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Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations

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I. Introduction

Are federal regulatory laws that are completely silent about their applicability to Indian nations nevertheless applicable to such nations inside Indian reservations? There are many such laws: The National Labor Relations Act (NLRA),[1] the Federal Labor Standards Act (FLSA),[2] the Occupational Safety and Health Act (OSHA),[3] the Age Discrimination in Employment act (ADEA),[4] the Americans with Disabilities Act (ADA),[5] and even the Affordable Care Act.[6] With the development of Indian gaming and the diversification of tribal economies bringing about a proliferation of tribally owned corporations, whether such laws are applicable to tribally

1. 29 U.S.C. § 151 (2012).
2. 29 U.S.C. § 201 (2012).
3. 29 U.S.C. § 651 (2012).
4. 29 U.S.C. § 621 (2012).
5. 42 U.S.C. § 12181 (2012).
6. 42 U.S.C. § 18081 (2012). *See* Northern Arapaho Tribe v. Burwell, 118 F. Supp. 3d 1264, 1281 (D. Wyo. 2015) (treating tribal employers as "large employers" under section 18081(f)(2)(A) because Indian tribes were not specifically excluded from the definition).

owned businesses is an increasingly frequently asked and litigated question. In all of these laws, Indian nations are not mentioned in the text of the statute or in the legislative history. The question, therefore, is whether to interpret this congressional silence as including or excluding tribal organizations from the laws' coverage.

Indian nations have been recognized as having the inherent sovereignty to exercise a number of governmental powers over their reservations.[7] Because in many cases, application of such federal regulatory laws would interfere with tribal sovereignty, a decision to apply these laws to Indian nations inside reservations is a question that goes to the essence of how federal courts should view tribal sovereignty.[8] Yet, even though the Supreme Court has issued many opinions concerning the extent of tribal sovereignty, especially as it relates to tribal jurisdiction over non-members,[9] or the application of state laws inside Indian reservations,[10] it has never directly addressed this particular issue.[11]

Faced with this congressional and Supreme Court silence, the Federal Circuit Court of Appeals have, since the early 1980s, developed at least four principal approaches in interpreting this congressional silence. Most circuits today are following an approach first developed in 1980 by the Ninth Circuit in *United States v. Farris*.[12] This approach is now known as the *Coeur d'Alene* approach from the first case that applied a general federal regulatory law to a tribally owned enterprise.[13] Under this approach,

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7. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1981).

8. This Article will generally refer to "Indian nations" and "Indian tribes" interchangeably. Although the Commerce Clause of the United States Constitution refers to Congress having the power to regulate Commerce with Indian "tribes," many treaties were subsequently signed between the United States and Indian "nations."

9. *See generally* Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading v. Shirley, 532 U.S. 645 (2001); Nevada v. Hicks, 533 U.S. 353 (2001); Plains Commerce Bank v. Long Family Land and Cattle, 554 U.S. 316 (2008).

10. *See generally* White Mountain Apache Tribe v. Braker, 448 U.S. 136 (1980), Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), California v. Cabazon Band, 480 U.S. 202 (1987), Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989).

11. There are currently, however, two petitions for certiorari, both filed on February 12th 2016, pending in front of the Supreme Court: NLRB v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015), Soaring Eagle Casino v. NLRB 791 F.3d 648 (6th Cir. 2015).

12. 624 F.2d 890 (9th Cir. 1980).

13. Donovan v. Coeur D'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985). In *Farris*, it was the application of a criminal law, the Organized Crime Control Act, to individual Indians owning a casino on the reservation. In *Coeur d'Alene*, it was the applicability of

the legislative silence is interpreted as creating a presumption that the federal regulatory law applies to Indian tribes but allows the presumption to be rebutted if application of the federal law would interfere with purely intramural aspects of tribal self-governance, or with a right reserved by the tribe in a treaty.[14] If the treaty or tribal self-governance exceptions apply, courts have required clear evidence of congressional intent to apply the law to the tribes. The *Coeur d'Alene* approach has been followed in the Second,[15] Sixth,[16] Seventh,[17] and Eleventh Circuits.[18]

A second approach was more recently developed by the D.C. Circuit in *San Manuel Bingo v. NLRB*.[19] This approach could be called the "Spectrum of Sovereignty" approach because under it, the general federal law will more likely not be applied to Indian nations if such application would interfere with more "traditional" aspects of tribal self-government but will be applied if it tends to interfere only with more "commercial" aspects of tribal self-government such as, for instance, the operation of a tribal casino.

Unlike both of these approaches which determine applicability of the federal law based on what kind of tribal sovereign powers are being interfered with, a Sixth Circuit panel recently decided the issue by putting the burden on the Indian nations to show that they had enough sovereignty left to preempt the federal law.[20] After stating that Indian tribes retained all their original sovereign powers unless such powers have been taken away by Congress, given up in treaties, or were lost through implicit divestiture

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OSHA to a tribally owned enterprise.

14. 624 F.2d 890, at 893–94. The court also mentioned that the presumption could also be rebutted if it could be proven by other evidence that Congress did not intend the law to apply. There seems to be no cases that have ever applied this third exception in order to rebut the presumption of applicability. It would seem that the presumption could be rebutted either by legislative history, some kind of structural analysis of the statute, or some historical understanding that tribes were to be exempted from application of the law.

15. Mashantucket Sand and Gravel v. Reich, 95 F.3d 174 (2d Cir. 1996).

16. *See* NLRB v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015), *petition for cert. filed*, (U.S. Feb. 12, 2016) (No. 15-1024).

17. *See generally* Smart v. State Farm Insurance, 868 F.2d 929 (7th Cir. 1989).

18. *See generally* Florida Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126 (11th Cir. 1999).

19. 475 F.3d 1306 (D.C. Cir. 2007).

20. *See* Soaring Eagle Casino v. NLRB, 791 F.3d 648 (6th Cir. 2015), *petition for cert. filed*, (U.S. Feb. 12, 2016) (No. 15-1034) (acknowledging that a previous panel in a different case, NLRB v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015), had adopted the Coeur d'Alene approach, however, petition for certiorari in that case was also filed February 12, 2016).

as a result of their status as domestic dependent nations, the panel took into consideration the evolving Supreme Court jurisprudence on the extent of retained tribal sovereignty over individuals who are not tribal members. Because the panel adopted the concept of implicit divestiture as set forth in the leading case, *Montana v. United States*,[21] I will refer to this approach as the "*Montana* framework" approach.

A fourth approach developed by the Tenth Circuit in *NLRB v. Pueblo of San Juan*,[22] adopted the opposite take on who has the burden to show preemption. Instead of asking whether the tribes have enough sovereignty to preempt the federal law, the court viewed the central question as whether Congress in enacting the NLRA had the intent to preempt Indian tribes from enacting right-to-work laws which may conflict with the NLRA requirements. Because the *Pueblo of San Juan* court also found that "in addition to broad authority over intramural maters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory,"[23] it concluded that "[p]reempting tribal laws divests tribes of their retained sovereign authority . . . In the absence of clear evidence of congressional intent, therefore, federal law will not be read as stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them."[24] Unlike the Ninth and the D.C. Circuits, therefore, the Tenth Circuit considered congressional "silence" as creating a presumption of non-applicability. Furthermore, unlike the approaches developed in the other circuits, instead of focusing on what kind of tribal sovereign powers are being interfered with, the Tenth Circuit asked the more appropriate and relevant question which is what indicia of legislative intent should courts demand of Congress before tribal sovereignty can be abrogated.

This Article takes the position that the meaning of congressional silence concerning application of these federal laws to Indian nations should be determined using a theory of statutory interpretation called "practical reasoning" which is a methodology first developed by Professors Philip Frickey and William Eskridge.[25] In their seminal work, Professors Frickey and Eskridge criticized the courts' exclusive reliance on what they call "foundational" theories of statutory interpretation. These are theories

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21. Montana v. United States, 450 U.S. 544 (1981).

22. NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002).

23. *Id.* at 1192–93.

24. *Id*. at 1195.

25. William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter "*Practical Reasoning*"].

that propose a unitary foundation for statutory interpretation. The three main ones being "intentionalism," "purposivism," and "textualism." Frickey and Eskridge argued that "[e]ach of the three grand theories seeks to reconcile statutory interpretation by unelected judges with the assumptions of majoritarian political theory."[26] Judges do this because they are concerned that their own interpretations will be criticized as being the product of raw political preferences and therefore illegitimate.

Although judges may claim they rely on only one of the foundationalist theories, practical reasoning suggests that in many cases, judges rely not only on all three foundationalist theories when interpreting statutes, but also add a good dose of practical or pragmatic reasoning in making their decisions. Thus, "practical reasoning" starts first with textual considerations (textualism),[27] moves next to historical considerations to understand the original legislative expectations (a mix of intentionalism and purposivism),[28] before ending with what the authors call "evolutive considerations."[29] This last step starts with considering how implementation of the statute has changed over time, and ends with an appraisal of how any proposed interpretation would fit with constitutional values, current congressional policies, and general ideas of fairness.[30] "Practical reasoning" is therefore both descriptive and prescriptive. It not only describes what judges actually do when interpreting statutes but also provides normative justifications for why interpretations reached through that method are legitimate. According to Eskridge and Frickey, "practical reasoning," "means an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives."[31]

"Practical reasoning" is especially well suited to determining the issue of applicability of federal laws to Indian nations because in the cases referred above, the circuits are not focusing on statutory meaning or congressional intent but on how to interpret congressional silence. "Practical reasoning" is also appropriate here because as once argued by Professor Frickey, when it comes to statutory interpretation in Federal

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26. *Id.* at 325.
27. *Id.* at 354.
28. *Id.* at 356.
29. *Id.* at 358.
30. Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 359.
31. *Id.* at 322 n.3.

Indian law, the Supreme Court is making its decisions largely along pragmatic considerations based on contextual and historical realities.[32]

In order to make these points, Part II sets forth and evaluates the various methodologies adopted by the circuits in determining whether to apply general federal regulatory laws to Indian nations. Part III applies "practical reasoning" methodology to this problem. After examining the contextual background of tribal sovereignty in federal Indian law through analysis of relevant Supreme Court precedents, the Article evaluates various practical considerations as well as current congressional policies, before concluding that the approaches developed by the Tenth Circuit in *Pueblo of San Juan* and in a Seventh Circuit opinion authored by Judge Posner,[33] are more consistent with Supreme Court precedents as well as with "practical reasoning."[34]

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32. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*. 78 CALIF. L. REV. 1137, 1234 (1990) ("The cases approach the problems with respect for tradition of Indian sovereignty, avoid adopting formal concepts that sweep away potential contextual concerns, and ultimately place the dispute where the best case for tribal sovereignty can develop, in a case-by-case, contextual manner consistent with Indian tradition and contemporary circumstances.") [hereinafter *Congressional Intent*]. Professor Frickey based this observation on cases such as Solemn v. Bartlett, 465 U.S. 463 (1984); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Bryan v. Itasca County, 426 U.S. 373 (1976); Mitchell v. United States, 463 U.S. 206 (1983); Menominee Tribe v. United States, 391 U.S. 404 (1968). In later writings, Professor Frickey noted that in its latest federal Indian law decisions, the Court was "jerry-rigging a ruthlessly pragmatic blend of federal Indian law with general American law." Philip P. Frickey, *(Native) American Law Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 460 (2005).

33. *See generally* Reich v. Great Lake Indian Fish and Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993).

34. Although the position adopted in this Article may allow Indian tribes to more readily avoid the application of general federal regulatory laws, this should not be an indication that, politically speaking, I am against laws imposing regulations protecting workers in the workplace or allowing these workers to unionize. In this fashion, I am sympathetic to the views of those scholars who have encouraged tribes to enact regulations protecting workers in a tribal environment. *See generally* Jonathan Guss, *Gaming Sovereignty? A Plea for Protecting Workers Rights While Preserving Sovereignty*, 102 CALIF L. REV. 1623 (2014); DAVID KEMPER, THE WORK OF SOVEREIGNTY: TRIBAL LABOR RELATIONS AND SELF-DETERMINATION AT THE NAVAJO NATION (2010).

II. Interpreting Silence in the Circuits

A. Silence as a Presumption of Applicability

1. The Ninth Circuit "Intramural Aspects" Approach.

The issue in *Donovan v. Coeur d'Alene* was the application of OSHA to the Coeur d'Alene tribal farm. The Ninth Circuit's approach starts with a presumption that the law applies to tribes. That presumption is derived from dicta in a Supreme Court case to the effect that it was "now well settled by many decisions of this Court that a general statute in terms applying all persons include Indians and their property interests."[35] That presumption in turn can be rebutted if: "(1) the law touches 'exclusive rights of self-governance in purely intramural matters, (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties, or (3) there is proof by legislative or some other means that Congress intended the law not to apply to Indians on their reservations."[36]

Having enunciated its legal principle, the Ninth Circuit concluded that the operation of a farm that sells produce on the open market and in interstate commerce should be covered under OSHA . "Because the Farm employs non-Indians . . . and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is "neither profoundly intramural nor essential to self-government."[37]

The Ninth Circuit decision to apply OSHA to tribal commercial enterprises was followed by the Seventh Circuit,[38] as well as the Second Circuit.[39] In addition to OSHA, commercial enterprises on Indian reservations also have to abide by the FLSA.[40] Similarly, tribal health centers have been held to be covered under ERISA.[41] In another case, the Eleventh Circuit found that under the Coeur D'Alene approach, a tribally owned restaurant and entertainment facility was subject to the ADA.[42]

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35. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).
36. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).
37. *Id.*
38. *See generally* Menominee Tribal Enterprises v. Solis, 601 F.3d 669 (7th Cir. 2010).
39. *See generally* Reich v. Mashantucket Sand and Gravel, 95 F.3d (2d Cir. 1996).
40. *See generally* Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009).
41. *See generally* Smart v. State Farm, 868 F.2d 929 (7th Cir. 1989).
42. Florid Paraplegic Ass. v. Miccosukee Tribe, 166 F.3d 1126, 1126 (11th Cir. 1999).

However, the Eleventh Circuit in that case also found that the tribe could not be sued because the ADA had not waived sovereign immunity.[43] Finally the Sixth Circuit recently used the "intramural aspect" approach to hold that the NLRA was applicable to a tribally owned casino.[44]

Coeur d'Alene's "intramural aspect" approach adopts a very restrictive and narrow view of tribal sovereignty. Under that approach, federal regulatory laws will almost always be found applicable to the tribes. There are, however, a few exceptions. Thus, the ADEA was found not applicable to a dispute between a Tribal Housing Authority and one of its employees who was a member of that tribe.[45] There is also one district court decision within the Ninth Circuit that did not follow the Seventh Circuit decision in *Smart v. State Farm*,[46] and refused to apply ERISA to a tribally owned lumber mill.[47] Furthermore, the FLSA was found not applicable to the operations of the Navajo Nation's Division of Public Safety, an agency in charge of law enforcement within the Navajo reservation.[48]

2. Evaluating the "Intramural Aspects" Approach.

Because the "purely intramural" approach has already been overwhelmingly criticized by scholars,[49] I am going to briefly summarize here the main arguments against the doctrine. The major problem with the

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43. *Id.* at 1131–34. This decision nicely highlights the irrational difference in treatment between abrogation of tribal sovereign immunity which under Supreme Court precedents, requires clear evidence of congressional intent, and abrogation of other tribal sovereign rights not specifically retained in a treaty which under *Coeur d'Alene*, require clear evidence of congressional intent to abrogate only if they can be considered to involve "strictly intramural aspects" of tribal sovereignty. Why the different treatment?

44. NLRB v. Little River Band, 788 F.3d 537, 548 (6th Cir. 2015).

45. *See generally* EEOC v. Karuk Tribe, 260 F.3d 1071 (9th Cir. 2001); Lumber Indus. Pension Fund v. Warm Springs Forest Prod. Indus., 730 F. Supp. 324 (E.D. Cal. 1990).

46. Smart v. State Farm, 868 F. 2d 929, 938 (7th Cir. 1989).

47. *Lumber Indus. Pension Fund*. 730 F. Supp. at 324 (E.D. Cal. 1990).

48. Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir 2004).

49. Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*. 26 ARIZ. ST. L.J. 681 (1994); Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation*, 2008 MICH. S. L. REV. 505, 538–42 (2008), Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 702–07 (2004), *see generally* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

doctrine is that the *Coeur d'Alene* court relied on a Supreme Court case, *FPC v. Tuscarora*,[50] which did not hold that federal regulatory laws that do not mention Indians are presumptively applicable to Indian tribes inside their reservations. In *Tuscarora*, the Federal Power Commission (FPA) was trying to condemn land owned in fee by the Tuscarora Indian Nation Act for a flood control project. The FPA exempted Indian reservations and the crucial issue was whether the land in question, which was owned in fee by the tribe, could be considered an Indian reservation under the Act and thus exempted from condemnation. The FPA was not, therefore, a federal law of general applicability not mentioning Indians or Indian tribes. The Court held that these tribal fee lands were not a "reservation" under the FPA.[51] The Tuscarora tribe also argued that even if its fee land could not be considered part of the reservation, it was exempted from the FPA under the doctrine of *Elk v. Wilkens*.[52] In *Elk*, the Court held that an Indian born on an Indian reservation did not become a United States citizen pursuant to the Fourteenth Amendment to the United States Constitution because, "[u]nder the constitution as originally established . . . General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[53] It is to answer this argument that the Court stated its now famous dicta that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[54] So, at most, the *Tuscarora* dicta was directed at "Indians and their property" outside Indian reservations.[55]

Besides relying on *Farris*, the *Coeur d'Alene* Court cited tax cases,[56] another case which, like *Farris*, applied federal criminal laws to individual

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50. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 111 (1960).

51. *Id.* at 142. That finding was controversial and probably erroneous, Justice Black's dissenting opinion ended by stating "I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word."

52. *See generally* Elk v. Wilkins, 112 U.S. 94 (1884).

53. *Id*. at 116.

54. *See id.* (citing cases involving federal taxation of individual Indians for its general rule, Five Civilized Tribes v. Comm'r, 295 U.S. 418 (1935); Choteau v. Burnet 283 U.S. 691 (1931); Oklahoma Tax Comm. v. United States, 319 U.S. 598 (1943)).

55. The Tenth Circuit has similarly distinguished *Tuscarora* as only applying to "Indians and their property" but not to situation where the tribe was exercising its sovereign governmental power. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1198–99 (10th Cir. 2002).

56. Confederated Tribes of Warm Springs v. Kurtz 691 F.2d 878 (9th Cir. 1982); Fry v. United States, 557 F.2d 646 (9th Cir. 1977).

Indians,[57] and one case, *United States v. Fryberg,* which held that the Eagle Protection Act abrogated the hunting treaty rights of Indian tribes.[58] To the extent that *Fryberg* is interpreted as allowing abrogation of treaty rights without clear evidence of congressional intent, it is no longer good law.[59] The only case cited in *Coeur d'Alene* which was remotely relevant to the application of general federal regulatory laws to Indian nations was *Navajo Tribe v. NLRB.*[60] This appears to have been the very first case which cited *Tuscarora* for the proposition that general federal laws could be applicable inside Indian reservations even if such laws never mentioned Indians. However, in this case, the NLRA was being applied to a non-Indian owned mining corporation, not to a tribally owned one.[61]

A second criticism is that the limits on rights of tribal self-governance to "purely intramural" aspects is not based on any relevant Supreme Court precedents. As stated earlier, the *Coeur d'Alene* court relied on *United States v. Farris* for its "purely intramural aspect" restriction on tribal self-government.[62] *Farris* cited *Santa Clara* for its "intramural" phraseology. In *Santa Clara,* after stating, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations,'"[63] the Supreme Court pointed to such

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57. United States v. Burn 529 F.2d 114, 117 (9th Cir. 1975).

58. United States v. Fryburg, 622 F.2d 1010, 1016 (9th Cir. 1980).

59. *See* United States v. Dion, 476 U.S. 734, 739 (1986); *but see Fryberg,* 622 F.2d at 1016

> Even though there was no express statement on the "face of the Act" or in the legislative history that Congress intended to abrogate or modify Indian treaty hunting rights, we are convinced that it is clear from the "surrounding circumstances" and "legislative history", including the broad purpose of the Act to protect the bald eagle and prevent its extinction, that Congress intended to modify Indian treaty rights to prohibit the taking of bald eagles.

60. Navajo Tribe v. NLRB, 288 F.2d 162, 164 (D.C. Cir. 1961).

61. *See id.*at 165

> Here, the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plant would clearly 'affect commerce' within the meaning of the Act. The circumstance that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act.

62. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (citing United States 624 F.2d 890 (9th Cir. 1980)).

63. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (citations omitted).

areas as tribal control of membership, domestic relations, and inheritance, as examples of tribal governing powers.[64] This list was obviously not meant to be all inclusive. As explained in the next few paragraphs, this is evident from the Court's reliance on *Williams v. Lee* at the end of that sentence.[65]

After stating that tribal sovereignty was limited to purely intramural aspects, the court quoted from *Arizona ex rel. Merrill v. Turtle* for the proposition that,

> [o]ver the years this original concept of tribal sovereignty has been modified to permit application of state law to reservation Indians in matters not considered essential to tribal self-government, but the basic principle that the Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation, has remained.[66]

As the language indicates, "essential matters" of tribal self-government is clearly not the same as "purely intramural matters." Interestingly, the Ninth Circuit in *Arizona ex. rel Merrill* had also relied on *Williams v. Lee* for its statement.[67]

Williams is the landmark decision where the Court held that a non-Indian trader could not sue a Navajo Indian in state court to recover a debt the Navajo had incurred on the reservation. The Court there famously stated,

> Over the years this Court has modified these principles [denying state jurisdiction] in cases where *essential tribal relations* were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained . . . Essentially, absent 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.[68]

It is clear that the matter in *Williams v. Lee* was not a "purely intramural" one as it involved a dispute between a tribal member and a non-Indian. Yet the Court held that essential tribal relations were involved because,

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern

64. *Id.* at 55–56.
65. *Id.* at 56 (citing Williams v. Lee, 358 U.S. 217 (1959)).
66. Arizona *ex rel.* Edgar Merrill v. Turtle, 413 F.2d 683, 684 (9th Cir. 1969).
67. *Id*. (citing Williams v. Lee, 358 U.S. 217 (1959)).
68. Williams v. Lee, 358 U.S. 217, 220 (1959).

> themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.[69]

3. The D.C. Circuit "Spectrum of Sovereignty" Approach.

In *San Manuel Indian Bingo v. NLRB,*[70] the D.C. Circuit upheld the Board's decision to assume jurisdiction over labor relations within a tribally owned casino on an Indian reservation. The court acknowledged that the Supreme Court had delineated principles which were "superficially at least, in conflict."[71] On one side, there was the *Tuscarora* dictum, which the court interpreted as presuming applicability of the federal regulations unless the law interfered with purely intramural aspects of self-governance. On the other were the canons of statutory interpretation according to which "(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."[72] After finding that the first canon was not applicable when a statute was not enacted specifically for the benefit of Indians, the *San Manuel* court stated that it did not have to choose between the second canon, also known as the *Santa Clara* principle, and the *Tuscarora* principle because "we can reconcile this principle with *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."[73] The court reached that conclusion by adopting what could be called a "spectrum of sovereignty" approach where core tribal sovereignty centers on the tribe's exercise of "traditional" governmental functions affecting tribal members on tribal lands while the peripheral areas of tribal sovereignty extends to the regulation of tribal commercial activities extending beyond the reservations and involving non-members either as customers or employees.[74] The court stated

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69. *Id.* at 223.

70. San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

71. *Id.* at 1311.

72. *Id.* at 1312.

73. *Id.*

74. *See id.* at 1312–13

> An examination of Supreme Court cases shows tribal sovereignty to be at its

> In sum, the Supreme court decisions reflects an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal governments engage in a varied range of activities many of which are not activities we normally associate with governance. These activities include . . . commercial enterprises that tend to blur any distinction between the tribal government and a private corporation.[75]

Although the Court acknowledged that application of the NLRA may infringe on tribal sovereignty in some circumstances, this was not the case here as the court concluded that "impairment of tribal sovereignty is negligible in this context, as the tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity."[76] The court also noted that the operation of a casino was not a traditional governmental function and that the vast majority of employees and customers were non-tribal members not living on the reservation.[77]

In the last part of the *San Manuel* decision, the court discussed whether the term "employer" under the NLRA included Indian tribal governments operating commercial enterprises.[78] Relying on decisions by the Seventh and Tenth Circuits,[79] the Pueblo had made the argument that because the NLRA had exempted from its application "any wholly owned government corporation . . . or any State or political subdivision thereof,"[80] tribally owned corporations should also be excluded.[81] Finding no indication of congressional intent whatsoever, the court applied *Chevron* deference to the agency's decision to include tribal commercial enterprises

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> strongest when explicitly established by a treaty, or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe. Examples of such intramural matters include regulating the status of tribe members in relation to one another, and determining tribe membership. Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.

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

76. *Id.* at 1315.

77. *Id.*

78. *Id.*

79. Reich v. Great Lakes Indian Fish Comm'n, 4 F.3d 490 (7th Cir. 1993); NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002).

80. 29 U.S.C. § 152(2) (2012).

81. San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1316–17 (D.C. Cir. 2007).

as "employers" under the Act. [82] Under *Chevron*, if a statutory term is ambiguous and Congress has delegated the power to make binding interpretations to the agency, a court will uphold the agency's interpretation as long as it is permissible or reasonable.[83] After acknowledging that the tribe's argument is "certainly plausible," the court held that, nevertheless, it could not say that the Board's interpretation decision was not a permissible construction of the statute.[84] The use of *Chevron* deference in Part III.B. of the opinion is surprising since earlier in the opinion, in Part III.A., the court had stated, "[b]ecause the Board's expertise and delegated authority does not relate to federal Indian law, we need not defer to the Board's conclusion. Therefore we decide de novo the implications of tribal sovereignty on the statutory construction question before us."[85] As some other scholars have noted, the two parts of Part III cannot be reconciled with each other.[86]

4. Evaluating the "Spectrum of Sovereignty" Approach.

In addition to also erroneously relying on *Tuscarora*, a major criticism of the *San Manuel* approach is that the distinguishing between tribal sovereign powers on a traditional-commercial spectrum conflicts with the spirit, if not the holding, of many recent Supreme Court opinions.[87] There are no Supreme Court precedents mandating different treatment for "traditional" instead of "commercial" activities when it comes to the exercise of tribal sovereign powers. In effect, quite the opposite is true. In refusing Michigan's argument to overturn or modify *Kiowa Tribe v. Manufacturing Technology*,[88] and deny the Tribe sovereign immunity when operating a commercial gaming establishment, the Supreme Court in its recent *Bay Mills* decision stated that in *Kiowa Tribe*,

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82. *Id.* at 1316 (referring to Chevron v. NRDC, 467 U.S. 837 (1984)).

83. 467 U.S. 837, 843.

84. *San Manuel Indian Bingo & Casino*, 475 F.2d at 1316–17.

85. *Id.* at 1312.

86. Vicki J. Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. STATE L. REV. 467, 472–76 (2008); Brian H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 474–511 (2007).

87. For some insightful critical analysis, see Limas, *supra* note 86; Wildenthal, *supra* note 86.

88. Kiowa Tribe of Oklahoma v. Mfg. Ind. Inc., 523 U.S. 751, 756 (1998).

> [i]n rejecting the identical argument Michigan makes, our decision reaffirmed a long line of precedents, concluding that "the doctrine of tribal immunity"—without any exceptions for commercial or off-reservation conduct—"is settled law and controls this case."[89] Second, we have relied on *Kiowa* subsequently: In another case involving a tribe's off-reservation commercial conduct, we began our analysis with *Kiowa*'s holding that tribal immunity applies to such activity (and then found that the Tribe had waived its protection).[90]

The *Bay Mills Court* ended its discussion by reiterating that the arguments for limiting tribal sovereignty in the area of commercial activities had all been made in *Kiowa Tribe*, and faced with these arguments "[t]he decision could not have been any clearer: 'We decline to draw [any] distinction' that would 'confine [immunity] to reservations or to noncommercial activities.'"[91] The *Bay Mills* and *Kiowa Tribe* decisions are undoubtedly correct in affording the same kind of protection to traditional and commercial governmental activities. The implication that tribal involvement into commercial activities somehow deserves less protection than "traditional" governmental functions is especially troublesome since, as pointed out by Professor Matthew Fletcher, Indian tribes are desperately in need of raising governmental revenues by different means since they do not have any kind of substantial tax base.[92]

*B. Silence as Equivocal: The 6th Circuit "*Montana *Framework" Approach.*

1. Soaring Eagle Casino v. NLRB.[93]

As mentioned in the Introduction to this Article, the *Soaring Eagle* court adopted what could be termed a "*Montana* framework" analysis as the governing methodology for determining if application of federal regulatory laws to a reservation-based tribally owned enterprise would infringe on tribal sovereignty.[94] After acknowledging that it was bound by a previous

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89. Michigan v. Bay Mills Indian Comm'n,134 S. Ct 2024, 2038 (2014) (quoting *Kiowa Tribe*, 523 U.S. at 756 (1998)).

90. *Id.* (citing to C&L Enter. v. Citizen Band of Potawatomi Indians, 121 S. Ct. 1589 (2001)).

91. *Id*. at 2038 (quoting *Kiowa Tribe of Oklahoma*, 523 U.S. at 758).

92. *See generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

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

94. At least one scholar had previously recommended such an approach. *See generally* Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint*, 2008 MICH. ST. L. REV.

6th Circuit decision which had adopted the *Coeur d'Alene* "purely intramural aspect,"[95] approach, the panel stated that it disagreed with that approach and proceeded on explaining "the approach that we believe is most consistent with Supreme Court precedent."[96]

The *Soaring Eagle* court took the position that the question to be answered in such cases was "whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity."[97] After noting that the tribal casino employed many people who were not tribal members, the court focused on whether the tribe had retained sovereign powers to regulate these non-members. The extent of tribal sovereign powers over non-members is determined by using an analysis first delineated in *Montana v. United States*.[98] After first stating that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,"[99] the *Montana* court came up with a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[100] However, the Court immediately identified two exceptions to this general rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on no-Indian fee lands. A tribe may regulate, through taxation, licensing or other means the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.[101]

After giving a comprehensive description of how this *Montana* framework analysis should proceed when it comes to determining if a

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505 (2008).

95. *Soaring Eagle Casino & Re*sort, 791 F.3d at 662, (citing to NLRB v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015)).

96. *Id.*

97. *Id.* at 666.

98. Montana v. United States, 450 U.S. 544, 547 (1981).

99. *Id*. at 564.

100. *Id*. at 565.

101. *Id*. at 565–66.

federal law of general applicability should apply to Indian nations,[102] the Sixth Circuit applied it to the facts of this case and concluded "the first *Montana* exception concerning consensual commercial relationship between the Tribe and nonmembers should apply to these facts."[103] The court explained that the consensual relations exception recognizes that, as a sovereign, the tribe has the power to enter into contractual relations with non-members working on the reservations and to place conditions in such contracts. The court also summarized why under its "totality of the circumstances" analysis, the tribal casino no-solicitation policy and its termination of employees violating that policy fell under *Montana*'s first exception. First, the operation of the casino was an important vehicle for the exercise of sovereignty. Second, while employing many non-members, it was mostly managed by tribal members. Third, revenues from the casino constituted 90% of all tribal revenues and allowed the tribe to provide essential government services to its members.[104] The court ended its explanation by reminding us that the Supreme Court has recognized that "the power and ability of a tribal government to raise revenues for its essential services is an important aspect of tribal sovereignty."[105]

The Sixth Circuit's opinion also contained a comprehensive discussion of why a previous Sixth Circuit panel, which could not be overturned by a

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102. *See* Soaring Eagle Resort & Casino v. NLRB, 791 F.3d 648, 667 (6th Cir. 2015)

> If Congress has not so spoken, we would then determine if the generally applicable federal regulatory statute impinges on the Tribe's control over its own members and its own activities. If it has, the general regulatory statute will not apply against the Tribe as a sovereign. If we find that the generally applicable federal statute does not impinge on the Tribe's right to govern activities of its members . . . we would assume that, generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." And we would determine, then, whether the Tribe has demonstrated that one of the two Montana exceptions to the general rule . . . applies. When analyzing the exceptions, we would apply a totality of the circumstances analysis . . . If one of the exceptions applies, the generally applicable federal statute should not apply to tribal conduct.

103. *Id.*

104. *Id.* at 668.

105. *See id.*

> We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe.

(quoting Merrion v. Jicarilla Indian Tribe, 455 U.S. 130, 137 (1981)).

subsequent panel in the same circuit, was wrong to adopt the *Coeur d'Alene* analysis and would have also been wrong to adopt the D.C. Circuit *San Manuel* methodology.[106] On *Coeur d'Alene*, the court concluded with the following observation,

> Ultimately, we find that the *Coeur d'Alene* framework, and especially its description of its first exception, overly constrains tribal sovereignty, fails to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary, and is inconsistent with the Supreme Court directives in *Montana* and *Hicks*.[107]

Concerning the D.C. Circuit's commercial/traditional dichotomy, the court stated that this "distinction distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination. Indeed, that distinction flies in the face of congressional pronouncements to the contrary in the IGRA."[108] The court also stated that the distinction between traditional and commercial governmental activities "ignores the fact that the Supreme Court famously rejected a similar distinction in connection with federal regulation of states, characterizing this distinction as unworkable."[109] The court there was referring to the adoption of the "traditional governmental functions" standard for determining state immunity from federal regulations in *National League of Cities v. Usery*.[110] That standard was rejected a few years later in *Garcia v. San Antonio* which characterized such an approach as unsound and unworkable.[111]

2. Criticisms of the Approach.

a. Questioning the Relevancy and Understanding of Montana's *Consensual Relations Exception.*

Although this Article takes the position that the *Soaring Eagle* "*Montana* framework" approach is more legally coherent than the "purely

106. *Id.* at 673–75 (referring to NLRB v. Little River Band of Ottawa Indians, 788 F.3d 537 (6th Cir. 2015)).

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

108. *Id.*

109. *Id.* at 675.

110. Nat'l League of Cities v. Usery, 426 U.S. 833, 840–52 (1976).

111. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–47 (1985).

intramural aspect" or the "spectrum of sovereignty" approaches, this approach does contain some flaws. While it claims to evaluate whether Indian nations have enough sovereignty to preempt federal law, because the *Montana* case creates a general rule of no tribal jurisdiction over non-members unless of the two *Montana* exceptions apply, the approach in effect creates a rebuttable presumption that Congress always intends a federal law to apply to Indian nations inside their reservations if such law has the potential to impact a substantial number of non-tribal members.

The *Soaring Eagle* approach could also result in a conundrum if the consensual exception was found not available to establish tribal jurisdiction over non-members. Although there is no question that application of the federal law to tribal regulations of its own members would intrude on tribal sovereignty, the reality is that it would not be politically, and perhaps even legally, feasible to have the non-member workforce covered under the NLRA and be allowed to join a union while the tribal workforce would have to remain unorganized. The same thing would probably be true for just about any of the general federal laws regulating the workplace, whether it be the FLSA or OSHA.

Another problem in relying on the *Montana* framework is that the Supreme Court's jurisprudence in applying the *Montana* consensual exception is a work in progress. As of now, for instance, there are no Supreme Court precedents which actually extend application of the *Montana* general rule (no tribal jurisdiction over non-members) to consensual relations involving activities of non-Indians on Indian owned lands within Indian reservations. *Nevada v. Hicks* extended *Montana* to all lands within Indian reservations but the case involved a very peculiar situation, extension of tribal adjudicatory jurisdiction over state game wardens,[112] and the claim of tribal jurisdiction was based on the self-governance exception. Furthermore, the Court was hopelessly fractured over the importance land ownership status should have concerning the *Montana* exceptions.[113] In addition, Justice Scalia in his *Hicks* plurality opinion went out of his way to first rule that the state did have jurisdiction to investigate the crime in question which had been committed off the reservation. Implicit in this finding was that the tribe had lost the right to

112. Nevanda v. Hicks, 533 U.S. 353, 374 (2001).

113. Three Justices took the position that land ownership played some role in the determination of tribal jurisdiction, three Justices took the position that land status was not a jurisdictional factor, and three Justices thought it was a very important factor. Finally, Justice Ginsburg took the position that *Strate* should be limited to cases involving assertion of tribal jurisdiction over state officers performing official duties on Indian reservations.

exclude these state game wardens as long as they were performing their official duties. Consistent with this statement, some lower courts as well as scholars have taken the position that the *Montana* rule should not even be applicable to lands over which the tribe has retained the treaty right to exclude.[114]

The consensual relations exception first came into play at the Supreme Court in *Strate v. A-1 Contractors* where a non-Indian plaintiff was suing a non-Indian corporation in tribal court over a fender bender type traffic accident that occurred on the reservation.[115] One of the plaintiff's arguments was that the tribal court had jurisdiction because the defendant had a contract with the tribe to perform some work on the reservation. The Court did not agree, stating that the highway accident at issue presented "no 'consensual relationship' of the qualifying kind."[116] The Court concluded that the contract was irrelevant here because it was between the defendant and the tribe and not with the plaintiff. The Court also examined the cases *Montana* listed as supporting the consensual exception. One involved a dispute over a sale transaction between a tribal member and a non-Indian trader.[117] The other three all dealt with tribal taxes on non-Indians conducting business on the reservation.[118]

The consensual relations exception also came into play in *Atkinson Trading Co. v. Shirley* where the non-Indian hotel operator was challenging a hotel occupancy tax imposed by the Navajo Nation.[119] Stating that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself,"[120] the Court concluded that a nonmember's receipt of police, fire, and medical services from the tribe "does not create the requisite connection,"[121] and neither did the fact that the nonmember had a federal license to be an "Indian trader" on the reservation.

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114. Water Wheel Camp Rec. Area Inc. v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011); Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, ARIZ. ST. L.J. (forthcoming).

115. Strate v. A-1 Contrs., 520 U.S. 438, 457 (1997).

116. *Id.*

117. *See generally* Williams v. Lee, 358 U.S. 217 (1959).

118. The tribal taxes involved were on non-Indians grazing cattle, conducting business, or buying cigarettes from Indian vendors.

119. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649 (2001).

120. *Id.* at 656.

121. *Id.* at 655.

Reliance on *Montana*'s consensual relations exception has also become more problematic because in its latest foray into the intricacies of the implicit divestiture doctrine, the Supreme Court seemed to have cast a doubt on the prevailing understanding of the exception.[122] Thus, In *Plains Commerce Bank v. Long Family Ranch*,[123] the Supreme Court came up with a new twist in interpreting the consensual relations exception. The Court refused to apply the exception to allow tribal court jurisdiction over a lawsuit filed by tribal member against a non-Indian bank which alleged that the bank had discriminated against tribal members who wanted to purchase land located on the reservation but owned in fee by the bank. The tribal members alleged that the bank offered much more favorable terms to non-Indians as it did to them. The Court first stated that Indian tribal courts lack jurisdiction in this case because "the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."[124]

Addressing *Montana*'s first exception, the Court stated that *Montana* only permits "tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests."[125] Thus, the Court seemed to imply that a tribe can only regulate the activities or conduct of non-members pursuant to the consensual relations exception, "to the extent necessary to protect tribal self-government and to control internal relations."[126] In this case, the Court found that the sale of non-Indian fee land could not be "justified by reference to the tribe's sovereign interests,"[127] because "fee land owned by nonmembers has already been removed from the tribe's immediate control."[128] While tribes may not be able to order the sale of non-Indian fee land, the Supreme Court has held that tribes can zone non-member fee lands under certain circumstances.[129] So, it was not quite accurate for the Court to state that tribal sovereign interests can never be affected when non-Indian fee lands are involved

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122. M. Gatsby Miller, Note, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction Over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825 (2014).

123. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008).

124. *Id.*

125. *Id*. at 333.

126. *Id.*

127. *Id.* at 336.

128. *Id.* at 330.

129. Brendale v. Confederated Tribes of the Yakima Indian Reservation, 492 U.S. 408, 431 (1989).

because tribes have no power to control non-member fee lands.[130] Besides, as argued by Justice Ginsburg in dissent, while under the Court's rationale, the tribal court could not have ordered the sale of the land to tribal members, nothing in the Court's reasoning should have prevented it from holding that the tribal court could still assess financial damages based on the discrimination claim since this remedy did not involve the forced sale of nonmember fee land.[131]

This latest twist concerning the limits of the consensual relations exception may be at play in the next Indian case to be decided by the Supreme Court since certiorari was recently granted to a case out of the Fifth Circuit, *Dollar General v. Mississippi Band of Choctaw*. [132] In the case, Dollar General filed suit in federal court to enjoin John Doe, a member of the tribe, from adjudicating a tort claim against the corporation in tribal court. John Doe, a thirteen year boy, alleged that the manager of the Dollar General store had sexually molested him when he was working there as an unpaid intern pursuant to a tribal educational program.[133] Dollar General was leasing the land where the store was located from the tribe and had agreed with the tribe to participate in the Tribal Youth Opportunity Program under which John Doe was placed as an intern in its store. The Fifth Circuit upheld tribal jurisdiction pursuant to the consensual relations exception. Although the court observed that the consensual relation did not have to be strictly commercial to qualify under the *Montana* exception, it concluded that the consensual relationship here was "unquestionably of a commercial nature."[134] The court also found that there was an obvious nexus to Dollar General's participation in the tribal program since the wrong alleged to have been perpetrated by Dollar General was placing a

130. Unless the word "immediate" which qualified the word "control" was used to distinguish a tribe ordering a "sale" of non-Indian fee land from a tribe just "zoning" such lands. Thus, later in the opinion Justice Roberts did acknowledge that the tribe "may legitimately seek to protect its members from noxious use that threaten tribal welfare or security," However, he judiciously omitted to comment on how the tribe could go about doing this. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 330, 336 (2008).

131. *Plains Commerce Bank*, 554 U.S. at 350–52.

132. Dolgencorp, Inc. v. Mississippi Band of Choctaw, 746 F.3d 167 (5th Cir. 2014), *cert. granted*, (No. 13-1496), Dollar General v. Mississippi Band of Choctaw, 135 S. Ct. 2833 (June 15, 2015) (case argued December 1, 2015).

133. Liability of Dollar General was alleged pursuant to vicarious liability and negligent hiring, training, and supervision of employees.

134. *Dolgencorp, 746* F.3d at 173 (ruling that the relation did not have to be strictly "commercial").

manager who sexually assaulted John Doe in a store located on tribal land.[135] Concerning the impact of Justice Roberts language in *Plains Commerce*, after first mentioning that it was only dicta, the court stated, "[w]e do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, intrude[s] on the internal relations of the tribe or threaten[s] self-rule."[136] The court also added that, in any case, "the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government."[137]

Since the Court decided *Plains Commerce*, no federal court of appeals has interpreted the case as modifying *Montana*'s consensual exception.[138] The upcoming *Dollar General* decision should, however, lead the Supreme Court to evaluate the normative justifications for the consensual relations exception to the *Montana* general rule since Dollar General will no doubt argue that unless the exercise of tribal jurisdiction over a nonmember pursuant to a consensual relation is tied to tribal self-government, there are no normative justifications. It is true that the *Montana* court started its argument by stating that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes."[139] Following Dollar General's reasoning, the consensual relations exception to the general rule of "no tribal jurisdiction" should therefore be either tied to tribal self-government or internal relations.

There are two principal arguments to rebut this position. First, it can be argued that when it created that exception, the *Montana* court itself implicitly acknowledged that tribal jurisdiction over disputes with a nexus to commercial consensual relations was indeed essential to tribal self-government or part of internal relations. Secondly, one can argue that the requirement of a nexus between the consensual agreement and tribal jurisdiction is there because for some Justices, the principal normative

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135. Dollar General also argued that its alleged negligence, the training and selection of the manager, did not take place on the reservation but the court refused to address the issue since it was not raised in either the tribal or federal district court. *Id.* at 173–74.

136. *Id.* at 175.

137. *Id.*

138. *See, e.g.*, Dish Network Service v. Laducer, 725 F.3d 877 (8th Cir. 2013); Att'ys Process & Investigation Servs. v. Sac & Fox Tribe, 609 F.3d 927 (8th Cir. 2010); Water Wheel Camp v. LaRance, 642 F.3d 802 (9th Cir. 2011). One federal district court did take the position advocated by the defendant in Dollar General, see Rolling Frito-Lay Sales L.P. v. Stover, CV 11-1361-PHX-FJM, 2012 U.S. Dist. LEXIS 9555, at *14 (D. Ariz. 2012).

139. Montana v. United States, 450 U.S. 544, 564 (1981).

argument against tribal jurisdiction over non-members is that they have not *consented* to tribal jurisdiction and such jurisdiction without consent runs against one of the basic foundations of the American political system which is the principle of "the consent of the governed."[140] Thus, in holding that Indian tribes did not have criminal jurisdiction over nonmembers, Justice Kennedy once stated, "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."[141] However, while in the field of criminal jurisdiction, Justice Kennedy took the position that consent may only be inferred through membership, it can be argued that in the civil context, the *Montana* court recognized that nonmembers with such consensual agreements have implicitly consented to tribal regulation tied to such contracts and agreements.

b. A Better Implicit Divestiture Approach?

In an earlier work, I had suggested that if one was going to determine applicability of a silent general federal law to Indian nations by reference to the implicit divestiture doctrine or, in other words, the amount of retained sovereignty still possessed by Indian nations, a possible approach would be to use the implicit divestiture doctrine as originally conceived and formulated by Justice Rehnquist in *Oliphant v. Suquamish Indian Tribe*.[142] In *Oliphant*, the Court held that when it came to assertion of tribal criminal jurisdiction over non-members, it was inconsistent with the status of Indian tribes to exercise inherent sovereign powers in a fashion that was in conflict with the *overriding sovereign interest* of the United States.[143] The *Oliphant* Court determined that such tribal jurisdiction was in conflict with an overriding federal interest because

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested a . . . great solicitude that its citizens be protected by the United Sates from unwarranted intrusions on their personal liberty . . . . By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give their power to try

140. *See* United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J.) ("The Constitution is based on a theory of original, and continuing, consent of the governed.").

141. Duro v. Reina, 495 U.S. 676, 693 (1990).

142. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). For further discussion see Skibine, *supra* note 49, at 126–30 (1991).

143. *Oliphant*, 435 U.S. at 209.

> non-Indian citizens of the United States except in a manner acceptable to Congress.[144]

Although the Court did not actually state specifically why tribal prosecutions could result in such unwarranted intrusions into personal liberty, it seems that the Court was concerned about the fact that under previous Supreme Court precedents, Indian tribes were not bound by the Constitution.[145] Thus, if the tribes had criminal jurisdiction over non-members, it was possible that they could decide to prosecute such non-members without the full protections of the Bill of Rights.[146]

Nowadays, although the *Montana* framework has supplanted the *Oliphant* methodology when it comes to determining tribal civil jurisdiction over non-members,[147] it could also be argued that the *Oliphant* methodology can still be used if application of the *Montana* framework would be awkward or inappropriate. Because the issue here is to determine whether Congress intended the law to apply to Indian nations, taking into account the existence of an overriding national interest to have the law apply is definitely more appropriate than making this decision by reference to whether tribes have jurisdiction over non-members under the *Montana* framework as was done in the *Soaring Eagle Casino* case.[148] Because the very concept of an "overriding" sovereign interest implies a balancing or

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144. *Oliphant*, 435 U.S. at 210.

145. Talton v. Mayes, 163 U.S. 376, 382–85 (1896).

146. Thus, the Court mentioned that even though Congress was careful to extend basic criminal rights to all non-Indians being prosecuted in federal courts for crimes committed in Indian country, "under respondent's theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings." *Id.* at 1022.

147. *See supra* notes 92–107 and accompanying text.

148. *See supra* notes 111–36 and accompanying text. When Justice Rehnquist first came up with his *Oliphant* test to implicitly divest Indian tribes of criminal jurisdiction over non-members, he never indicated that such test was limited to matters of criminal jurisdiction. It is only after the test was unsuccessfully invoked in 1980 in an effort to prevent Indian tribes from taxing non-members buying cigarettes on Indian reservations, that the Court radically altered the *Oliphan*t test in *Montana*. Thus, in *Washington v. Confederated Tribes of the Colville Reservation*, the Court stated,

> Tribal powers are not implicitly divested by virtue of the tribe's dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation.

447 U.S. 134, 153–54 (1980).

comparison with other interests, i.e. the tribal interests,[149] I suggested that in determining whether there was an overriding federal interest to apply general federal regulatory laws to Indian nations inside Indian reservations, there should be a balancing between the federal interests in applying the law to Indian nations and the interest of those nations in being governed by their own tribal law.[150] Furthermore, the importance of the federal interest should be determined by whether the application of the general law to Indian nations inside the reservations was necessary to achieve the purpose and implementation of the law outside the reservations. In other words, would a tribal exemption from the law inside the reservations have a substantial negative impact on the implementation of the law outside Indian reservations?[151]

C. Silence as a Presumption of Non-Applicability.

1. The Tenth Circuit "Intent to Preempt" Approach.

Faced with the same issue as the D.C., Ninth, and Sixth Circuits, the Tenth Circuit in *NLRB v. Pueblo of San Juan*,[152] phrased the issue as follows: "the central question here is whether the Pueblo continues to exercise the same authority to enact right-to-work laws as do states and territories, or whether Congress in enacting §§ 8(a)(3) and 14(b) of the NLRA, intended to strip Indian tribal governments of this authority as a sovereign."[153] The tribal ordinance in this case was prohibiting employers and unions from entering into agreements requiring employees to belong to a union. The court also mentioned that the district court "took pains to point out, namely, that the general applicability of federal labor law is not at issue."[154] While this sentence may lead some to erroneously believe that the case did not involve the application of laws of general applicability to Indian tribes, the court was only citing to a sentence in the district court

149. The *Oliphan*t Court just assumed, however, that the federal interest in protecting its citizens from unwarranted intrusion into their liberty was overriding without actually doing any balancing with the tribal interests at stake. *See* Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. IND. L. REV. 391, 397–98 (2007–2008).

150. Skibine, *supra* note 49, at 128.

151. *Id.* at 129.

152. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191 (10th Cir. 2002).

153. *Id*.

154. *Id.*

opinion which stated that the question was not whether the NLRA was applicable to a private employer doing business on an Indian reservation but whether the private employer was also bound by the laws of the Pueblo.[155]

The court announced that its analysis would be guided by the following principle:

> The burden falls on the NLRB and the Union, as plaintiffs attacking the exercise of sovereign tribal power, "to show that it has been modified, conditioned or divested by Congressional action . . . ambiguities in federal law have been construed generously in order to comport with tribal notions of sovereignty and with the federal policy of encouraging tribal independence."[156]

The court also reiterated that "a well-established canon of Indian law is that doubtful expressions of legislative intent must be resolved in favor of the Indians."[157] Perhaps more controversial, the court also asserted that, "[t]he canon applies to other statutes, even where they do not mention Indians at all."[158]

Having determined that the NLRB had the burden to demonstrate a congressional intent to preempt the exercise of tribal sovereign power, the court found that enactment of such right-to-work ordinance was part of the Pueblo's sovereign powers because "[i]n addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate economic activity within their territory."[159] The court did mention that under *Montana*, the tribe was divested of some inherent sovereign powers over non-members, but it concluded that,

> These limiting precedents, however, are not applicable here, where the NLRB seeks a declaratory judgment prohibiting the application of the ordinance to all persons everywhere on the reservation, and where the only instance of regulation cited pertains to consensual commercial dealings between the Pueblo and its members on the one hand, and a lumber company operating on lands leased from the tribe on the other.[160]

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155. NLRB v. Pueblo of San Juan, 30 F. Supp. 2d 1348, 1351–52 (D.N.M. 1998).

156. *Id.* at 1190.

157. *Id.* at 1191.

158. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191–92 (10th Cir. 2002) (citing EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989)).

159. *Id.* at 1192.

160. *Id.* at 1193.

In Part II.B. of its opinion, the court explained why the burden to show a congressional intent to preempt should be on the NLRB, and why the Indian canons of statutory construction were applicable to a statute that was silent concerning Indians. The court started by asserting that although Congress can divest tribal powers, divestiture was disfavored as a matter of national policy. The court also mentioned the existence of a trust relationship between the United States and the tribe as well as Supreme Court precedents that had cautioned that when tribal sovereignty was at stake "we tread lightly in the absence of clear indications of legislative intent."[161] The Court also referred to the principle that there is a presumption of non-preemption,[162] although usually, this principle is applied only to federal preemption of state law. Finally, the court mentioned that finding preemption of tribal law in this case would contradict congressional policy as well as the policy of the executive branch, which is to encourage tribal self-government.[163] Addressing the argument made by the NLRB that there were other canons such as the principle *expresio unius est exclusion alterius*, which could clarify the plain meaning of the law as favoring preemption, the court stated, "[i]n the context of Indian law, appeals to 'plain language' or 'plain meaning' must give way to canons of statutory construction peculiar to Indian law."[164]

The issue in *Pueblo of San Juan* really came down to interpreting congressional silence on whether the law should apply to Indian tribes inside their reservations. Does such silence create a presumption of applicability or not? The court resolved the question in favor of tribal sovereignty, stating that, "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory. The correct presumption is that silence does not work a divestiture of tribal power."[165] Noting that the section of the law at stake here did not preempt the states from enacting such right-to-work laws but reaffirmed their existing authority, the court stated "Congress' silence as to the tribes can therefore hardly be taken as an affirmative divestment of their existing general authority as sovereigns to control

161. *Id.* at 1195 (quoting from Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

162. *Id.*

163. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1195 (10th Cir. 2002).

164. *Id.* at 1196.

165. *See id.* at 1196 ("[T]he proper inference from silence . . . is that the sovereign power to tax remains intact." (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n.14 (1982))).

economic activity."[166] The same attitude towards legislative silence was recently adopted by the Sixth Circuit in a decision examining whether what the court referred to as "legislative void" evidenced a congressional intent to divest the tribes of jurisdiction over their own members committing crimes outside Indian reservations.[167] The Sixth Circuit concluded that in light of the Supreme Court's decision in *Bay Mills*, "congressional silence in matters of tribal sovereignty is more aptly viewed as congressional deference to tribal sovereignty."[168]

2. Judge Murphy's Dissent.

Judge Murphy penned a lengthy dissent asserting that Congress can abrogate tribal sovereign rights by implication and espousing the *Coeur d'Alene* approach. He also accused the majority of disregarding the fact that previous Tenth Circuit opinions had explicitly adopted the *Coeur d'Alene* approach. However, a closer reading of the three cases cited by Judge Murphy reveals that these cases are not that clear on this issue. In *Nero v. Cherokee Nation*,[169] after noting that a previous Tenth Circuit opinion had questioned the validity of the *Tuscarora* dictum after the Supreme Court decision in *Merrion v. Jicarilla Apache Tribe*,[170] the *Nero* court only mentioned that *other* lower court had adopted the *Coeur d'Alene* approach.[171] The court did conclude, however, that application of the federal statute in this case would interfere with purely internal matters of self-government.[172] The second case mentioned by Judge Murphy, *EEOC v. Cherokee Nation*,[173] only mentioned *Tuscarora* and *Coeur d'Alene* in a footnote and only for the proposition that some of the principles enunciated in these cases were not applicable to a case like this one where treaty rights were being impacted.[174]

166. Part III of the court's decision explains why the *Tuscarora* dictum, if applicable at all, should be limited to regulations of Indian property and should not be applied to tribal exercise of sovereign power. *Id.* at 1198.

167. Kelsey v. Pope, 809 F.3d 849, 862 (6th Cir. 2016).

168. *Id.* at 863.

169. Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1462 (10th Cir. 1989).

170. 455 U.S. 130 (1982).

171. Nero, 892 F.2d at 1462–63.

172. *Id.* at 1463.

173. 871 F.2d 937 (10th Cir. 1989).

174. *Id.* at n.3.

Judge Murphy also relied on *Phillips Petroleum v. EPA*,[175] where the issue was the applicability of the Safe Drinking Water Act (SDWA) inside the Osage Indian reservation. Notably, Judge Murphy took the majority to task for only distinguishing that case based on the fact that in *Phillips Petroleum*, the Osage Nation did not object to application of the SDWA.[176] The reality is actually more complicated. The *Phillips Petroleum* court relied primarily on its finding that Congress specifically intended the law to apply to Indians. The court first noted that the definition section of the SDWA refers directly to Indian tribal organizations in defining municipality.[177] After looking at the text of the statute the court analyzed the "context, the purposes of the law, and the circumstances under which the words were employed,"[178] in order to back its finding that the legislative history reflected the fact that, "[i]n adopting the SDWA, Congress expressly stated its concern that Indians should enjoy the benefits of clean water drinking, as should all Americans."[179] It is only to back up its conclusion that the court at last mentioned that application of the SDWA here was also consistent with the *Tuscarora* principle.[180] It is true that the *Phillips Petroleum* court did not directly address whether application of the SDWA should be precluded because it generally interfered with the sovereignty of the Osage Nation. However, because the Osage Nation wanted the Act to apply, there was no one to make this argument on appeal.

Judge Murphy's criticisms aside, the Tenth Circuit has more recently reaffirmed the position first adopted in *Pueblo of San Juan* in *Dobbs v. Anthem Blue Cross*.[181] The court stated, "In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal

175. 803 F.2d 545 (10th Cir. 1986).

176. 871 F.2d at 1203.

177. 803 F.2d at 554.

178. *Id.*

179. *Id.* at 555. The court backed its statement by quoting from a congressional committee report service which noted that there were existing government programs for Indians but that, "[I]n the Committee's view these grant programs to construct drinking water supply systems are not necessarily adequate to assure that safe drinking water will be available [to Indians], even from those systems which are constructed with such aid." *Id.* (quoting H.R. REP. NO. 1185, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6462).

180. Although the court acknowledged that the *Tuscarora* rule "can be rescinded where a tribe raises a specific right under a treaty or statute which is in conflict with the general law to be applied," the court found that this case did not involve any such statutory or treaty right. *Id.* at 557.

181. Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010).

governments exercising their sovereign authority absent express congressional authorization."[182] After acknowledging that applying federal regulatory laws to Indian tribes could interfere with tribal sovereignty, the court stated,

> For this reason, ERISA would not apply to insurance plans purchased by tribes for employees primarily engaged in governmental functions unless Congress expressly or necessarily preempted Indian tribal sovereignty. Applying ERISA to such plans would prevent tribal governments from purchasing insurance plans for governmental employees in the same manner as other government entities, thus treating tribal governments as a kind of inferior sovereign. We do not assume Congress intended to infringe on Indian tribal sovereignty in this manner absent an express statement or strong evidence of congressional intent.[183]

3. Concluding Comments on the Various Approaches Adopted in the Circuits.

In conclusion, both the Ninth Circuit's "purely intramural aspects" as well as the D.C. Circuit's "spectrum of sovereignty" approaches consider silence as creating a presumption of applicability and refuse to require clear indication of congressional intent unless the application of the law to Indian nations would impose an undue interference on peculiar "aspects" of tribal sovereignty. While the *Soaring Eagle* "*Montana* framework" approach claims to just ask whether the Indian nations have enough sovereignty to preempt application of the general federal law, its practical impact is to impose a presumption that Congress always intends a federal law impacting non tribal members to be applicable to Indian nations even on Indian reservations. Unlike the first three approaches which ask either whether tribal sovereignty is being interfered with "enough" or whether the tribes have "enough" sovereignty to preempt federal law, the Tenth Circuit rightly assumes that most if not all applications of a comprehensive federal regulatory scheme to Indian nations will interfere with tribal sovereignty. Legislative silence concerning Indian nations in this area, therefore, creates a presumption that the law should not be applicable to Indian nations. The key question is not, therefore, whether the general federal laws *unduly*

182. *See id.* at 1283–84 ("Although our early cases relied in part on treaties that expressly protected Indian tribes' sovereignty, we later recognized that a treaty was not a necessary prerequisite to exemption.").

183. *Id.* at 1284.

interferes with tribal sovereign rights or whether the tribes have *enough* sovereignty to preempt federal law but whether Congress intended to preempt tribal sovereign rights when enacting these general federal laws. The answer to that question turns on the current assumptions and understandings concerning how clear Congress needs to be in order to interfere with tribal sovereignty. In the next Part, I explain why the methodology used in *Pueblo of San Juan* by the Tenth Circuit is more consistent with "practical reasoning" and better reasoned than the methodology used by the other circuits.

III. Interpreting Silence Under Practical Reasoning.

A. Practical Reasoning.

As stated in the introduction, this article takes the position that resolving the ambiguity created by the lack of any reference to Indian tribes in some of the federal regulatory laws of general applicability should be resolved according to "practical reasoning", a theory put forth by Professors Frickey and Eskridge.[184] Philip Frickey once stated that under practical reasoning "the interpreter consults all potentially relevant sources of statutory meaning. These sources include statutory text, legislative expectations, statutory purposes, evolution of the statute over time, and coherence of the statute with the broader public law."[185] Frickey and Eskridge explained that their methodology could be visualized as a "funnel of abstraction."[186] In that funnel, the statutory interpreter starts with more concrete factors such as text, legal precedent, legislative history, and statutory purpose, before moving on to more abstract factors such as evolutive considerations, and reconciliation of the interpretation with current public norms. When it comes to interpreting statutes in federal Indian law, Professor Frickey's practical reasoning approach begins with a "heightened concern for context,"[187] followed by a "critical assessment of

184. *See supra* notes 25–32 and accompanying text.

185. Frickey, *supra* note 32, at 1208.

186. Eskridge & Frickey, *supra* note 25, at 353.

187. Frickey, *supra* note 32 at 1220. Frickey further explained that practical reasoning

> Attacks legal problems from a contextual framework—from the ground up rather than by a descending inquiry from conceptual formal theory. Although difficult to define, practical reason includes a concern for history and context; a desire to avoid abstracting away the human component in judicial decision-

traditions and preunderstanding, and fusion of horizons."[188] Frickey and Eskridge borrowed the term "fusion of horizons" from Hans-Georg Gadamer's theory of hermeneutics for interpreting text.[189] According to this theory, "[t]he historical text contains assumptions and 'preunderstanding' a 'horizon which is often quite different from the "horizon" of the later interpreter.'"[190] Thus, interpretation should be viewed "as an effort to seek common ground between the two often distant horizons."[191]

Last but not least, as once put by Professor Frickey, "it is essential to note what practical reasoning in federal Indian law is *not*. It is not blind acceptance of the Indian position in a case. Indeed, an appreciation for context, a critical assessment of asserted preunderstandings, and a fusing of horizons may work against Indian advocates in some circumstances."[192] In the next sections, after first considering text, purpose and congressional intent, the so-called foundational theories of statutory interpretation, I move to more contextual considerations such as the traditional understanding of tribal sovereignty, before ending with evolutive considerations.

B. Foundational Considerations: Text, Purpose, and Congressional Intent.

In the case of statutes silent about Indians, Indian nations could be included if the statute contained specific text to the effect that, "This Act shall be applied to absolutely everyone, located anywhere within the territorial borders of the United States." This can explain why reservation Indians are covered for most purposes under general federal tax laws.[193]

> making; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance of ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies . . . One significant consequence of thinking about interpretation in this way is that statutes have a dynamic quality; they can mean different things over time and across contexts and interpreters.

Id. at 1208.

188. *Id.* at 1231.

189. Eskridge & Frickey, *supra* note 25, at 346 (citing to Hans-Georg Gadamer theory of philosophical hermeneutics).

190. *Id.*

191. *Id.*

192. Frickey, *supra* note 32, at 1237.

193. *See, e.g.*, The Cherokee Tobacco Case, 78 U.S. 616, 621 (1870); Okla. Tax Comm'n v. United States, 319 U.S. 598, 606 (1943) (explaining that revenue laws are extended over Indian territories where they are exempt in other respects). *See also* United States Trust Co. v. Helvering, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest on implications.").

Inclusion can also be predicated on legislative history reflecting a congressional intent that tribes be covered by the legislation.[194] Finally, inclusion could also arguably be derived from the structure or purpose of the statute in cases where, for instance, excluding Indian nations would either make key provisions of the law unenforceable or defeat the very purpose of the law. This could help explain the inclusion of reservation Indians for the purpose of federal criminal laws applicable to anyone within the United States.[195] In most cases, however, such arguments will not be available or convincing in arguing for inclusion of Indian nations within general federal regulatory statutes.

C. Contextual Considerations: Historical Assumptions and Understanding About Tribal Sovereignty and Statutes Abrogating that Sovereignty.

The relevant "context" here is the place of Indian nations within the legal and political system of the United States as well as the exercise of tribal sovereign powers which may conflict with the requirements mandated in some of the general federal regulatory laws. "Context" for the purpose of practical reasoning can be both the historical context as well as the current one. So on one hand, one can look at the historical context concerning the position of Indian nations at the time the legislation was enacted. Under this analysis, one would analyze what the legislators thought about Indian nations at the time the statute was enacted. On the other, one should also look at the current political and legal context. Here, one would look at the current understanding of the place of Indian nations within our legal and political system. Because Professor Frickey once wrote that "*practical reason* asks the questions relevant to understanding and reconstructing the legal treatment of tribal Indians as they are situated today,"[196] it would seem that while the historical context at time of passage is certainly not irrelevant, the current political and legal understanding of Indian nations as they are today is more important.

It seems clear that the assumptions and understandings of legislators before 1870 was that Indian nations were outside the political system of the

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194. Phillips Petroleum, 803 F.2d 545 (10th Cir. 1986); *see also* notes 175–80 for further discussion.

195. *See* United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) (applying the Organized Crime Control Act to illegal gambling conducted by Indians inside an Indian reservation).

196. Frickey, *supra* note 32, at 1240.

United States and therefore congressional legislation did not include them unless they were specifically mentioned.[197] That was because until 1871, the United States related with tribes mostly by signing treaties with them.[198] However, legislation enacted during the Allotment Era could arguably carry the opposite understanding since the purpose of the policy was to assimilate Indians into the mainstream of American society.[199] However, the Allotment Era ended in the late 1920s. It seems that most of the federal regulatory acts at issue in this article can be described as labor legislation enacted in the wake of the New Deal. As such they are contemporaries to the Indian Reorganization Act of 1934 (IRA).[200] The IRA put an end to the Allotment Era and endorsed a policy of government to government with Indian tribes.[201] One of IRA's principal policy was the revitalization of tribal governments.[202] Thus, it can be assumed that the New Deal Congress was in favor of protecting and promoting tribal self-government. It is highly unlikely, therefore, that such Congress would have interfered with tribal sovereign rights in such an underhanded manner as imposing a federal regulatory regime preempting tribal power without so much as mentioning Indian nations in such legislation.

Part of the historical "assumptions and understandings" concerning interpretation of statutes affecting the rights of Indian nations are the various canons of statutory interpretations that are peculiar to the field of federal Indian law.[203] One of them is that treaties and statutes are to be

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197. *See generally* Elk v. Wilkins, 112 U.S. 94, 122–23 (1884) (holding that unlike others non-citizens born in the United States, such as African American slaves, the Fourteenth Amendment of the Constitution did not make Indians born on Indian reservations citizens).

198. *See* Act of March 3, 1871, 16 Stat. 263 (codified as amended at 25 U.S.C. § 71 (2012) (prohibiting the making of any further treaties with Indian nations).

199. The Allotment Era started around 1871, the year Congress enacted a law putting an end to treaty making with Indian tribes (16 Stat. 544, codified at 25 U.S.C. 71), but it went into full force with the enactment of the General Allotment Act of 1887, also known as the Dawes Act. The purpose of the Act was to break up the tribally owned land base by giving an 80 to 160-acre allotment to every member of the tribe and selling the remaining lands on the reservation to non-Indians through the Homestead Acts. For further analysis, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1 (1995).

200. Also known as the Wheeler-Howard Act, 48 Stat. 984–88, codified as amended at 25 U.S.C. §§ 452–454 (2012).

201. For more background information on the IRA, see Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. L. REV. 189 (2001).

202. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 79–84 (Nell Jessup Newton et al. eds., 2012).

203. *See* Frickey, *supra* note 32, at 1228 ("In practical reasoning, canons can serve a critical interpretive role. They constitute a shorthand method of identifying the relevant

liberally construed with ambiguous provisions construed to the Indians' benefit.[204] This canon was initially only applied to treaty interpretation but was later extended to statutes affecting or dealing with Indians.[205] As mentioned above, the Tenth Circuit in *Pueblo of San Juan* applied this Indian canon of statutory interpretation to a statute that was not enacted with Indians in mind, let alone enacted for their particular benefit.[206] The Supreme Court has not directly addressed whether the Indian canons could be applied beyond Indian-specific statutes because most cases involve with statute specifically enacted for the benefit of Indians or for the regulation of Indian affairs. Furthermore, in many cases, the Court avoids the issue altogether by not finding any ambiguity generating the use of the canons, when in fact ambiguity there was.[207] In a thorough and comprehensive article, Professor Bryan Wildenthal made some convincing arguments why the Indian canons should apply to federal laws of general applicability.[208] Among other things, he noted that at least three Supreme Court cases, *Iowa Mutual v. LaPlante*,[209] *Merrion v. Jicarilla Apache Tribe*,[210] and *United States v. Dion*, [211] had applied such canons to laws of general applicability.

The Court has many times endorsed the statement that the Indian canons were "rooted in the unique trust relationship between the United states and the Indians."[212] So perhaps, the more cogent argument against applying the Indian canons to general federal statutes is that if the reason for the canons is the existence of a trust relationship between the United States and the Indian nations, the canons should only be applied to statutes

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public law tradition.").

204. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (pointing out that one of the canons of statutory interpretation of Indian law is that statutes are to be liberally construed in favor of Indians).

205. *See* Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) (restating the deeply rooted principle that statutes should be construed liberally in favor of Indians).

206. For the opposite view *see* San Manuel Bingo v. NLRB, 475 F.3d 1306, 1312 (2007) (refusing to apply the Indian canons to federal statutes of general applicability).

207. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) (interpreting IGRA as clearly allowing federal taxation of some tribal gaming over a forceful dissent by Justice O'Connor who would have applied the Indian canons).

208. Bryan H. Wildenthal, *Federal Labor Laws, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007).

209. 480 U.S. 9, 17–18 (1987).

210. 455 U.S. 139, 149–52 (1982).

211. 476 U.S. 734, 739 (1986).

212. Oneida Cnty. v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Montana v. Blackfeet Tribe 471 U.S. 759, 766 (1985).

enacted pursuant to that trust relationship. In other words, the canons should only be applicable to statutes enacted for the benefit of Indian tribes or concerning the regulation of Indian affairs. The mistake in this conclusion has its roots in an erroneous or simplistic understanding about the nature of the trust responsibility.

As originally conceived by Chief Justice Marshall, the ultimate reason for the trust, and therefore the Indian canons, is not the protection of individual Indians as incompetent wards of the government.[213] The reason for the trust is the protection of Indian nations as domestic dependent nations.[214] Because the Indian canons are derived from the trust, the reason for their existence, therefore, is the protection of the right of these domestic dependent Indian nations to exercise their sovereign rights of self-government. Thus, no one would argue that the Indian canons should be applicable to all general federal laws such as a general criminal statute being applied to individual Indians or to a statute with no implications for tribal self-government, such as for instance, a statute governing how anyone should go about doing business with the Defense Department. However, a general federal statute silently preempting the exercise of tribal sovereign rights is another matter.

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213. This later understanding of the trust doctrine was introduced during the Allotment Era. *See* United States v. Kagama, 118 U.S. 375 (1886) United States v. Sandoval, 231 U.S. 28, 45 (1913) (bringing up the question of whether the United States should treat Indians as wards).

214. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (examining the unique relationship between the United States government and Indian nations and noting that they are domestic dependent nations); Worcester v. Georgia, 31 U.S. 515, 582 (1832) (noting that while every nation is somewhat dependent on the nations that surround it they are still separate communities). For an eloquent argument interpreting the jurisprudence of Chief Justice Marshall as using canons of statutory and treaty interpretation to protect tribal sovereignty within the structure of the United States Constitution see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393–417 (1993).

D. Evolutive Considerations and Fusion of Horizons.

1. Current Assumptions and Understanding Concerning Abrogation of Inherent Tribal Sovereignty.

a. Current Congressional Policies.

One could argue that the last piece of congressional legislation which abrogated some inherent powers possessed by Indian tribes was the Indian Civil Rights Act of 1968, since the Act mandated application of most of the rights contained in the Bill of Rights to tribal governments.[215] Since then, congressional legislation has either been supportive of tribal self-government,[216] or relaxed some previously imposed restrictions.[217] Other acts confirmed,[218] or even arguably expanded the sovereign powers of Indian Tribes.[219] Some may argue that the Indian Gaming Regulatory Act (IGRA),[220] restricted tribal authority by mandating that tribes enter into compacts with states before conducting casino-type gaming activities. However, in reality, a lot of gaming activities were already prohibited or severely restricted on Indian reservations pursuant to federal law.[221]

Therefore, it can be concluded that there is absolutely nothing in the record of Congress or congressional history which indicates that if given

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215. 25 U.S.C. §§ 1301–1303 (2012).

216. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (facilitating and encouraging tribal self-government); *see also* Tribal Self-Governance Act, Pub. L. No. 103-413, 108 Stat. 4250 (1994) (same); Indian Financing Act, Pub. L. No. 93-262, 88 Stat. 77 (1974) (same).

217. *See* Tribal Law and Order Act of 2010, P.L. 111-211, Title II, 124 Stat 2261, Indian Mineral Development Act of 1982, Pub. L. No. 97-382, 96 Stat. 1938 (1982) (allowing Indians to enter into agreements regarding the disposition of their mineral resources).

218. *See* 25 U.S.C. § 1301 (2012) (affirming tribal criminal jurisdiction over non-member Indians); 25 U.S.C. § 1304(b)(1) (2012) (affirming Indians' special domestic violence criminal jurisdiction over all persons); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 120 (providing, under certain conditions, tribes criminal jurisdiction over all persons committing crimes involving domestic violence).

219. *See* Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (establishing standards for foster care placement with the intention of not breaking up Indian families).

220. 25 U.S.C §§ 2701–2721 (2012).

221. *See* Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 96 (2010) (pointing out that many Indians opposed IGRA because it would curtail control but in reality federal government already controlled these activities through other legislation).

the choice, Congress would overwhelmingly approve legislation amending these federal laws of general applicability to include Indian tribes, thereby abrogating or preempting tribal powers. In fact, if Congress felt strongly about including the tribes under these acts, it would have already amended these acts to preempt tribal power. The fact that, with a couple of minor exceptions,[222] it has done nothing indicates that Congress is, at best, neutral on this issue. There have been some proposed amendments to grant Indian tribes the same kind of exemptions enjoyed by other governmental organizations but so far, the organized labor lobby has prevented enactment of any such amendments.[223]

b. Supreme Court Precedents.

A major criticism of the approaches adopted in all the circuits except for the Tenth Circuit in *Pueblo of San Juan* is that they do not require clear indication of congressional intent to abrogate tribal sovereign powers and in doing so ignore the Supreme Court's jurisprudence concerning congressional abrogation of tribal sovereign rights. As stated in a recent Supreme Court decision: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority. As dependents, the tribes are subject to plenary control by Congress . . . and yet they remain separate sovereigns pre-existing the Constitution. Thus, unless and until Congress acts, the tribes retain their historic sovereign authority."[224]

Concerning abrogation of tribal sovereign immunity from suits, the Supreme Court continues to uphold the language in the landmark decision in *Santa Clara Pueblo v. Martinez*,[225] to the effect that "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[226] That language was recently reaffirmed in *Michigan v. Bay*

222. *See* Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(32) (2012) (exempting only tribal agencies that conduct governmental functions); Worker Adjustment and Retraining and Notification Act, 29 U.S.C. § 2101(a)(1), (7) (2012) (seeming to exempt all tribally operated institutions).

223. The latest effort is the Tribal Labor Sovereignty Act of 2015, S. 248, which was reported out of the Senate Indian Affairs Committee on September 10, 2015. S. REP. NO. 114-140 (2015). For a description of other failed efforts see Guss, *supra* note 34, at 1651–52.

224. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014).

225. *See Santa Clara Pueblo*, 436 U.S. 49, 72 (1978) (holding that the sovereign immunity of the Pueblo from suit had not been abrogated in the Indian Civil Rights Act of 1968).

226. *Id.* at 59.

Mills,[227] where the Court held that nothing in the IGRA expressly abrogated the tribe's sovereign immunity for allegedly conducting gaming on non-Indian lands.[228] Therefore, the state of Michigan could not sue the tribe in the instant case.[229] In explaining the normative reason why it adopted a position requiring clear evidence of congressional intent to divest tribes of sovereign immunity, the Court stated "[w]e ruled that way for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether and how to limit tribal immunity. The special brand of sovereignty the tribes retain . . . rests in the hands of Congress."[230]

Requiring clear evidence of congressional intent to abrogate tribal sovereign rights beyond sovereign immunity from suits was recognized in *Merrion v. Jicarilla Apache Tribe*,[231] where the Supreme Court had to decide whether a couple of federal statutes as well as national energy policies implicitly preempted the tribe's ability to tax oil and gas producers operating pursuant to tribal leases on the reservation. The Court first remarked that the Tribe had the inherent power to impose its severance tax pursuant to either its power of self-government or its power to exclude.[232] After quoting language from an earlier case to the effect that "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,"[233] the Court stated that "petitioners can cite to no statute that specifically divests the Tribe of its power to impose the severance tax on their mining activities."[234] The Court concluded that because it could find no "clear indications" that Congress implicitly divested the tribe of its power to impose the tax, the Federal Government

227. 134 S. Ct. 2024, 2031 (2014) ("The baseline position, we have often held, is tribal immunity; and "[t]o abrogate such immunity, Congress must 'unequivocally' express that purpose.") (citing C&L Enter. v. Citizen Band, 532 U.S. 411, 418 (2001)) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

228. *Id.* at 2032–33.

229. The Court held that IGRA abrogated the tribe's immunity for gaming conducted illegally on Indian lands but the gaming here was not conducted on Indian lands as such lands are defined in IGRA.

230. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2037 (2014) (emphasis added).

231. 455 U.S. 130 (1981).

232. *See id.* at 137, 144 (noting that the power to tax is a fundamental attribute of sovereignty).

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

234. *Id.* at 151.

had not divested the Tribe of its inherent authority to tax mining activities on its land.[235]

Merrion was followed by *Iowa Mutual Insurance Co. v. LaPlante*, where the petitioner insurance corporation argued that the grant of diversity jurisdiction to federal courts in 28 U.S.C. § 1332 overrode the federal policy requiring some lawsuits arising on lands arguably under tribal jurisdiction to be first filed in tribal courts.[236] The Court disagreed, stating that it did not "read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty. . . . The diversity statute 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."[237]

In conclusion, current Supreme Court jurisprudence indicates that clear indication of congressional intent is required before tribal sovereign rights are interfered it. This indicates that the Tenth Circuit approach as applied in *Pueblo of San Juan* is more consistent with Supreme Court jurisprudence. In the next section I ask pragmatic questions in order to reconcile the decision to interpret legislative silence as not abrogating tribal sovereign rights with current public norms.

2. Reconciliation of the Interpretation with Current Public Norms.

a. Are There any Reasons to Privilege Specific "Treaty" Rights over Other Specific Tribal Rights?

As mentioned earlier, the *Coeur d'Alene* court recognized a second exception to the *Tuscarora* general presumption of applicability when it stated that, "A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if . . . the application of the law to the tribe would 'abrogate rights guaranteed by

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235. *Id.* at 152. The Court also commented that even if there was some "ambiguity on this point, the doubt would benefit the Tribe, '[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" (quoting from White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980)).

236. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 11 (1987).

237. *Id.* at 17. The Court also remarked that "The original statute did not manifest a congressional intent to limit tribal sovereignty . . . Congress has amended the diversity statute several times since the development of tribal judicial systems, but it has never expressed any intent to limit the civil jurisdiction of the tribal courts." *Id.* at 17–18.

treaties.'"[238] In such treaty cases, the Ninth Circuit does require the same clear indication of congressional intent that the Tenth Circuit requires for abrogation of any sovereign right. In this section, I argue that there are no reasons to treat abrogation of tribal sovereign rights any differently than abrogation of specific treaty rights. In other words, both should demand clear indication of congressional intent.

A year after the *Coeur d'Alene* decision, the Supreme Court addressed whether a general federal regulatory statute had abrogated a treaty right in *United States v. Dion*.[239] The issue in *Dion* was whether the Eagle Protection Act (EPA) applied to reservation Indians so as to prohibit them from hunting eagles without complying with the EPA's restrictions. The Court started its analysis with the observation that,

> All parties to this litigation agree that the treaty rights reserved by the Yankton included the exclusive right to hunt and fish on their land. As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress.[240]

After recognizing that the Court's cases for finding abrogation of Indian treaty rights had at times used different language, the Court announced that, "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[241] In *Dion*, the Court found such clear evidence of congressional intent from the fact that the EPA allowed the Secretary of the Interior to issue permits to Indians for the purpose of taking eagles for religious purposes.[242]

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238. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (2005). For a recent use of the treaty exception to avoid applying a law of general applicability, see the NLRB opinion in *Chickasaw Nation*, holding that a treaty clause granting the Chickasaw Nation the right to be secure from all laws except those passed by Congress under its authority over Indian Affairs, required clear evidence of congressional intent before the NLRA could be applied to the tribe. 362 N.L.R.B. No. 109, 2015 WL 3526096 (2015).

239. 476 U.S. 734 (1986).

240. *Id.* at 737–38.

241. *Id.* at 739–40.

242. As stated by the Court,

> Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. 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

Since then, the question has been whether the *Coeur d'Alene* "treaty" exception as supplemented by *Dion*'s "clear evidence" test is applicable to all "rights" that can be implied from the creation of a reservation, or whether such special treatment is only applicable to the abrogation of a specific kind of treaty rights such as hunting rights. This Article takes the position that although the Supreme Court in *Dion* talked in terms of a "treaty" right to hunt, that was only because the Yankton Sioux reservation happened to have been set aside by treaty. In fact, its holding is applicable to all reservations, those set aside by treaties and those that are not.[243] First, the *Dion* Court emphasized that "These [hunting] rights need not be expressly mentioned in the treaty."[244] Secondly, although the Court relied on the existence of a religious purpose exemption for Indians to find clear evidence that Congress actually considered the treaty right and decided to abrogate it, the legislative history the Court relied on emphasized the need for a religious purpose exemption for tribes such as the Hopi, Zuni, and several Pueblos in the Southwest, which in fact do not have treaties with the United States.[245]

One circuit, the Eighth, has agreed with this position even though it has otherwise generally followed the Ninth Circuit's intramural aspect approach. For instance, in *EEOC v. Fond du Lac*,[246] where the issue was the applicability of the Age Discrimination and Employment Act to Indian tribes, the Eighth Circuit took the position that the *Tuscarora* general rule "does not apply when the interest sought to be affected is a specific right reserved to Indians. Specific Indian rights will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent."[247] After first specifying that "[a]lthough the specific Indian right involved usually is based upon a treaty, such rights may also be based upon statutes, executive agreements, and federal common law,"[248] the Eighth Circuit

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> statute, but by authorizing the Secretary to issue permits to Indians where appropriate. The legislative history of the statute supports that view.

Id. at 740.

243. Reservations can also be set aside by Executive Order or by congressional legislation. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 190–93 (Nell Jessup Newton et al. eds., 2012).

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

245. *See id.* at 741–42 (noting the religious significance of the bald eagle to many Indians).

246. 986 F.2d 246 (8th Cir. 1983).

247. *Id.* at 248 (citations omitted).

248. *Id.* at 248 (emphasis added).

remarked that "[i]nherent 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. Accordingly, the Band has the implicit right to self-governance."[249] The court took the position that because the Indian tribes' implicit right of tribal self-governance could be such a "specific right," whenever a general federal regulatory law interfered with tribal self-government the law was not applicable to Indian tribes absent clear evidence of congressional intent to apply it. Although sounding different, *Fond du Lac* is not an outright rejection of the basic *Coeur d'Alene* approach.[250] What is different about the case is that it seems to merge the treaty right with the intramural aspect exception and in doing so, allows "specific rights" to tribal self-government to be treated as if they were specific treaty rights under *Coeur d'Alene*. Thus, under *Fond du Lac*, interference with the specific right of tribal self-government, even if that right is not specifically mentioned in a treaty, would require clear indication of congressional intent before the general federal law could be applied to the tribe.

Much of the debate concerning interpretation of the treaty right exception has centered on a related issue: whether a treaty reserving the reservation "for the exclusive use" of the tribe and its members is *specific* enough to come under the treaty exception. Such treaty right to "exclusive

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249. *Id.* (citations omitted).

250. Thus, in holding that the ADEA was not applicable in this case, the *Fond du Lac* court emphasized that because it was a tribal member who was suing his own tribe for age discrimination under the ADEA "this dispute involves a strictly intramural matter." *Id.* at 249. In other words, the case would have come the same way using *Coeur d'Alene*'s "purely intramural" exception. The question left open in the Eighth Circuit after *Fond du Lac*, was what would have happened if the person bringing the law suit under the ADEA had not been a member of the tribe. That question was answered at least at a district court level within the Eighth Circuit in *NLRB v. Fortune Bay Resort Casino*. 688 F.Supp.2d 858 (D. Minn. 2010). The *Fortune Bay* court acknowledged that under *Fond du Lac* "unless there is clear and plain congressional intent to the contrary, a statute that is silent about its applicability to tribes is presumed **not** to apply to tribes if the statute abrogates or limits 'specific Indian rights.'" *Id.* at 867. However, the court concluded that it was "unclear in this case whether the NLRA affects rights specifically reserved to the Band." *Id.* at 869. A reading of the opinion reveals that the district court relied heavily on the D.C. Circuit's *San Manuel* opinion as demonstrating that "facts relating to a tribal enterprise's impact on interstate commerce, particularly where the tribal enterprise's activities involve significant numbers of non-Indians, are relevant to the consideration of whether the NLRA applies to the tribal enterprise." *Id.* at 870. After observing that the tribal casino employed a substantial number of non-Indians and had a substantial non-Indian customer base, the court concluded, "It appears that Fortune Bay's 'activities are commercial in nature—not governmental. Moreover, the operation of a casino . . . can hardly be described as vital to the tribes' ability to govern themselves or as an essential attribute of their sovereignty.'" *Id.*

use" explicitly recognizes the tribal right to exclude non-members but it also implicitly recognizes the lesser right to condition entry into the reservation by regulating all those who enter the reservation.[251] The narrow "specific" right approach seems to have originated in *United States v. Farris*,[252] the same case which gave birth to the *Coeur d'Alene* doctrine. After enunciating the treaty exception to the *Tuscarora* principle, the *Farris* court stated that "[t]his rule applies only to subjects specifically covered in treaties, such as hunting rights . . . To bring the special rule into play here, general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient, although such language does suffice to oust state jurisdiction."[253]

The Ninth Circuit has continued to follow this approach. For instance, in *Department of Labor v. Occupational Safety and Health Review Commission* where the issue was the application of OSHA to a tribally owned enterprise,[254] one of the issues was whether the tribal treaty rights required the government to come up with clear evidence of congressional intent to apply the law to the tribe. Because the treaty created the reservation for the exclusive use of the tribe and specified that "nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent," the Occupational Safety and Health Commission concluded that the treaty "evidence an intent of the parties to exclude the white man from the reservation lands for any and all purposes except as therein enumerated."[255] Therefore the Commission concluded that the application of OSHA to the tribe would infringe on the tribe's right to exclusive use. Relying on *Farris*, and another Ninth Circuit precedent,[256] the Ninth Circuit disagreed, stating,

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251. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. The power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct."); *see also* Kaighn Smith, *Tribal Self-Determination and Judicial Restraint*, 2008 MICH. ST. L. REV. 505, 517–28 (2008) (discussing the authority of Indian tribes to condition the presence of nonmembers for personal gain).

252. 624 F.2d 890 (9th Cir. 1980).

253. *Id.* at 893.

254. *See* Dep't of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 183 (9th Cir. 1991) (determining whether OSHA infringed on treaty rights in the operation of a saw mill owned and operated by the tribe).

255. *Id.* at 184–85.

256. *See* Confederated Tribes of Warm Springs v. Kurtz, 691 F.2d 878, 883 (9th Cir. 1982) (applying federal tax laws to the tribe).

> on the facts before us, we do not find the conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the Occupational Safety and Health Act to be sufficient to bar application of the Act to the Warm Springs mill. The conflict must be more direct to bar the enforcement of statutes of general applicability.[257]

Perhaps not surprisingly, most circuits that have favored the Ninth Circuit's narrow definition of tribal sovereignty to purely intramural aspects have also adopted the restrictive "specific" right approach to the treaty exception. Thus in *Smart v. State Farm*, where the issue was application of ERISA to a healthcare center run by the Chippewa Tribe,[258] the Seventh Circuit took the position that, "Simply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian Tribe."[259] After stating, "The critical issue is whether application of the statute would jeopardize a right that is secured by the treaty,"[260] the court stated, "The treaties to which the Chippewa Tribe are signatory do not delineate specific rights . . . The Chippewa treaties simply convey land within the exclusive sovereignty of the Tribe."[261] More recently, the Sixth Circuit in *Soaring Eagle Casino v. NLRB*,[262] after acknowledging a split between the Ninth and Seventh Circuits on one side and the Tenth on the other, recognized that the question

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257. Dep't of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 186–87 (9th Cir. 1991). In a more recent decision, the Ninth Circuit reaffirmed its narrow specific right approach to the treaty exception and held that the treaty at issue in the case could not prevent the application of the Fair Labor Standards Act on the reservations because,

> Here, there is nothing in the Medicine Creek Treaty directly on point discussing employment or wages and hours. Moreover, the language regarding freeing all slaves is not so ambiguous that it could be construed to cover the payment of required wages. Therefore, the application of the overtime provisions of the FLSA to a retail business such as Baby Zack's does not impact the tribe's agreement that it would free all slaves.

Solis v. Matheson, 563 F.3d 425, 435 (2009).

258. *See* Smart v. State Farm Ins. Co., 868 F.2d 929, 30 (7th Cir. 1989) (presenting the question of whether ERISA applies to a health center owned and operated by the Chippewa).

259. *Id.* at 934.

260. *Id.* at 935.

261. *Id.* at 935. Thus, the court concluded that there was not a "single specific treaty or statutory right that would be affected by application of ERISA." *Id.* The Seventh Circuit has reaffirmed its "specific right" approach in a more recent case, *Menominee Tribal Enterprises v. Solis*, where it held that a OSHA was applicable to a tribal enterprise located on the reservation. 601 F.3d 669 (7th Cir. 2010).

262. 791 F.3d 648 (6th Cir. 2015).

was a close one,[263] but nevertheless concluded that a treaty right to exclude was "insufficient to bar application of federal regulatory statutes of general applicability,"[264] at least in the absence of a "direct conflict between a specific right or exclusion and the entry necessary for effectuating the statutory scheme."[265]

In a pre-*Dion* case decided two years after *Farris*, the Tenth Circuit in *Donovan v. Navajo Forest Products,*[266] came up with a different take on the treaty exception and held that OSHA was not applicable to a tribally owned enterprise because the treaty of 1868 with the Navajo Nation provided that only designated federal officials could enter the Navajo reservation.[267] Because applying OSHA would have allowed federal employees to enter the reservation at will for the purpose of enforcing the statute,[268] the court stated

> The Navajo Treaty recognizes the Indian sovereignty of the Navajos and their right of self-government . . . Application of OSHA to NFPI would constitute abrogation of Article II of the Navajo Treaty relating to the exclusion of non-Indians not authorized to enter upon the Navajo Reservation. Furthermore, it would dilute the principles of tribal sovereignty and self-government recognized in the treaty.[269]

After asserting that, "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 and legislative history,"[270] the

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263. *See id.* at 660–61 (discussing the different approaches by the circuits).

264. *Id.*

265. *Id.*

266. 692 F.2d 709, 710–11 (10th Cir. 1982).

267. Article II of the treaty, states as follows:

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

Treaty with the Navaho, 15 Stat. 667 (1868).

268. *See* 29 U.S.C.A. § 657 (a)(1) (2012)

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

269. Donovan v. Navajo Forest Prods., 692 F.2d 709, 712 (1982).

270. *Id.*

court took the position that the Supreme Court in *Merrion v. Jicarilla Apache Tribe*,[271] had abrogated the *Tuscarora* principle.[272]

The Tenth Circuit followed *Navajo Forest Products* in a post *Dion* case, *EEOC v. Cherokee Nation*,[273] where the issue was application of the ADEA to the Cherokee Nation. Describing *Navajo Forest Products* as having also been based on the principle that application of OSHA "would dilute the principles of tribal sovereignty and self-government recognized in the treaty," the court concluded that the "the treaty-protected right of self-government" would also be affected here.[274] As stated by the court, "The treaty's language clearly and unequivocally recognizes tribal self-government with only two express exceptions, neither of which is at issue in this case . . . Consequently, we hold that ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government."[275]

This kind of thinking was more recently reflected by Judge Helen White's concurring and dissenting opinion in the *Soaring Eagle Casino* case.[276] Relying on the canons of Indian treaty interpretation,[277] Judge White disagreed with

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271. 455 U.S. 130 (1982). *See supra* notes 231–35 and accompanying text for a discussion of *Merrion*.

272. The court stated that

> *Merrion*, in our view, limits or, by implication, overrules *Tuscarora*, at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora* that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

Donovan, 692 F.2d at 713.

273. 871 F.2d 937, 938 (10th Cir. 1989) (stating that the court will follow the reasoning in *Navajo Forest Products*).

274. *Id.* Article V of the Treaty of New Echota, December 29, 1835, 7 Stat. 478, provides in part:

> The United States hereby covenant and agree . . . [to] secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them; provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade intercourse with the Indians.

(emphasis added).

275. *Cherokee Nation*, 871 F.2d at 938.

276. *See* Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 675–76 (6th Cir. 2015) (White, J., concurring in part dissenting in part) (stating that the canons of interpretation require statutes to be interpreted in the light most favorable to Indians).

277. *See id.* at 656 (majority opinion)

> These canons include '(1) how the words of the treaty were understood by the

the majority and argued that a treaty clause reserving tribal land for the exclusive use of the tribe was precise enough to require clear indication of congressional intent before it can be considered abrogated.[278] According to her, the tribal members who signed a treaty giving up a huge portion of their tribal territory "would not have understood their right to the exclusive use, ownership, and occupancy of their remaining land to be limited, non-specific, or subject to regulation regarding the conditions the Tribe might impose on those it permitted to enter."[279]

In conclusion, the normative reasons for the Dion rule do not justify requiring more specificity among treaty rights. Nor do they justify treating abrogation of tribal sovereign rights not mentioned in treaties any different than the ones specifically mentioned in treaties. As explained above, the Indian canons of statutory construction are derived from the trust responsibility the United States has towards Indian nations.[280] The protection of tribal sovereign rights is as, if not more, essential to the survival of Indian nations as domestic dependent nations than the protection of specific treaty rights.[281] In the process of upholding a tribe's inherent sovereignty to tax non-members, the Court once remarked that the fact that the reservation of a tribe "was established by Executive Order rather than by treaty does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created."[282] Similarly, the fact that a tribal sovereign right was not specifically reserved in a treaty should not affect the analysis when it comes to determining if a general federal regulatory law should be applied to the tribe. So, one can conclude

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> Indians rather than their critical meaning should form the rule of construction . . . (2) The language used in treaties with the Indians *shall never be construed to their prejudice* . . . (3) Congress may abrogate Indian treaties but it must clearly express its intent to do so.'

(internal citations omitted).

278. *Id.* at 676 (White, J., concurring in part dissenting in part).

279. *Id.*

280. *See supra* notes 203–14 for further discussion. On the extent and evolution of the trust doctrine, see Mary Christina Wood, *Indian Land and the Promise of Native American Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–523 (1994).

281. *See* Mary Christina Wood, *Protecting the Attributes of Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 177 (1995) ("[A]ny treaties, statutes, and judicial opinions recognize the self-governance of Indian nations as integral to sovereignty.").

282. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 133 n.1 (1982). The Court has also stated in *Arizona v. California* that whether a reservation was created by treaty or Executive Order is irrelevant when it comes to whether the reservation possessed federally reserved water rights under the *Winters* doctrine. 373 U.S. 546, 597–98 (1963).

that all "rights" possessed exclusively by Indian tribes that are implicit in the creation of an Indian reservation require "clear evidence" of Congressional intent under Dion before they are considered abrogated. Inherent sovereign tribal rights to govern the reservation are such rights and should come under the Dion principle.

One of the reasons for requiring clear evidence of congressional intent before finding a congressional abrogation of treaty rights is that since 1903, the Court has taken the position that Congress has plenary power to abrogate such treaty rights.[283] In return for granting such power, the judicial branch developed canons of treaty interpretation peculiar to the field of federal Indian law.[284] Similarly, however, the Court has also continued to hold that Congress has almost "plenary" authority in regulating tribal activities within Indian reservations.[285] The Court did not have to do this since, arguably, the only power Congress has today over Indian tribes under the Constitution is to "regulate Commerce . . . with the Indian Tribes."[286] In return for this grant of what some may call, an extra-constitutional power,[287] the courts developed special canons of statutory construction peculiar to the field of federal Indian law.[288] One of these canons is that in return for allowing Congress to terminate or abrogate inherent tribal

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283. *See* Lonewolf v. Hitchcock, 187 U.S. 553, 565–56 (1903) (noting that Congress has plenary authority over tribal relations).

284. *See* Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 424 (1993).

285. *See* Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.") For critical evaluations of congressional plenary power, see Nell Jessup Newton, *Federal Power Over Indians: Its Source, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199–228 (1984) (discussing the history and implications of the plenary power of Congress); and Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 39–94 (1996) (same).

286. U.S. CONST. art. I, § 8, cl. 3. The power was at least implicitly recognized as early as *Worcester v. Georgia*, although at that time, Congress still used the war power, and the treaty power in addition to the Commerce Clause power. 31 U.S. 515, 559 (1832). For a comprehensive analysis about the original intent on the reach of the Indian commerce power, *see generally* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

287. *See, e.g.*, Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115 (2002) ("It is simply that there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty.").

288. *See* Frickey, *supra* note 284, at 424 (discussing the canons of interpretation).

sovereign powers at will, the Court will require clear evidence that Congress actually intended such termination.[289]

b. Are There Legitimate Reasons to Treat Tribal Governmental Institutions Differently Than Similar State, County, or Municipal Institutions?

An opinion by Judge Posner for the Seventh Circuit which refused to apply the FLSA to a tribal law enforcement organization,[290] represents a good example of a decision not inconsistent with practical reasoning. In adopting what could be called a "comity" approach, Judge Posner engaged in an innovating exercise of statutory interpretation. After remarking that even literalists "do not interpret statutes literally when doing so would produce a result senseless in the real world,"[291] he concluded that a literal reading of the FLSA would create an absurd distinction between tribal police and all other law enforcement agencies. After acknowledging that the statutory silence concerning Indians created an ambiguity in the FLSA, Posner stated, "We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemptions to Indian police . . . more important no reason has been suggested to us."[292] After determining that the warden-policemen of the Tribal Great Lakes Fish and Wildlife Commission were exercising the kind of regulatory functions over both Indians and non-Indians that was part of the "inherent sovereignty" of the tribe,[293] the court took the position that out of notions of comity the same exemptions available to state police departments should be extended to tribal ones.[294] The court held that when it comes to the FLSA, "tribal employees exercising governmental functions that when exercised by employees of other governments are given special consideration by the Act are exempt."[295]

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289. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (finding that Congress must make it their clear intention to intrude on tribal sovereignty); *see also supra* notes 203–14 and accompanying text for discussion.

290. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 496 (7th Cir. 1993).

291. *Id.* at 494.

292. *Id.*

293. *Id.*

294. *Id.* at 495.

295. *Id.* At first reading, one could easily believe that Judge Posner was devising a new approach to determine the applicability of silent federal regulatory statutes to Indian tribes, an approach one could describe as the "comity" approach. However, Judge Posner did

It is noteworthy that this comity approach was recently endorsed by the Senate Committee on Indian Affairs which voted in favor of reporting the Tribal Labor Sovereignty Act of 2015 (TLSA).[296] The TLSA would amend the National Labor Relations Act to make sure that tribes and tribally owned businesses are treated the same under the law as other governmental employers. The idea of comity was also recently used by Justice Sotomayor in her concurrence in *Michigan v. Bay Mills Indian Community*.[297] At issue in the case was whether Michigan could sue the tribe for allegedly opening an illegal gaming operation on tribal fee land located off the reservation. The tribe argued that it had sovereign immunity from such lawsuits. Joining the majority's ruling in favor of the tribe, Justice Sotomayor added another reason for upholding tribal sovereign immunity:

> Principles of Comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct . . . We have held that Tribes may not sue States in federal court, including for commercial conduct that chiefly impacts Indian reservations . . . As the principal dissent observes, "Comity is about one sovereign respecting the dignity of another." This Court would hardy foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing states for commercial activity on Indian lands.[298]

The comity principle reflected in both Judge Posner and Justice Sotomayor's opinions is consistent with an argument I have made elsewhere that Indian nations have been incorporated into the political and legal system of the United States as governmental entities under a third sphere of sovereignty.[299] As such, there should be a presumption that Indian

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acknowledge that the Seventh Circuit in *Smart v. State Farm* had already adopted the *Coeur d'Alene* approach but distinguished the case by stating that the employees there "were engaged in routine activities of a commercial service character." *Id.* In a later decision, Judge Posner further confirmed his understanding that the *Coeur d'Alene* approach was the law in the Seventh Circuit. *See* Menominee Tribal Enter. v. Solis, 601 F.3d 669 (7th Cir. 2010) (stating that his previous decision in *Great Lakes Fish Commission* was based on *Coeur d'Alene's* "intramural aspect" exception).

296. *See* S. Rep. No. 114-140, at 4 (2015) (amending the NLRA to include businesses owned and operated by Indians on Indian land).

297. See Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring) ("[T]he question whether to confer sovereign immunity is not a matter of right but rather one of 'comity.').

298. *Id.* at 2041–42.

299. Alex Tallchief Skibine, *Constitutionalism, Federal Common Law and the Inherent Powers of Indian Tribes*, 39 AM. IND. L. REV. 77, 102–07 (2014).

nations are treated the same as other non-federal governmental entities existing within the United States.

IV. Conclusion

For unknown reasons, in enacting many general federal regulatory laws, Congress by its silence failed to indicate whether the activities of Indian nations inside their own reservations should be covered under such legislation. In deciding whether such laws should include Indian nations, most courts have used an unjustified presumption to include them but have made exceptions when application of the law inside Indian reservations would interfere with certain aspects of tribal sovereignty or "specific" tribal treaty rights. After criticizing the various approaches developed in the Federal Circuit Courts of Appeals, this Article has advocated using practical reasoning as a theory of statutory interpretation in order to determine whether Indian nations should be covered under these general federal regulatory laws.

In doing so, the Article addressed the question of statutory applicability not by asking how important are the tribal sovereign rights being interfered with but how specific or clear Congress has to be before an intent to interfere with tribal sovereign rights can be found. In making such determinations, the Article also asked pragmatic questions and answered them by taking into consideration the status of Indian nations within our political, legal, and constitutional system. Thus, the Article has argued for clear indications of congressional intent before any tribal sovereign right is interfered with by a law of general applicability. Furthermore, when it comes to requiring clear indications of congressional intent, there are no reasons to distinguish between specific Indian treaty right and all other tribal sovereign rights inherent or implicit in the creation of Indian reservations. Finally, the Article argued that of all the circuits, the Tenth Circuit opinion in *Pueblo of San Juan* represents the more consistent approach with *Practical Reasoning*. The Article also endorsed what some have called a "comity" approach and concluded that when it comes to the implementation of many of these general federal regulatory laws, there is no reason to treat Indian nations differently than how other local governments are treated under those laws.