises are central to their survival.

3. Applications of the Coeur d'Alene *Test Outside the Ninth Circuit*

The Second, Sixth, Seventh, and Eleventh Circuits have all adopted the *Coeur d'Alene* test, leaving the Eighth and Tenth Circuits alone in adopting the clear and plain rule. Two recent Sixth Circuit cases, however, show that some judges are in favor of rejecting the *Coeur d'Alene* test and adopting the clear and plain rule. Each of these cases are discussed below.

a) Second, Seventh, and Eleventh Circuit Cases

The Second Circuit first adopted the *Coeur d'Alene* test in *Reich v. Mashantucket Sand & Gravel* and held that the OSHA applied to a tribally owned sand and gravel company.[169] *Reich* is unique from the other cases discussed in this section because the court expressly rejected the clear and plain rule instead of simply ignoring it in favor of *Coeur d'Alene*.[170] According to the court, the clear and plain rule is overbroad and would make "every federal statute that failed expressly to mention Indians . . . not apply to them."[171] In contrast, the court believed the *Coeur d'Alene* test did not raise the same degree of overbreadth and would therefore be "more accommodating to notions of federal and tribal sovereignty."[172]

Similarly, the Seventh Circuit in *Smart v. State Farm Insurance Co.* adopted the *Coeur d'Alene* framework to hold that ERISA applied to tribal employers.[173] A few years later, the Seventh Circuit reaffirmed its adoption of the *Coeur d'Alene* test to hold that the FLSA did not apply to tribal game wardens.[174] Most recently, the Seventh Circuit used the *Coeur d'Alene* to conclude that the OSHA applied to a tribal sawmill.[175] In each opinion, the court adopted the *Coeur d'Alene* test without any consideration of the clear and plain rule.

Finally, the Eleventh Circuit in *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida* adopted the *Coeur d'Alene* test to conclude that

169. 95 F.3d 174, 182 (2d Cir. 1996).

170. *Id.* at 177–79.

171. *Id.* at 178.

172. *Id.* at 179.

173. 868 F.2d 929 (7th Cir. 1989), *superseded by statute* as stated in Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818 (7th Cir. 2016).

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

175. Menominee Tribal Enters. v. Solis, 601 F.3d 669, 671–74 (7th Cir. 2010).

Title III of the ADA applied to both a tribal restaurant and gaming facility because both enterprises acted in interstate commerce and did not fall under the test's self-governance exception.[176] Uniquely, the court *also* used the clear and plain rule to hold that the Miccosukee Tribe could not be subject to a private suit under the ADA because Congress had not clearly said so.[177] To explain its conflicted reasoning, the court stated that "a statute can apply to an entity without authorizing private enforcement actions against that entity."[178] Though this statement may be true,[179] it does not adequately explain why the court chose to use two different tests for issues that both concerned the abrogation of tribal sovereignty.

Nevertheless, the Eleventh Circuit reaffirmed its *Miccosukee* holding when it held a tribe's health department could not be subject to a private lawsuit under the ADEA based on tribal sovereignty.[180] Unlike *Miccosukee*, however, the Eleventh Circuit in this case gave little reasoning as to why the tribe's health department may have been subject to the ADEA. Instead, the court based its holding on a distinction in the notion of a tribe being subject to a statute and being sued by private citizens for violating a statute.[181] Unfortunately, the Eleventh Circuit has yet to adequately explain why it adopted two conflicting tests for determining the abrogation of tribal sovereignty.

b) Sixth Circuit Split

In 2015, the Sixth Circuit considered two parallel cases—*NLRB v. Little River Band of Ottawa Indians Tribal Government*[182] and *Soaring Eagle Casino & Resort v. NLRB*[183]—both of which concerned whether the NLRA applied to tribes. In both cases, the Sixth Circuit held the NLRA did apply to

176. 166 F.3d 1126, 1128–30 (11th Cir. 1999).

177. *Id.* at 1131–34.

178. *Id.* at 1128.

179. *See* Kiowa Tribe of Okla. v. Manufacturing Tech., Inc., 523 U.S. 751 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them.").

180. Williams v. Poarch Band of Creek Indians, 839 F.3d 1312, 1324 (11th Cir. 2016) ("[E]ven though the ADEA is a statute of general applicability, and the Poarch Band might be generally subject to its terms, the doctrine of tribal sovereign immunity protects the Poarch Band from suits under the statute.").

181. *Id.* at 1323–24.

182. 788 F.3d 537 (6th Cir. 2015).

183. 791 F.3d 648 (6th Cir. 2015).

tribes.[184] Four of the six judges who considered the issue, however, strongly favored the application of the clear and plain test instead of the *Coeur d'Alene* test and believed the NLRA should not apply to the respective tribes.

First, in *Little River*, the court voted two-to-one to adopt the *Coeur d'Alene* test because it "accommodate[d] principles of federal and tribal sovereignty" by favoring federal supremacy over tribal self-governance and regulation of nonmembers.[185] Specifically, the court stated that the test reflects "a stark divide between tribal power to govern identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other."[186]

The court then held that the NLRA presumably applied to the Tribe's casino unless one of the *Coeur d'Alene* exceptions could be asserted.[187] To meet the first exception, the Tribe argued that the NLRA would intrude on its right of self-governance because it would affect the revenues of the tribe's casino, which funded approximately fifty percent of its tribal government.[188] The court rejected this argument, stating that "Indian tribes are not shielded from general statutes because the application of those statutes may incidentally affect the revenue streams . . . that fund tribal government."[189] The Tribe then argued that the application of the NLRA would invalidate a Tribal Council statute that regulated tribal and non-tribal employees.[190] The court rejected this argument too, commenting that "it cannot be the rule that . . . a tribal government may avoid implication of a generally applicable federal statute by enacting a regulation governing the activities of non-members and members alike."[191] The Tribe failed to meet any of the *Coeur d'Alene* exceptions, so the NLRA applied to its casino activities.

The one *Little River* dissenting judge critiqued the majority's reliance on the *Tuscarora* dicta and the majority's adoption of the *Coeur d'Alene* test.[192] The dissenter questioned how dicta could grow into a doctrine that "is exactly

184. *Id.* at 675 ("[W]e are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and that the Board has jurisdiction over the present dispute."); *Little River Band*, 788 F.3d at 555–56.

185. *Little River Band*, 788 F.3d at 551.

186. *Id.*

187. *Id.*

188. *Id.* at 552–53.

189. *Id.* at 553 (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)).

190. *Id.* at 554.

191. *Id.*

192. *Id.* at 556–65 (McKeague, J., dissenting).

180-degrees backward."[193] Not only did the majority's decisions reaffirm this "doctrine," but the dissenter also argued that it "ignores Supreme Court precedent, creates a needless circuit split, and . . . impermissibly intrudes on tribal sovereignty."[194]

Just a few weeks later, the Sixth Circuit also applied the NLRA to tribal employment in *Soaring Eagle*.[195] The *Soaring Eagle* court, however, stated that it ruled against the Tribe only because it was bound by *Little River*'s precedent.[196] Had it an opportunity to write on a "clean slate,"[197] the *Soaring Eagle* court would have rejected the *Coeur d'Alene* test and held that the NLRA did not apply because "the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino."[198]

The Soaring Casino court stated that hypothetically, absent *Little River*, the court would have applied a modification of the clear and plain rule. It went on to explain what its analysis and conclusion would have been. First, the court would have relied on existing Supreme Court precedent,[199] which required a clear intention from Congress before tribal sovereignty can be abrogated.[200] Finding that there was no clear intent, the court would have to assume that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" unless one of the two *Montana* exceptions applied.[201] If the court had reviewed *Montana*, they would have been bound to conclude that the first *Montana* exception concerning consensual commercial relationships applied. Non-tribal

193. *Id.* at 565.

194. *Id.*

195. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015).

196. *See id.* at 670, 675.

197. *Id.*

198. *Id.* at 670.

199. *Id.* at 666 ("We believe this Supreme Court precedent clarifies that, absent a clear statement by Congress, to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*.").

200. *Id.* (first citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); then citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) ("Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government . . . ."); and then citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.")).

201. *Id.* at 667 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

employees voluntarily enter into commercial relationships with the tribe when they agree to work for the casino.[202] Instead, because non-tribal employees voluntarily enter into these types of relationships, the court concluded that "the Tribe as a sovereign itself may choose to place conditions on its contractual relationships with those nonmembers, and the court[] will not annul the private dealings of the Tribe with nonmembers absent clear statements of Congress's desire to abrogate those dealings."[203] So, without *Little River*'s precedent, the *Soaring Casino* court would not have adopted the *Coeur d'Alene* test and would not have applied the NLRA to the Tribe's casino.

In conclusion, though the *Coeur d'Alene* test has now become the majority's test, courts should rethink their choice. The test is based on an overbroad reading of *Tuscarora*, which itself only relied on Supreme Court cases where generally applicable statutes applied to individuals. Additionally, under the current test, most forms of tribal economic development will not escape application of the federal statute, leaving few labor and employment laws left that do not restrict tribal sovereignty. Such outcomes are inconsistent with Congress's recent goal to promote tribal self-determination, and so future courts should adjust their framework in favor of the clear and plain rule.

C. The San Manuel *Sliding Scale Test*

The final test analyzed in this comment is the San Manuel sliding scale test created by the D.C. Circuit in *San Manuel Indian Bingo & Casino v. NLRB*.[204] Essentially, this tests asks a court "to determine whether a tribe's activity is 'Indian enough' and whether an incursion into tribal sovereignty or treaty rights is 'big enough' to warrant protection."[205] In doing so, it requires a court to measure the statute's effect on tribal sovereignty by balancing the "'traditional customs and practices' occurring within the reservation," on one side and "commercial enterprises that tend to blur any distinction between tribal government and a private corporation' at the other [end]."[206]

A few years before *San Manuel*, the NLRB adopted a new policy seeking to apply the NLRA to tribal enterprises.[207] Interestingly, the NLRB started

202. *Id.* at 667–68.
203. *Id.* at 668.
204. 475 F.3d 1306 (D.C. Cir. 2007).
205. *Id.*
206. Intermill, *supra* note 4, at 69.
207. *See id.* at 68–69.

applying the NLRA to tribes because the NLRB began using the *Coeur d'Alene* test in its administrative hearings.[208] Eventually, the NLRB applied the NLRA to the San Manuel Band of Serrano Mission Indians' tribally owned casino.[209] However, because the NLRA was silent on its applicability to tribes, the Tribe argued that the D.C. Circuit should adopt the clear and plain rule to interpret the statute, but the NLRB argued that the court should adopt the *Coeur d'Alene* test.[210]

However, the court refused to apply either test because the court found "conflicting Supreme Court canons of interpretation" between the two tests.[211] Instead, the court chose to adopt a sliding scale that it believed would accommodate each of those canons of interpretation to examine how far the NLRA infringed on tribal sovereignty.[212] At one end of the scale was a tribe's "traditional customs and practices,"[213] meaning that if the statute infringed too far upon their cultural customs or traditional government functions, the statute would be too restrictive and would not apply. On the other end of the scale were "commercial enterprises that tend to blur any distinction between tribal government and a private corporation."[214] If the statute infringed upon these activities, the statute probably would not be too restrictive and would be more likely to apply.[215]

Applying the new test, the court concluded that "the NLRA does not impinge on the Tribe's sovereignty enough"[216] to "demand a restrictive construction of the NLRA."[217] The court reasoned that the tribe's operation of the casino was "not a traditional attribute of self-government."[218] In addition, the court pointed out that the majority of the casino's employees and customers were non-tribal members who lived off the reservation.[219] Taken together, the court believed that the tribe's operation of the casino fell

208. *See* Fletcher, *supra* note 36, at 457 (detailing the shift in NLRB policy in administrative hearings and enforcement practices).
209. *San Manuel Indian Bingo & Casino*, 475 F.3d at 1309.
210. *See id.* at 1309–10.
211. *Id.* at 1310.
212. *See id.* at 1314–15.
213. *Id.* at 1314.
214. *Id.*
215. *See id.*
216. *Id.* at 1315.
217. *Id.*
218. *Id.*
219. *Id.*

closer to the "commercial activities" side of the scale and that any impairment of tribal sovereignty would be negligible.[220]

Since its release in 2007, no other circuit court has applied the *San Manuel* test. But although its use is restricted to the D.C. Circuit, future courts should understand why *San Manuel* was not the solution to the circuit split that the *San Manuel* court thought it was. First, as Professor Ezekiel Fletcher argues, the decision was a missed opportunity "to address the underlying tensions between the use of Supreme Court dicta and the misapplication and ignorance of fundamental principles of Indian law."[221] Instead of examining how the Supreme Court's leading clear and plain rule cases like *United States v. Dion* or *Iowa Mutual Insurance Company v. LaPlante* fit into the labor and employment context, the D.C. Circuit did not cite to either case at all. Second, as the Sixth Circuit pointed out in *Soaring Eagle*, the *San Manuel* test created "an analytical dichotomy between commercial and more traditional governmental functions of Indian tribes . . . . [which] distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination."[222] Thus, in creating this dichotomy, the D.C. Circuit undermined the very goal of tribal economic development and self-determination that Congress had promoted for the last few decades.

But perhaps most of all, the *San Manuel* test problematically asks courts to decide for themselves what activities are "Indian" enough to warrant protection. As Professor Vicki J. Limas points out, the argument that "traditional activities are unique to a tribe's status as a tribe implies that only 'Indian' activities are traditional activities."[223] This reasoning, she argues, "raises the question of what is 'Indian,' which will be decided by non-Indian decision-makers. These decision-makers will likely be guided by stereotypical notions of what constitutes 'traditional' Indian activities."[224] Under this "Indian" test, would a tribe's expansion into certain economic industries fall outside of its traditional governmental function merely because it is not historically related to the tribe? Or worse, would that activity lose its protection because that industry is not associated with whatever Indian stereotype qualifies?[225] Ultimately, this test of "Indianness" is not only

220. *Id.*
221. *Id.* at 459.
222. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 674–75 (6th Cir. 2015).
223. Limas, *supra* note 17, at 476–77.
224. *Id.*
225. For more on Indian stereotypes, see generally M. Alexander Pearl, *Paint Chip Indians*, 9 UNBOUND: HARV. J. LEGAL LEFT 62, 63–65 (2015).

inconsistent and detrimental to the self-determination policies Congress has promoted since the 1980s, but it places this determination in the hands of those poorly-equipped to examine it. As a result, future courts would do well to ignore such reasoning.

III. Which Test Is Better? Arguing for the Clear and Plain Rule

Now that each test has been explained, this final Part argues why federal courts should adopt the clear and plain rule over the *Coeur d'Alene* and *San Manuel* tests.

A. The Clear and Plain Rule Is Consistent with Supreme Court Precedent

Over the last half-century, the Supreme Court has consistently applied the clear and plain rule in cases where the sovereignty and treaty rights of a tribe were at stake. In cases like *United States v. Dion*, where a tribe was in danger of losing its treaty rights, the Court expressly required a showing that Congress *considered* Indian treaty rights—evidenced in either the legislative history or the statute itself—and chose to pass the statute anyway.[226] And, in a case involving a tribe's adjudicatory jurisdiction over a nonmember, the Court again applied the clear and plain rule to reject the abrogation of the tribe's sovereignty.[227] In either case, complete silence was not enough; the Court required evidence that Congress intended to reduce the tribe's treaty rights or authority over individuals within its reservation. The clear and plain rule is consistent with this precedent.

But, even though the Supreme Court has not modified its clear and plain rule since *Dion*,[228] the *Coeur d'Alene* test disregards this precedent and "unduly shifts the analysis away from a broad respect for tribal sovereignty . . . and does so based on a single sentence from *Tuscarora*."[229]. In fact, the single sentence from *Tuscarora* so often relied on never concerned tribal authority over members and nonmembers. Instead, *Tuscarora* concerned the property rights of *individual* Indians, not the sovereign rights of *tribes*.[230] Ultimately, if its dicta can be applied at all, *Tuscarora* only stands "for the rule that under statutes of general application *Indians* are treated as any other person, unless Congress expressly excepts

226. 476 U.S. 734, 739–40 (1986).

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

228. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (citing, inter alia, *Dion*, 476 U.S. at 738–39)).

229. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 674 (6th Cir. 2015).

230. *See* Intermill, *supra* note 4, at 67.

them therefrom."[231] It is doubtful one sentence of dicta from a Termination-Era decision can bear the weight placed on it by the *Coeur d'Alene* framework. At some point, *Tuscarora*'s dicta cannot continue to take precedence over a decade's worth of Supreme Court decisions that say otherwise.

Like the *Coeur d'Alene* test, the *San Manual* test also conflicts with Supreme Court principles of federal Indian law. In *San Manual*, the D.C. Circuit stated:

> The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, 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.[232]

But, as stated above, this determination problematically asks if the tribe's conduct is "Indian enough" and if the reduction of tribal sovereignty is severe enough on the tribe's governmental activities.[233] This reasoning, "raises the question of what is 'Indian,' which will be decided by non-Indian decision-makers . . . . [who] will likely be guided by stereotypical notions of what constitutes 'traditional' Indian activities."[234] Ultimately, this sliding scare finds no place in Supreme Court precedent and is inconsistent and detrimental to the self-determination policies Congress has promoted for the benefit of Indian tribes. Thus, the clear and plain rule should be the plain winner over either of the other two tests.

B. Montana *Recognizes That Tribes Have the Authority to Regulate Employment Relationships on Tribal Land*

The second reason courts should apply the clear plain rule is that it gives deference to tribes when they have attempted to fill in the gap left by Congress's silence with their own labor and employment laws. Under the

231. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 711 (10th Cir. 1982) (emphasis added) (citing Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 115–18 (1960)).

232. San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1313 (D.C. Cir. 2007) (citations omitted).

233. Intermill, *supra* note 4, at 69.

234. Limas, *supra* note 17, at 476–77.

first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, or its members, through commercial dealing, contracts, leases, or other arrangements."[235] This exception recognizes that tribes can likely enter into employment contracts with members and nonmembers and place conditions on those contracts."[236] This also means that members and nonmembers who seek or enter into employment contracts with a tribe "should expect to be governed by tribal law, and the tribe may exercise jurisdiction over such individuals or business."[237]

The Supreme Court itself has described *Montana* as the "pathmarking case" for when tribal jurisdiction extends to members and nonmembers on tribal land.[238] Yet, circuits who have adopted the *Coeur d'Alene* and *San Manuel* tests (except for the Sixth Circuit in *Soaring Eagle*[239]) ignore the *Montana* framework analysis.[240] Because they improperly disregard *Montana*, the courts fail to see tribal labor and employment laws as part of tribal sovereignty.

In contrast, because the clear and plain rule favors tribal sovereignty, it allows tribes to create their own labor and employment laws.[241] In doing so, it allows tribes to construct laws that reflect their cultural values while also providing opportunities for economic development. This principle is consistent with Supreme Court precedent[242] and Congress's goal to increase

235. Montana v. United States, 450 U.S. 544, 565–66 (1981).

236. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 668 (6th Cir. 2015) (citing *Montana*, 450 U.S. at 565–66).

237. *See* Fletcher, *supra* note 36, at 452–53.

238. *Hicks*, 553 U.S. at 358.

239. *Soaring Eagle Casino & Resort*, 791 F.3d at 668 (citing *Montana*, 450 U.S. at 565–66).

240. *See id.* at 668–74 (critiquing the Sixth Circuit's earlier holding in *Litle River* as well as decisions from other circuits following *Coeur D'Alene* framework for failing to properly engage with the *Montana* analysis).

241. *See, e.g.*, YUROK TRIBE, TRIBAL CODE: TITLE 5 EMPLOYMENT CODE (2023), https://yurok.tribal.codes/YTC/5 (highlighting the Yurok Tribe's extensive labor and employment code); SHOSHONE-BANNOCK TRIBES TRIBAL EMPLOYMENT RIGHTS ORDINANCE, No. TERO-08-S1, § 101 (2008), https://library.municode.com/tribes_and_tribal_nations/shoshone-bannock_tribes/codes/the_law_and_order_code?nodeId=CD_TIT21EM_CH1TREMRIOR_PTIGE (highlighting a Shoshone-Bannock Tribe labor and employment ordinance) .

242. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." (citation omitted)).

tribal self-determination.[243] Therefore, lower courts should apply the clear and plain rule for this reason as well.

C. The Clear and Plain Rule Maintains Separation of Powers and Respects Congress's Decision to Remain Silent

Finally, the clear and plain rule forces courts to exercise judicial restraint and respect the decisions of Congress. Congress has shown that it knows how to apply labor and employment statutes to tribes. For example, though ERISA was originally silent on its applicability to tribes, Congress passed the PPA which expressly integrated retirement plans created by tribal governments into the federal framework.[244] Additionally, Title VII of the Civil Rights Act of 1964 expressly exempts tribes from the definition of "employer"[245] and expressly permits employers on Indian reservations to favor tribal citizens in employment decisions.[246] Similarly, the ADA expressly excludes Indian tribes from the definition of "employer."[247]

Courts should respect Congress's silence. When a court holds that a silent statute applies to tribes, the court essentially rewrites a tribal provision into the statute. Additionally, in doing so, the court limits, modifies, or eliminates tribal sovereign powers. But it is Congress's job to decide what provisions go into a statute, and it is Congress's job to limit, modify, or eliminate tribal sovereign powers. When the court applies a silent statute to the tribe, it violates essential separation of powers principles, and by applying the clear and plain rule, it can refrain from doing so.

Ultimately, federal courts should adopt the clear and plain rule over the *Coeur d'Alene* and *San Manuel* tests. Doing so would be consistent with Supreme Court precedent, would be consistent with Congress's goal to increase tribal self-determination, and would maintain the separation of powers. Although multiple circuits have failed to acknowledge these principles and have violated decades-worth of Supreme Court precedent, it's not too late to set things straight.

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243. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

244. 29 U.S.C. § 1002(b)(32).

245. 42 U.S.C. § 2000e(b) ("The term 'employer' . . . does not include . . . an Indian tribe.").

246. 42 U.S.C. § 2000e-2(i) ("Nothing contained in this subchapter 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.").

247. 42 U.S.C. § 12111(5)(B)(i) ("The term "employer" does not include . . . an Indian tribe.").

Conclusion

Because Congress did not specify whether certain labor and employment statutes abrogate tribal sovereignty, courts should not deviate from well-established federal Indian law principles to diminish a tribe's ability to govern its relationship with its employees. Not only would applying the clear and plain rule be more consistent with established precedent, but it would also respect Congress's goal to increase tribal self-determination while also maintaining separation of powers. And above all else, this test will provide greater predictability for tribes to provide culturally-valuable services for their employees, their members, and their communities.

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