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Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in *Soaring Eagle Casino and Resort v. National Labor Relations Board*

Riley Plumer

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Introduction

On July 1, 2015, the United States Court of Appeals for the Sixth Circuit decided *Soaring Eagle Casino and Resort v. NLRB*.[1] The three-judge panel unanimously concluded that the National Labor Relations Act (NLRA),[2] a generally applicable federal statute,[3] should not apply to Indian tribes.[4] However, by a 2-1 vote, the court held that the NLRA would apply to the tribally-

†. J.D. Candidate 2017, University of Minnesota Law School. Special thanks to the editors and staff of *Law & Inequality* for their comments and critiques in writing this Article. I would also like to thank my parents, Joseph and Ramona Plumer, for their constant encouragement and belief that I can accomplish anything I put my mind to.

1. 791 F.3d 648 (6th Cir. 2015).

2. 29 U.S.C. §§ 151–169 (2012).

3. A generally applicable federal statute refers to a statute that appears to apply nationwide. Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, 62 FED. LAW. 64, 65 (Sept. 2015), http://hogenadams.com/wp-content/uploads/2012/11/FedLawer-Article.pdf; *see also* Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419 (2012). The NLRA prohibits "employers" from engaging in unfair labor practices and gives the National Labor Relations Board (NLRB) the authority to prevent such labor practices. *See* 29 U.S.C. §§ 152(1)–(2), 158(a), 160(a) (2012). The NLRA does contain an express exemption for federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines). 29 U.S.C. § 152(2) (2012). The NLRA, however, does not mention Indian tribes in either the statute's text or its legislative history. *Id.* For purposes of *Soaring Eagle*, the Saginaw Chippewa Tribe of Michigan and the NLRB agree that the "NLRA is entirely silent with respect to Indians and Indian tribes." *Soaring Eagle*, 791 F.3d at 658. Other courts have assumed or concluded that the NLRA is a statute of general applicability. *See* San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306, 1312 (D.C. Cir. 2007); NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 998 (9th Cir. 2003). *But see* NLRB. v. Pueblo of San Juan, 280 F.3d 1278, 1283 (10th Cir. 2000) (concluding that "the NLRA by its terms is not a statute of general application, it excludes states and territories").

4. *Soaring Eagle*, 791 F.3d at 669–70; *id.* at 675 (White, J. concurring and dissenting in part).

owned and operated casino by the Saginaw Chippewa Tribal Nation on reservation land.[5] The Sixth Circuit ultimately determined that it was bound by its earlier decision in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, which it decided twenty-two days earlier.[6]

In *Little River*, a Sixth Circuit panel concluded by a 2-1 vote that the tribal sovereignty of the Little River Band of Ottawa Indians did not preclude applying the NLRA to a tribally-owned casino located on reservation land.[7] The *Soaring Eagle* court declared that *Little River* was wrongly decided, and explained that "if writing on a clean slate," it would have instead followed Supreme Court precedent regarding the applicability of generally applicable laws to Indian tribes.[8] The *Soaring Eagle* court added that, if it was not bound by *Little River*, it would have held that the NLRA—which does not contain any congressional intent to apply to Indian tribes—should not apply to tribes.[9]

Following *Little River* and *Soaring Eagle*, the Little River Band of Ottawa Indians and the Saginaw Chippewa Tribal Nation petitioned to the Supreme Court of the United States to review the decisions.[10] The tribes asked the Court to overturn the Sixth Circuit's rulings and align the decisions with Supreme Court precedent.[11] However, the Supreme Court declined to grant review of the cases to address the question of whether the NLRB has authority to assert jurisdiction on reservation land and solicit tribal casino employees to join labor unions.[12]

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5. *Id.* at 662 ("[W]e must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino.").

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

7. *Id.* at 555 (holding that applying the NLRA to the Little River Band "does not undermine the Band's right of self-government in purely intramural matters, and we find no indication that Congress intended the NLRA not to apply to a tribal government's operation of tribal gaming . . . .").

8. *Soaring Eagle*, 791 F.3d at 670 ("[I]f writing on a clean slate, we would conclude that . . . the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino . . . .").

9. *Id.*

10. NLRB v. Little River of Ottawa Indians Tribal Gov't, 788 F.3d 537 (6th Cir. 2015), *petition for cert. filed*, (U.S. Feb. 12, 2016) (No. 15-1024); Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015), *petition for cert. filed* (U.S. Feb. 12, 2016) (No. 15-1034).

11. *Little River*, 788 F.3d 537, *petition for cert. filed* at 19; *Soaring Eagle*, 791 F.3d 648, *petition for cert. filed* at 15.

12. *See* NLRB v. Little River of Ottawa Indians Tribal Gov't, 788 F.3d 537 (6th Cir. 2015), *cert. denied*, (U.S. June 27, 2016) (No. 15-1024); Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015), *cert. denied* (U.S. June 27, 2016) (No. 15-1034).

Under longstanding principles of federal Indian law, the Supreme Court takes the position that Congress must clearly express its intent to limit tribal sovereignty or abrogate treaty rights.[13] The Supreme Court has consistently applied the clear statement rule to determine whether federal statutes apply to Indian tribes.[14] Under the Supreme Court's analysis, a federal statute that is silent on its application to Indian tribes cannot undermine or limit tribal sovereignty or authorize suit against Indian tribes.[15] The clear statement rule presumes that tribal sovereignty remains intact when a federal statute does not mention Indian tribes in its text or legislative history.[16] In this context, the Supreme Court interprets congressional silence to mean that tribal sovereignty is not abrogated.[17] Furthermore, the Court recognizes the unique nature of Indian tribes, and does not view tribes as private, voluntary organizations.[18] In 2014, the Supreme Court declared the clear statement rule as "an enduring principle of Indian law: Although Congress has plenary authority

13. *See, e.g.*, Elk v. Wilkins, 112 U.S. 94, 100 (1884) ("General acts of Congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them.").

14. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986) (stating that there must be "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"); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 173–74 (1999) (applying the test to find that the "Chippewa's usufructuary rights were not extinguished" because there was no "clear evidence" that Congress intended to abrogate the treaty rights); South Dakota v. Bourland, 508 U.S. 679, 687 (1993) ("Congress has the power to abrogate Indians' treaty rights . . . though we usually insist that Congress clearly express its intent to do so.") (citations omitted); Bryan v. Itasca Cty., 426 U.S. 373, 380–81, 392–93 (1976) (holding that an ambiguous federal statute did not grant the state of Minnesota the authority to collect tax on reservation land); Lone Wolf v. Hitchcock, 187 U.S. 553, 556, 566 (1903) (considering the ability of Congress to abrogate treaties with Indian tribes).

15. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.") (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982)).

16. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

17. *See Iowa Mut.*, 480 U.S. at 18.

18. *See Bryan*, 426 U.S. at 388; United States v. Mazurie, 419 U.S. 544, 557 (1975) (stating that Supreme Court decisions "establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations . . . .'").

over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."[19]

The Sixth Circuit's rulings in *Little River* and *Soaring Eagle* further widens a circuit split and conflicts with Supreme Court precedent on whether generally applicable federal statues, like the NLRA, apply to Indian tribes.[20] In *NLRB v. Pueblo of San Juan*, the Tenth Circuit Court of Appeals applied the clear statement rule to find that the NLRA did not prevent the Pueblo Tribe from applying its own "right-to-work law" on its own Indian reservation.[21] The Tenth Circuit explained that when "tribal sovereignty is at stake, the Supreme Court has cautioned that 'we tread lightly in the absence of clear indications of legislative intent'" to abrogate tribal sovereignty.[22]

The Sixth Circuit's ruling in *Soaring Eagle* relies on dictum to determine its outcome, and applying the NLRA to the Tribe is inconsistent with fundamental principles of tribal sovereignty.[23] The decision in *Soaring Eagle* complicates existing case law, and provides the Supreme Court with an opportunity to address the applicability of generally applicable federal statutes to Indian tribes.[24] In addition, the enactment of the Tribal Labor Sovereignty Act of 2015[25] by Congress, which would expressly

19. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031–32 (2014).

20. NLRB v. Little River of Ottawa Indians Tribal Gov't, 788 F.3d 537, 556 (6th Cir. 2015) (McKeague, J., dissenting); *see also* Intermill, *supra* note 3; Steve Biddle & Danielle Fuschetti, *The Sixth Circuit Extends the NLRA's Reach to Tribal-Owned Casinos*, LITTLER INSIGHT (July 7, 2015), https://www.littler.com/files/2015_7_insight_6th_circuit_extends_nlra_reach_tribal-owned_casinos.pdf (discussing the impact of the *Little River* and *Soaring Eagle* decisions and the need to clarify existing law on the issue); Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations Within the Reservation*, 2008 MICH. ST. L. REV. 505, 533–42 (2008) (discussing the circuit split in applying generally applicable federal labor and employment statutes to Indian tribes).

21. 276 F.3d 1186, 1191 (10th Cir. 2002).

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

23. Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648, 675 (White, J., dissenting).

24. Intermill, *supra* note 3; *see also* Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 530–31 (2007) ("Only an appeal to the Supreme Court would give th[e] Court the opportunity to rein in the Board and the lower courts."); Richard A. Duncan, Toni M. Everton & Thomas J. Posey, *A Look at 6th Circ[uit] Application of NLRA to Tribal Casino*, LAW360 (July 9, 2015, 10:20 AM), http://www.faegrebd.com/files/111300_A_Look_At_6th_Circ._Application_Of_NLRA_To_Tribal_Casino.pdf (stating that the circuit split on the issue of whether generally applicable statutes apply to tribes "appears ripe for Supreme Court review").

25. On November 17, 2015, the United States House of Representatives passed

exclude tribes from the NLRA's definition of employer, would also resolve the issue presented in *Soaring Eagle*.

The focus of this Article is on the proper application of the NLRA and other generally applicable federal statutes to Indian tribes. The analysis draws on case law discussing the unique status of Indian tribes within the United States and their longstanding relationship with the federal government. In this context, this Article evaluates the application of general federal statutes to Indian tribes and the issue of tribal sovereignty in deciding whether the NLRA should encompass tribally-owned and operated enterprises.

This Article argues that applying the NLRA to Indian tribes is inconsistent with fundamental principles of tribal sovereignty and Supreme Court precedent addressing the application of federal statutes to Indian tribes. This Article further argues that the decision in *Soaring Eagle* conflicts with laws promoting the self-government of Indian tribes. As a result, *Soaring Eagle* widens a circuit split on the correct approach to follow when interpreting the applicability of federal statutes to Indian tribes. Because of the circuit split and the existence of many other generally applicable federal statutes, which approach to follow when determining NLRA applicability to Indian tribes demands eventual Supreme Court review or Congressional implementation of an exception that expressly excludes tribes from the Act's application.

Part I provides a background on tribal sovereignty and inherent powers of Indian tribes. Part II proceeds in two parts. Section A discusses background on the NLRA. Section B discusses the varying approaches used by federal courts in applying generally applicable federal statutes to Indian tribes. Section B includes a discussion on Supreme Court precedent and application of its clear statement rule. Further, Section B argues that this is the correct approach courts should follow when applying generally applicable federal statutes to Indian tribes. In addition, this section includes a discussion of approaches followed by lower courts when facing the same issue. Finally, this section argues that the approaches followed by lower courts are misapplied, undermine sovereign powers possessed by tribes, and are

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H.R. 511, 114th Cong. § 2 (1st Sess. 2015), referred to as the Tribal Labor Sovereignty Act of 2015, which would expand the list of entities exempted from the NLRA's definition of "employer" by adding "any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands." 161 CONG. REC. H8260, H8272 (daily ed. Nov. 17, 2015).

inconsistent with Congress's plenary power over tribes. Part III describes the factual and historical background of the Saginaw Chippewa Indian Tribe of Michigan. Part IV discusses the Sixth Circuit's reasoning and ruling in *Soaring Eagle Casino and Resort v. NLRB*.

I. Tribal Sovereignty and the Unique Status of Tribes Within the United States

a. The United States Trust-Responsibility to Tribes

The issue of whether generally applicable federal statutes that do not explicitly mention tribes in their text or legislative history should apply to tribes is complicated by the historical relationship between the federal government and Indian tribes.[26] Before the formation of the United States, "tribes were self-governing sovereign political communities."[27] Through treaties, Indian tribes came under the power of the federal government.[28]

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26. *See* 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, 683–84 (1994); Ann Richard, *Application of the National Labor Relations Act and the Fair Labor Standards Act to Indian Tribes: Thwarting the Economic Self-Determination of Tribes*, 30 AM. INDIAN L. REV. 203, 205–07 (2005–2006) (describing the trust relationship between the United States and Indian tribes); Intermill, *supra* note 3, at 65 (arguing that the "trust-responsibility" doctrine and the plenary power doctrine create foundational inconsistencies for federal Indian law principles); Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and* NLRB v. San Manuel Band of Mission Indians, 43 IDAHO L. REV. 127, 134, 140–41 (2006); San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1056 (2004) (acknowledging that the Board's decision in ruling on whether the NLRA applies to tribes is "difficult because Indian tribes occupy a unique position in the Nation's political and legal history").

27. United States v. Wheeler, 435 U.S. 313, 322–23 (1978); McLanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) ("Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained . . . ."); Johnson v. M'Intosh, 8 (Wheat.) 543, 574 (1823) (stating that tribes' "rights to complete sovereignty, as independent nations, [are] necessarily diminished").

28. For a discussion on treaties between the United States and Indian tribes, see STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 45–54 (4th ed. 2012); *see also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW §§ 5.01–5.04 (2005); Anna Wermuth, *Union's Gamble Pays Off: In San Manuel Indian Bingo & Casino, The NLRB Breaks the Nation's Promise and Reserves Decades-Old Precedent to Assert Jurisdiction Over Tribal Enterprises on Indian Reservations*, 21 LAB. LAW. 81, 82–84 (2005) (discussing treaties between the federal government and Indian tribes during the 1800s).

In exchange for land, the federal government made promises to Indian tribes, including agreements to set aside reservation land for tribes' exclusive use, protection of tribal sovereignty, and preservation of the welfare of tribal members.[29] These considerations given by the United States to Indian tribes form the basis of the trust-responsibility doctrine that has been characterized as a guardianship over tribes.[30] In essence, this trust relationship imposes on the federal government the obligation to protect tribal property rights, preserve tribal self-governance, and provide services to Indian tribes.[31] The special relationship between Indian tribes and the United States is also grounded in longstanding Indian law principles.[32]

The Supreme Court has performed a significant role in defining the unique relationship between the United States and Indian tribes.[33] Although Indian tribes gave up their rights to the land they inhabited, the Supreme Court has explained that Indian tribes continue to exercise "inherent powers of a limited sovereignty."[34] In a series of cases decided by the Supreme Court in the 1820s and 1830s,[35] Chief Justice Marshall discussed the legal status of Indian tribes within the United States, which became a foundational framework for federal Indian law.[36] Justice

29. *See* PEVAR, *supra* note 28, at 46–47 (discussing exchanges between the United States and Indian tribes in the context of tribal treaties).

30. Limas, *supra* note 26, at 683–84 (discussing the "unique relationship between the federal and tribal governments."); Richard, *supra* note 26, at 205–07 (describing the trust relationship between the United States and Indian tribes).

31. *See* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW HORNBOOK 181–82 (2016).

32. *See* Julie Thompson, *Application of the National Labor Relations Act to Indian Tribes: Preserving Indian Self-Government and Economic Security*, 27 U. DAYTON L. REV. 189, 195–97 (2001) (discussing tribal sovereignty and the relationship between the federal government and Indian tribes); COHEN, *supra* note 28, § 5.04[4][a], at 418 ("One of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes."); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 35 (5th ed. 2009) ("Much of American Indian Law revolves around the special relationship between the federal government and the tribes.").

33. *See* CANBY, *supra* note 32, at 37–39 (discussing the evolution of the trust relationship between the federal government and Indian tribes).

34. United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)); *see also* United States v. Kagama, 118 U.S. 375, 381–82 (1886) (stating that although tribes no longer possess "full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations . . .").

35. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

36. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D.

Marshall characterized Indian tribes as "domestic dependent nations" that exercise inherent sovereign authority over their members and territories.[37]

In *Worcester v. Georgia*, Justice Marshall discussed Indian tribes' inherent right to tribal sovereignty.[38] The issue was whether the State of Georgia could impose its laws within the boundaries of the Cherokee reservation.[39] The Supreme Court ruled that Georgia could not subject the Cherokee people to its laws within the reservation lands because the laws were preempted by the sovereign-to-sovereign relationship that existed between Indian tribes and the federal government.[40] In his opinion, Justice Marshall stated:

> Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . . The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress.[41]

The Supreme Court continues to recognize the concept of inherent tribal sovereignty.[42] The inherent powers of tribes are not powers delegated by Congress, but instead powers possessed "by implication as a necessary result of their dependent status."[43]

L. REV. 627 (2006) (explaining that the three opinions by Justice Marshall, referred to as the "Marshall Trilogy" identify the boundaries of Indian law as they remain today); Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

37. *Cherokee Nation*, 30 U.S. at 2. In *Cherokee Nation*, the Supreme Court held that the Cherokee Nation could not be regarded as a "foreign state" within the meaning of the United States Constitution. *Id.* at 20.

38. *Worcester*, 31 U.S. at 580.

39. *Id.* at 516.

40. Justice Marshall concluded that Indian tribes are "nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries . . . ." *Id.* at 557.

41. *Id.* at 559–61.

42. *See* South Dakota v. Bourland, 508 U.S. 679, 698 (1993) (Blackmun, J., dissenting) ("It is a fundamental principle of federal Indian law that Indian tribes possess inherent powers of a limited sovereignty which has never been extinguished.") (quoting United States v. Wheeler, 435 U.S. 313, 322 (1978)).

43. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

As a sovereign government, the primary source of tribal rights is its right to govern itself.[44] The tribal right of self-government encompasses several functions, including: the power of tribes to determine their own form of tribal government,[45] the power to determine tribal membership,[46] the power to enact laws[47] and enforce laws within their forum,[48] the power to tax,[49] the power to establish a tribal court system,[50] and the power to exclude non-members from tribal lands.[51] In addition to these inherent tribal powers, Indian tribes retain the power of sovereign immunity from lawsuits, which enables tribes to avoid becoming a party to litigation without their consent or authorization by Congress.[52] Furthermore, the Supreme Court has explained that although the plenary power doctrine grants Congress the authority to authorize lawsuits against Indian tribes, a waiver of sovereign immunity must be clearly and unequivocally expressed.[53]

Collectively, these inherent tribal powers enable Indian tribes to govern their own internal affairs and exercise authority

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44. For a general discussion on tribal sovereign rights, see Limas, *supra* note 26, at 685–90 (1994); *see also* COHEN, *supra* note 28, at 211–22 (discussing the extent of tribal powers over their members and territory); Smith, *supra* note 20, at 510–13 (explaining attributes of tribal sovereignty and inherent powers of tribes).

45. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (explaining that tribes possess the power to determine their form of self-government, subject to restrictions placed on tribes by Congress).

46. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981) (stating that tribes "retain their inherent power to determine tribal membership . . . ").

47. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 54 ("[Tribes] have power to make their own substantive law in internal matters . . . .") (citations omitted).

48. *See, e.g.*, 18 U.S.C. § 1153 (2012) (providing that tribes have criminal jurisdiction over tribal members that commit "major crimes" on reservation lands); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978) (explaining that tribes have criminal jurisdiction over non-members).

49. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (describing tribes' power to tax as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenue for its essential services . . . .").

50. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987) (recognizing that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged this development") (citations omitted).

51. *See, e.g.*, *Montana*, 450 U.S. at 566–67 (holding that tribes may prohibit or place restrictions on nonmembers from hunting or fishing on land owned by Indian tribes or held in trust by the federal government).

52. *See, e.g.*, Kiowa Tribe of Okla. v. Mfg Tech., Inc., 523 U.S. 751 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

53. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978).

over their members and territory.[54] Additionally, these attributes of tribal sovereignty play an important role in promoting efforts to further tribal economic development and self-determination.[55] Through the operation of tribally-owned enterprises located on reservation lands, Indian tribes work to establish an economic means of supporting their tribal governmental affairs and becoming more self-sufficient sovereign nations.[56] The Supreme Court has noted that "Congress has consistently reiterated its approval of the immunity doctrine" through authorizing limited classes of lawsuits against tribes, which "reflect[s] Congress' [sic] desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[57]

b. The Plenary Power Doctrine

The plenary power doctrine appears to contradict the United States' trust-responsibility to commit its national honor[58] in fulfilling treaty responsibilities with tribes.[59] The United States Constitution grants Congress general powers to legislate in regards to Indian tribes.[60] Under the plenary power doctrine, the federal government can assert essentially unlimited authority over Indian tribes subject to the Constitution and its trust-responsibility to the tribes.[61] The Supreme Court has consistently held that although Indian tribes have inherent sovereign powers,

54. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (explaining that the sovereignty retained by tribes encompasses "the power of regulating their internal and social relations . . .") (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

55. Limas, *supra* note 26, at 690.

56. *Id.* at 691.

57. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991) (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

58. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011) (quoting Heckman v. United States, 224 U.S. 413, 437 (1912)).

59. *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 551–56 (1987).

60. United States v. Lara, 541 U.S. 193, 200 (2004).

61. The Court in United States v. Wheeler, 435 U.S. 313, 323 (1978) stated:

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

Congress has authority to limit, modify, or eliminate the powers of self-government which the tribes otherwise possess.[62]

The trust-responsibility doctrine and the plenary power doctrine create tension for courts to address the question of whether generally applicable federal statutes apply to Indian tribes.[63] Although tribal treaties are the supreme law of the land[64] and the United States is under a trust-responsibility to tribes, Congress's power to enact federal laws that preempt tribal law has the effect of undermining tribal sovereignty.[65] For instance, applying the NLRA to tribally-owned enterprises located on reservation land abrogates both the tribes' right to enact rules and the right to exclude individuals from reservation land.[66] The right of self-government would be abrogated by preventing tribes from applying their own labor codes or from exercising jurisdiction to resolve labor dispute in their own tribal court systems.[67] The right to exclude nonmembers would be impaired by denying tribes the authority to prohibit labor organizers from entering tribal lands.[68]

II. Application of Federal Laws of General Applicability to Indian Tribes

a. Background on the National Labor Relations Act

Like most federal labor and employment statutes,[69] the NLRA is silent with respect to its application to Indian tribes.[70]

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62. *See*, *e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 382 (1896) (describing the power of tribal self-government limited by the "paramount authority of [C]ongress").

63. *See* Intermill, *supra* note 3, at 65 (describing the tension between the trust-responsibility and plenary power doctrines as "the root of the question" of whether courts choose to apply generally applicable federal statutes to Indian tribes).

64. U.S. CONST. art. VI, cl. 2.

65. *See* Intermill, *supra* note 3, at 65.

66. *Id.* at 66; *see also* Brief for Chickasaw Nation as Amicus Curiae Supporting Petitioner, Saginaw Chippewa Indian Tribe of Mich. v. NLRB, Docket No.13-01569 (6th Cir. May 3, 2013), (Nos. 13-1569 and 13-1629), 2013 WL 10180847, at *27 ("Applying the NLRA to Tribes . . . would abrogate their Treaty-protected rights of self-government by subjecting government operations to the continuing consent of their employees' bargaining representatives.").

67. Intermill, *supra* note 3, at 66.

68. *Id.*

69. *See, e.g.*, Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 440–64 (2008); Thompson, *supra* note 32, at 191 (explaining that "several federal statutes that regulate many aspects of the employment relationship" do not expressly mention Indian tribes within the language of the statute).

70. *See, e.g.*, NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 542 (6th Cir. 2015) ("The NLRA is a statute of general applicability and is

The NLRA ensures employees the right to self-organize, to form, join, or assist labor organizations, to bargain collectively, and to engage in other activities.[71] Additionally, the NLRA prohibits an "employer" from engaging in unfair labor practices.[72] Under the NLRA, the term "employer" is defined as not including the "United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ."[73] The NLRA grants the NLRB the power to enforce and carry out its policies.[74]

The Supreme Court has ruled that the NLRA permits States to regulate their labor relationships with public employees.[75] In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court addressed the issue of whether the NLRA applied to schools operated by church institutions.[76] The Court determined that the NLRB's jurisdiction is limited in the absence of a clear expression of congressional intent.[77] The Court refused to construe the NLRA to apply to church-operated institutions in the absence of an affirmative intent by Congress.[78]

b. Conflicting Approaches to Applying Generally Applicable Federal Statutes to Indian Tribes

The Supreme Court has been reluctant to construe federal statutes to apply to Indian tribes without Congress's clear intent to do so.[79] This standard ensures that a law generally will not interfere with tribes' inherent right to self-government unless Congress specifically intended to interfere in tribal affairs.[80] Furthermore, the Supreme Court's approach closely adheres to the plenary power doctrine.[81] Some courts facing the same issue have

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silent as to Indian tribes.").

71. 29 U.S.C. § 159 (2012).

72. 29 U.S.C. § 152(2) (2012).

73. *Id.*

74. *See* 29 U.S.C. § 160(a) (2012) (stating that the NLRA empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce").

75. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181 (2007) (citing 29 U.S.C. § 152(2)).

76. 440 U.S. 490 (1979).

77. *Id.* at 500.

78. *Id.* at 506–07.

79. *See, e.g.*, United States v. Dion, 476 U.S. 734, 740 (1986) (noting that Congressional intent to abrogate Indian treaty rights was "strongly suggested" by the statute at issue).

80. *Id.*

81. *See* United States v. Lara, 541 U.S. 193, 200 (2004) (explaining that

applied an approach that begins with the presumption that generally applicable federal statutes should be applied to Indian tribes.[82] Under this approach, courts are willing to accept the proposition that the NLRA applies to Indian tribes without congressional intent.[83]

Part (i) of this section discusses the Supreme Court's approach in applying federal statutes to Indian tribes, and argues that this precedent properly respects tribes' sovereign rights. Part (ii) discusses lower courts reliance on dictum in presuming that generally applicable federal statutes should apply to Indian tribes. Part (iii) discusses the *Tuscarora-Coeur d'Alene* framework that has led courts to find that generally applicable federal statutes apply to Indian tribes.

i. The Clear Statement Rule

The Supreme Court has consistently applied the clear statement rule to determine that Congress may abrogate the inherent sovereign rights of tribes, but its intent to abrogate tribal rights must "be clear and plain."[84] Under this rule, the Supreme Court is "extremely reluctant to find congressional abrogation of treaty rights"[85] and it does not construe statutes to abrogate treaty rights in a manner inconsistent with the intent of Congress.[86] In various decisions, the Supreme Court has applied the clear statement rule to determine whether certain federal statutes abrogated tribal rights.[87]

Congress has been granted broad general powers by the Constitution to legislate with respect to Indian tribes, and the Supreme Court has consistently described those powers as "plenary and exclusive").

82. *E.g.* Donovan v. Coeur D'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

83. *See, e.g.*, San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007) (holding that the NLRA applied to a casino owned and operated by the San Manuel Band of Serrano Mission Indians on its own reservation).

84. *See, e.g.*, Elk v. Wilkins, 112 U.S. 99, 100 (1884) ("General acts of [C]ongress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Williams v. Lee, 358 U.S. 217, 221 (1958) (concluding that a clear statement of congressional intent is necessary to permit state civil or criminal jurisdiction over non-Indian reservation activity); County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 269 (1992).

85. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968)).

86. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) (explaining that the Supreme Court "decline[s] to construe the Termination Act as a backhanded way [of] abrogating the hunting and fishing rights of these Indians.").

87. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("The power

In *United States v. Dion*, the Supreme Court unanimously concluded that in order to limit tribal sovereignty there must be evidence that Congress actually considered the conflict between its proposed action on the one hand and Indian treaty rights on the other, and then chose to resolve the conflict by abrogating the treaty.[88] In *Dion*, the Court addressed the question of whether the Eagle Protection Act[89] abrogated tribal members' implied tribal treaty rights to hunt eagles on reservation land.[90] The case involved a member of the Yankton Sioux Tribe who was prosecuted for killing four bald eagles while hunting on the Tribe's reservation land in South Dakota.[91] The Court noted that it has long required Congress to abrogate Indian treaty rights in a clear and plain manner because "treaty rights are too fundamental to be easily cast aside."[92]

The *Dion* court found compelling evidence to suggest that Congress intended to abrogate Indian treaty rights to hunt eagles.[93] The Court explained that the Act's legislative history discussed the significance of eagle feathers for Indian religious ceremonies.[94] The text of the statute also provided an express provision authorizing "the Secretary of the Interior to permit the taking, possession, and transportation of eagles 'for the religious purposes of Indian tribes . . . .'"[95] The Court construed this provision to mean that only the Secretary of the Interior had the authority to authorize Indians to hunt eagles, and the statute otherwise prohibits the hunting of eagles by Indians.[96] This

exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."); South Dakota v. Bourland, 508 U.S. 679, 687 (1993) ("Congress has the power to abrogate Indians' treaty rights . . . though we usually insist that Congress clearly express its intent to do so.").

88. 476 U.S. 734, 740 (1986).

89. 16 U.S.C. § 668(a) (1972).

90. *Dion*, 476 U.S. at 738.

91. *Id.* at 735.

92. *Id.* at 738.

93. *Id.* at 739–40 ("[W]here the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.'") (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 223 (1982)).

94. *Id.* at 744.

95. *Id.* at 742.

96. *Id.* at 740 ("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

reliable evidence in the statute's text and legislative history were sufficient to support the determination that Congress, through the Eagle Protection Act, intended to abrogate tribal hunting rights within.[97]

In *NLRB v. Pueblo of San Juan*,[98] the United States Court of Appeals for the Tenth Circuit applied the clear statement rule to resolve the issue of whether the NLRA precluded the Pueblo Tribe from applying its own government ordinance prohibiting union agreements.[99] The Tenth Circuit determined that the Pueblo's right-to-work ordinance was an exercise of its tribal sovereign authority, and that the NLRA would be construed to apply to the Tribe only if Congress intended.[100] Because neither the language of the statute nor its legislative history mentions Indian tribes, the Tenth Circuit determined that congressional silence is not sufficient to undermine Indian tribes' inherent authority to govern their own territory.[101] The court further stated that the proper approach to follow is that congressional silence cannot serve to divest tribal power to govern their territory.[102]

Similarly, in 2014, the Supreme Court reaffirmed the clear statement rule in *Michigan v. Bay Mills Indian Community* to find that the Indian Gaming Regulatory Act (IGRA) did not abrogate tribal sovereign immunity.[103] The IGRA expressly abrogates tribal sovereign immunity under certain circumstances: suits by states "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . ."[104] The Supreme Court addressed the issue of whether the State of Michigan had the authority to bring suit against the Tribe's gaming activities in violation of the Tribal-State compact taking

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recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.").

97. *Id.* at 739.

98. 276 F.3d 1186, 1200 (10th Cir. 2002).

99. *Id.* at 1192 ("In order to find preemption of tribal laws . . . it is necessary to determine whether Congress intended to divest the San Juan Pueblo of its power as a sovereign to pass right-to-work laws.").

100. *Id.* at 1195 (holding that the court does not "lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so").

101. *Id.* at 1196.

102. *Id.*

103. 134 S. Ct. 2024, 2033 (2014).

104. 25 U.S.C. § 2710(d)(7)(A)(ii) (2012).

place off-reservation.[105] The Bay Mills Indian Community purchased off-reservation land, and constructed and operated a casino on this land.[106] The Supreme Court held Congress did not authorize the State of Michigan to bring this specific class of suits against the Tribe because the Tribe's gaming operations were not on Indian lands.[107] The Supreme Court explained that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."[108] In conclusion, the Supreme Court refused to abrogate tribal sovereignty even though construing the statute as written resulted in an apparent anomaly that permits "a State to sue a tribe for illegal gaming inside, but not outside, Indian country."[109]

Dion and *Bay Mills* properly recognize and respect fundamental federal Indian law principles.[110] The decisions illustrate the Supreme Court's "deference to Congress's plenary and exclusive role in imposing limits on tribal sovereignty."[111] The Supreme Court's clear statement rule, used to test whether Congress abrogates tribal sovereignty reflects tribes' unique legal status within the United States, and respects their inherent right to self-government.[112] Furthermore, these decisions show the extent of evidence necessary to persuade the Supreme Court that Congress intended to impose limits on tribal sovereignty.[113] The rule ensures that without reliable evidence of Congressional intent to justify abrogating tribes' sovereign rights, the court must presume that Indian tribes continue to retain authority over their reservations.[114]

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105. *Bay Mills Indian Cmty*., 134 S. Ct. at 2029.

106. *Id.*

107. *Id.* at 2032.

108. *Id.* at 2039.

109. *Id.* at 2033.

110. *See, e.g.*, Fletcher, *supra* note 69, at 436–38 (discussing the Supreme Court's approach in determining when Congress intended to abrogate tribal rights).

111. NLRB v. Little River Band of Ottawa Indian Tribal Gov't, 788 F.3d 537, 563 (6th Cir. 2015) (McKeague, J., dissenting).

112. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 546 (1974) (acknowledging the "unique legal status of tribal and reservation-based activities").

113. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .").

114. Williams v. Lee, 358 U.S. 217, 222 (1959).

ii. *Tuscarora* Dictum

Some lower courts have relied on a single statement made by the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nations*[115] to presume that generally applicable federal statutes should apply to Indian tribes.[116] In *Tuscarora*, the Supreme Court addressed the issue of whether the Federal Power Act (FPA) authorized the taking of off-reservation land owned by the Tuscarora Tribe in fee simple.[117] To resolve the issue, the Court had to determine whether the FPA covered Indian tribes.[118] The Court applied the clear statement rule to find that Congress intended the FPA to cover lands owned by Indian tribes because it "defines and treats with lands occupied by Indians."[119] Ultimately, the Supreme Court determined that because the Tuscarora Tribe owned the fee land, the lands did not satisfy the statutory definition of "reservation," and thus the federal government's taking of the land was permitted.[120]

In a statement not necessary to its holding and widely considered dictum,[121] the Court declared 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."[122] The cases the Court cited to support this statement

115. 362 U.S. 99 (1960).

116. For a discussion on the Supreme Court's reasoning and outcome in *Tuscarora*, see Wildenthal, *supra* note 24; Wermuth, *supra* note 28, at 88–107; Intermill, *supra* note 3, at 66–67; William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365, 1379 (1995).

117. *Tuscarora*, 362 U.S. at 110 (describing the issue in the case as involving "whether the Tuscarora lands covered by the Commission's license are a part of a 'reservation' as defined and used in the Federal Power Act . . .").

118. *Id.*

119. *Id.* at 118.

120. *Id.* ("[The FPA] does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.").

121. *See* NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 557 (6th Cir. 2015) (McKeague, J., dissenting) (stating that the *Tuscarora* statement "was not essential" to the Court's holding and "is in the nature of dictum and entitled to little precedential weight"); Mitchell Peterson, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S.D. L. REV. 631, 642–44 (2002); San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1071 n.61 (2004) (stating that the "language from *Tuscarora* is mere dictum premised on inapposite authority."); Maureen M. Crough, *A Proposal For Extension of the Occupational Safety and Health Act to Indian-Owned Businesses on Reservations*, 18 U. MICH. J.L. REF. 473, 486 (1985); COHEN, *supra* note 28, at 412 ("[The] statement was not part of the Court's holding or necessary to it, because ample evidence supported the shaky foundation.").

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

involved income tax statutes that subjected "every individual" to income tax and did not exempt "either Indians or any other persons from their scope."[123] Because the Tuscarora Indian Nation owned the land at issue in fee simple and it was not within the meaning of a "reservation," it was not necessary for the Supreme Court to analyze whether Congress intended the FPA to encompass Indian tribes.[124] Despite making this statement, the Supreme Court did not overrule its longstanding rule that general acts of Congress should not be applied to Indian tribes unless there is a clear expression to the contrary.[125] Lower courts have relied on the Court's statement, however, made in the context of tax exemptions to create a presumption in favor of applying generally applicable federal laws to Indian tribes.[126]

iii. The *Tuscarora-Coeur d'Alene* Rule

In 1985, twenty-five years following the Supreme Court's decision in *Tuscarora*, the United States Court of Appeals for the Ninth Circuit decided *Donovan v. Coeur d'Alene Tribal Farm*.[127] The Ninth Circuit adopted a new approach in applying generally applicable federal statutes to Indian tribes.[128] The court began its analysis by adopting the *Tuscarora* presumption that the Occupational Safety and Health Act (OSHA) applied to a tribally-owned and operated enterprise.[129] The Ninth Circuit also agreed with the Tribe that the "language from *Tuscarora* is dictum," but the court stated that "it is dictum that has guided many of our decisions."[130] To support this statement, the court cited to cases involving individual Indians, not Indian tribes.[131] The Ninth Circuit further stated that it had not adopted the clear statement

123. *See id.* at 116–17.

124. *See* NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 558 (6th Cir. 2015) (McKeague, J., dissenting) ("The *Tuscarora* Court did not have to define the scope of the Federal Power Commission jurisdiction in the face of congressional silence . . . .").

125. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024. 2033 (2014).

126. *See, e.g.*, COHEN, *supra* note 28, at 128–29; D. Michael McBride, III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of* San Manuel Band of Indians v. National Labor Relations Board, 40 J. MARSHALL L. REV. 1259, 1287 (2007) (describing courts' willingness to apply federal labor and employment laws to tribes in the absence congressional intent).

127. 751 F.2d 1113 (9th Cir. 1985).

128. *See* Intermill, *supra* note 3, at 67 (discussing the Ninth Circuit's adoption of the *Tuscarora-Coeur d'Alene* framework and its influence on other courts).

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

130. *Id.*

131. *Id.* at 1115–16.

rule.[132] Instead, under the Ninth Circuit's framework, a federal law, if silent on the issue of applicability to Indian tribes, will not apply to them," unless one of three exceptions is met:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ." In any of these situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.[133]

The Ninth Circuit's decision in *Coeur d'Alene* has established a strong presumption that generally applicable federal statutes should be applied to Indian tribes.[134] The Second, Seventh, Ninth, and Eleventh circuits have applied the *Tuscarora-Coeur d'Alene* framework to determine whether generally applicable federal statutes apply to Indian tribes.[135] Accordingly, courts have found that some federal labor and employment statutes should be applied to Indian tribes.[136] This analytical framework has also led the NLRB to alter its stance on the applicability of the NLRA to Indian tribes.[137]

In 2004, in *San Manuel Indian Bingo and Casino v. NLRB*, the San Manuel Indian Bingo and Casino brought suit after the Board overturned its own precedent by ruling that the Casino, a tribally-owned casino on reservation land, was subject to the NLRB's jurisdiction under the NLRA.[138] Originally in 1976, the

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132. *Id.* at 1116 (stating that it had not "adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them").

133. *Id.* (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1985)).

134. *See* Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 706 (2005) (arguing that the Ninth Circuit's decision in *Donovan v. Coeur d'Alene* "establishes a rebuttable presumption stacked against tribal interests").

135. *See* Intermill, *supra* note 3; Duncan, *supra* note 24.

136. *See* Wildenthal, *supra* note 24, at 455; Singel, *supra* note 134, at 691 (stating that the *Tuscarora-Coeur d'Alene* framework has been applied by six courts of appeals without review by the Supreme Court).

137. *See* San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1055 (2004).

138. The Board stated:

> For almost 30 years, the Board has wrestled with the question of whether the Act applies to the employment practices of this Nation's Indian tribes. During that time, the Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy. As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses. This case requires the Board to accommodate Federal labor policy and Federal Indian policy in deciding whether to assert jurisdiction, under the Act, over tribal enterprises.

Board in *Fort Apache Timber Co. v. NLRB* first ruled that the tribally-owned enterprises located on Indian reservations were implicitly exempt as "employers" under the NLRA's coverage.[139] Relying on established Indian law principles, the Board held that a timber company owned by the White Mountain Apache Tribe on reservation land was immune from "federal intervention, unless Congress has specifically provided to the contrary."[140] In reaching its decision, the Board noted that a tribal council on a reservation should be treated as a government by Congress and courts.[141] In other decisions, the Board ruled that tribally-owned enterprises operated on reservation lands were "governmental entities" that were "political subdivisions," exempt from the NLRA's definition of "employer."[142]

The Board in *San Manuel* reversed its prior decisions in finding for the first time that, as a statute of "general application," the NLRA should be applied to Indian tribes.[143] The Board adopted the proclaimed "well established" *Tuscarora* presumption to determine that Congress intended the NLRA to have the "broadest possible breadth permitted under the Constitution."[144] The Board reasoned that because the NLRA did not expressly exclude tribes from its coverage, Congress decided to encompass Indian tribes within the meaning of the Act.[145] The Board applied the *Tuscarora-Coeur d'Alene* framework to determine whether tribal sovereignty precluded the application of the NLRA to tribes.[146] The Board considered whether the assertion of jurisdiction over the Tribe would "touch exclusive rights of self-governance in purely intramural matters" similar to "tribal membership, inheritance rules, and domestic relations."[147] The Board found that because the casino substantially affected interstate commerce and many of the casino's employees were not

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Id. at 1056. *See also* McBride & Court, *supra* note 126 (discussing the *San Manuel* decision); Singel, *supra* note 134; Wildenthal, *supra* note 24.

139. Fort Apache Timber Co. v. NLRB, 226 N.L.R.B. 503, 506 (1976) (concluding that the "Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act").

140. *Id.*

141. *Id.*

142. *See* Singel, *supra* note 134, at 694 (discussing the Board's reluctance to apply the NLRA to Indian tribes in several cases).

143. *See* San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055, 1063 (2004).

144. *Id.*

145. *Id.* at 1063.

146. *Id.*

147. *Id.*

tribal members, the operation of a casino was not an exercise of self-governance.[148] Ultimately, the Board determined that it could properly assert jurisdiction over the Tribe's casino on reservation land.[149]

In 2007, the United States Court of Appeals for the D.C. Circuit affirmed the Board's decision in *San Manuel* by finding that applying the NLRA to the Tribe was justified.[150] The D.C. Circuit noted that the Supreme Court's statement in *Tuscarora* is "possibly dictum."[151] Furthermore, the court stated that the Board's decision in *San Manuel* failed to consider the Tribe's interests in exercising its essential self-government functions, including its power to regulate labor relations and power to exclude non-members from its lands.[152] Following this decision, the NLRB continued to assert jurisdiction over Indian tribes, including the Saginaw Chippewa Indian Tribe of Michigan.[153]

III. Background on the Saginaw Chippewa Indian Tribe of Michigan

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian tribe that resides on the Isabella Indian Reservation in Mount Pleasant, Michigan.[154] Through treaties with the federal government, the Tribe ceded land to the United States.[155] In an 1855 treaty, the bands of the Saginaw, Swan Creek, and Black River ceded lands to the United States.[156] Under another treaty in 1864, additional lands reserved to the bands under the 1855 treaty were relinquished.[157] Under the 1864 treaty, the Isabella Reservation was designated "for the exclusive use, ownership, and occupancy" of the Saginaw Chippewa Indians.[158] These treaties grant the Tribe the authority to govern

148. *Id.*

149. *Id.*

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

151. *Id.* at 1311.

152. *Id.*

153. *See, e.g.*, McBride & Court, *supra* note 126, at 1264 ("Under the authority of the *San Manuel* decision, the Board has asserted jurisdiction and summarily denied challenges of two tribal governments to the application of the Act on Indian lands.").

154. Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648, 651 (6th Cir. 2015).

155. *Id.*

156. Treaty with the Chippewa of Saginaw art. 3, Aug. 2, 1855, 11 Stat. 633.

157. Treaty with the Chippewa of Saginaw art. 2, Oct. 18, 1864, 14 Stat. 657.

158. *Id.*

itself and exclude individuals from the lands located within the reservation.[159] The Tribe currently has over 3,000 members.[160] The Tribe makes decisions through a twelve-member tribal council, which is elected by the tribal members.[161] The tribal council governs and manages economic development for the Saginaw Tribe, and enacts laws applicable to tribal members.[162]

In 1993, the Saginaw Tribe entered into a gaming compact with the state of Michigan to conduct gaming operations on the Isabella Reservation in accordance with the Indian Gaming Regulatory Act (IGRA).[163] As required by IGRA, the Saginaw Tribe uses its gaming revenue for self-governance, to discharge essential government functions, and to provide economic opportunities for tribal members and others.[164] Similar to many Indian tribes across the country, gaming continues to function as an important economic development tool for the Saginaw Tribe.[165] The casino generates approximately $250 million in gross annual revenues by drawing in roughly 20,000 customers each year.[166] The Soaring Eagle Casino and Resort produces the Tribe's primary income source, with its gaming operations generating approximately ninety percent of its overall income.[167] The Tribe's gaming revenue is used primarily to fund its 37 governmental departments and 159 tribal programs.[168] Some of the Tribe's departments include health administration, social services, tribal police and fire departments, utilities, a tribal court system, and education for tribal members.[169]

Soaring Eagle Casino employs approximately 3,000 employees, seven percent of whom are tribal members.[170] The Saginaw Tribe adopted and implemented an employee handbook, which includes a no-solicitation policy that prohibits casino employees from engaging in solicitation related to union

159. *See Soaring Eagle*, 791 F.3d at 651 ("It is undisputed that the Treaties preserved the Tribe's right to exclude non-Indians from living in the territory.").
160. *Id.* at 652.
161. *Id.*
162. *Id.*
163. 25 U.S.C. § 2701 (2012).
164. *See* 25 U.S.C. § 2702 (2012).
165. COHEN, *supra* note 28, at § 12.02(1).
166. *Soaring Eagle*, 791 F.3d at 652.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

activities.[171] The dispute in *Soaring Eagle* arose when the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (Union) filed a complaint against the Tribe with the NLRB.[172] The complaint was filed on behalf of a non-tribal member employee of the Soaring Eagle Resort and Casino.[173] The complaint alleged that the Tribe violated § 8(a)(1) of the NLRA because of its a no-solicitation policy and banning of employee discussion of union activities at the casino.[174] The Tribe moved to dismiss the complaint for lack of jurisdiction contending that the NLRA did not apply to the Tribe's activities as a sovereign.[175] Additionally, the Tribe argued that the Board could not assert jurisdiction over the Soaring Eagle Casino located on the Isabella Reservation.[176]

On March 26, 2012, in an administrative adjudication, the NLRB held that the NLRA applied to the Tribe's gaming operations and, as a result, it concluded that it had jurisdiction to review the merits of the complaint.[177]

IV. Analysis of *Soaring Eagle Casino and Resort v. National Labor Relations Board*

a. The Sixth Circuit's Reliance on Little River *to Find that the NLRB Has Jurisdiction on Indian Reservation Land*

In *Soaring Eagle*, the Sixth Circuit affirmed the NLRB's order prohibiting the Saginaw Chippewa Indian Tribe from applying its own tribally-enacted no-solicitation policy against employees at the Soaring Eagle Casino and Resort.[178] The Sixth Circuit indicated that it was bound by its earlier decision in *Little River* even though it did not agree with the majority's adoption of the *Tuscarora-Coeur d'Alene* framework or its analysis of tribal sovereignty.[179]

In *Little River*, the majority affirmed the NLRB's decision that the NLRA could apply to the casino resort operated by the

171. *Id.*
172. *Id.* at 653.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 654.
178. *Id.* at 675 ("We enter judgment enforcing the Board's order and deny the Tribe's petition for review.").
179. *Id.*

Little River Band of Ottawa Indians within its reservation on trust land.[180] The majority opinion adopted the *Tuscarora-Coeur d'Alene* framework applied by the Ninth Circuit for interpreting generally applicable federal statutes to Indian tribes because it "accommodates principles of federal and tribal sovereignty."[181] The Sixth Circuit rejected the Tribe's argument that the NLRA could not be applied to Indian tribes "without a clear expression from Congress."[182] The court reasoned that, because many of the casino employees are not tribal members,[183] a clear statement of congressional intent to apply the NLRA to Indian tribes is not required in all circumstances.[184] Instead, the Sixth Circuit applied the *Tuscarora-Coeur d'Alene* framework to presume the NLRA applies to Indian tribes and analyze whether any of the three exceptions in the test were implicated.[185]

The *Little River* court found that applying the NLRA to the Tribe did not implicate its inherent right of self-governance.[186] First, the Sixth Circuit determined that the application of the NLRA to the Tribe did not undermine its ability to generate revenue through the casino's operation and fund its government.[187] The court reasoned that the Tribe's right to operate commercial enterprises without restrictions imposed by the federal government is not a feature of self-government, and the Tribe is not protected from statutes that "may incidentally affect the revenue streams of tribal commercial operations that fund tribal government."[188] Second, the Sixth Circuit found that applying the NLRA to the Tribe did not undermine the Tribe's right to enact its own regulations because the Tribe's regulation encompasses the activities of both members and nonmember employees of the casino.[189] Accordingly, the court determined that the NLRA applies to the Little River Tribe because Indian tribes fit within the NLRA's definition of "employer."[190]

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180. NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 539–40 (6th Cir. 2015).

181. *Id.* at 551.

182. *Id.* at 548.

183. It was estimated that out of the casino's 905 employees, 107 were enrolled members of the Little River Band, 27 were members of other Indian tribes, and 771 did not have membership with any tribe. *Id.* at 540.

184. *Id.* at 550.

185. *Id.* at 551.

186. *Id.*

187. *Id.*

188. *Id.* at 553.

189. *Id.*

190. *Id.* at 555 ("[I]f Congress intended to include Indian tribes within its

In his *Little River* dissent, Judge McKeague criticized the majority's reasoning:

> The sheer length of the majority's opinion, to resolve the single jurisdictional issue before us, betrays its error. Under governing law, the question presented is really quite simple. Not content with the simple answer, the majority strives mightily to justify a different approach. In the process, we contribute to a judicial remaking of the law that is authorized neither by Congress nor the Supreme Court. Because the majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split, I respectfully dissent.[191]

Echoing the dissent in *Little River*, the *Soaring Eagle* court determined that the legal framework applied by the *Little River* panel wrongfully shifts the analysis away from a broad respect for tribal sovereignty and the application of the clear statement rule as a requirement to abrogate that sovereignty.[192] Despite the disagreement, the *Soaring Eagle* panel was bound by its holding in *Little River* and reached the same conclusion in the matter involving the Saginaw Chippewa Indian Tribe.[193] The court rejected the *Little River* panel's reasoning in adopting the *Coeur-d'Alene* framework, proposing that it would have mandated the opposite outcome.[194]

The *Soaring Eagle* court then adopted its own approach in determining whether the NLRA applies by considering whether applying the Act "impinges on the Tribe's control over its own members and its own activities."[195] The court determined that an employee working for a tribally-owned and operated casino presents a consensual commercial relationship.[196] Therefore, the court concluded that nonmember casino employees should be subject to the Saginaw Tribe's no-solicitation policy.[197] In conclusion, the majority reasoned that, if not for its ruling in *Little River*, "we would conclude that, keeping in mind 'a proper respect both for tribal sovereignty itself and for the plenary authority of

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explicit list of exceptions to 'employer,' it would have done so.").

191. *Id.* at 556.

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

193. *Id.* at 675.

194. *Id.*

195. *Id.* at 667.

196. *Id.*

197. *Id.*

Congress in this area,' . . . . [the NLRA] should not apply to the Casino and should not render its no-solicitation policy void."[198]

b. The NLRB's Arguments to Support Jurisdiction Over Indian Tribes Are Unfounded

In opposing Supreme Court review of *Soaring Eagle*, the NLRB argued that there is no clear circuit split on the issue of applying generally applicable federal statutes to Indian tribes.[199] The NLRB itself recognizes that the Sixth and Tenth Circuit Courts take different analytical approaches to reach contrary conclusions regarding the applicability of the NLRA to Indian tribes.[200] The NLRB, however, attempts to distinguish the Tenth Circuit's decision in *Pueblo of San Juan* on the grounds that, in its opinion, the court addressed the Tribe's authority when acting in its "sovereign" capacity, as opposed to its "proprietary" capacity.[201] In *Soaring Eagle*, all three judges on the panel emphasized that the Tenth Circuit rejected the analytical approach applied by the Sixth Circuit.[202] In addition, Judge McKeague stated in his *Little River* dissent that the Tenth Circuit had "considered . . . and definitively rejected" the same arguments accepted by the *Little River* majority.[203]

The NLRB's justification for asserting jurisdiction on casinos located on reservation land is inconsistent with Supreme Court precedent.[204] The NLRB argues that the NLRA applies to Indian tribes because tribes are not expressly exempt from the definition of "employer."[205] However, this argument directly conflicts with the clear statement rule, which mandates that Congress "unequivocally express" its intent to abrogate tribal sovereignty.[206]

198. *Id.* at 670 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

199. Brief of Respondent at 13, Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015) (No. 15-1034) (U.S. May 24, 2016).

200. *Id.*

201. *Id.* at 14.

202. *Soaring Eagle*, 791 F.3d at 672.

203. NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 536, 561 (6th Cir. 2015).

204. *See* Reply Brief of Petitioner at 4–9, Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015) (No. 15-1034) (U.S. June 6, 2016) (discussing the Supreme Court's application of the clear statement rule in determining when federal statutes apply to Indian tribes).

205. *See* Brief of Respondent at 19, Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015) (No. 15-1034) (U.S. May 24, 2016) (stating that the NLRB's determination that tribes are not "exempted from the definition of 'employer' is correct and, at a minimum, entitled to deference").

206. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031–32 (2014).

Applying the NLRA to Indian tribes in this manner has the effect of singling out tribes as the only domestic sovereign subject to the provisions of the NLRA.[207] The correct inference from congressional silence in the text and legislative history of the NLRA in regards to Indian tribes is the presumption that Congress never intended to abrogate tribal sovereignty.[208]

The NLRB also argued that the question of whether the NLRA applies to Indian tribes should be left to Congress to resolve. On November 17, 2015, the United States House of Representatives passed the Tribal Labor Sovereignty Act of 2015, which would expand the list of entities exempt from the NLRA's definition of "employer" to include Indian tribes.[209] A legislative fix by Congress to resolve the issues regarding the applicability of the NLRB outlined in the *Little River* and *Soaring Eagle* decisions now represents a favorable option for Indian tribes to pursue.[210]

Conclusion

The *Soaring Eagle* decision approves of applying the NLRA to Indian tribes in a way that has not been accepted by the Supreme Court or justified by Congress's plenary power of Indian tribes.[211] The *Soaring Eagle* court acknowledged the current circuit split on the issue of whether generally applicable statutes should apply to Indian tribes.[212] Following the Supreme Court's decision to decline review of *Little River* and *Soaring Eagle*, the question of whether the NLRA permits the NLRB to assert its jurisdiction on casinos owned and operated by Indian tribes located on reservation land remains unresolved.

The approach taken by the Sixth Circuit in *Soaring Eagle* ignores the importance of tribal sovereignty and tribes' unique

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207. *See* Reply Brief of Petitioner at 5, Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015) (No. 15-1034) (U.S. June 6, 2016).

208. *Id.*

209. 161 CONG. REC. H8245, H8272 (daily ed. Nov. 17, 2015).

210. *See* McClatchey, *supra* note 26, at 183.

211. *See* Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648, 675 (6th Cir. 2015) (stating that the court's decision does not "properly address[] inherent tribal sovereignty under governing Supreme Court precedent . . .").

212. The court stated:

> In sum, the Second, Seventh, Ninth, Eleventh, and now the Sixth, Circuits, apply the *Coeur d'Alene* framework to determine whether statutes of general applicability apply to Indian tribes, the Eighth and Tenth Circuits reject it, and the D.C. Circuit applies a fact-intensive analysis of the tribal activity at issue and a policy inquiry comparing the federal interest in the regulatory scheme at issue with the federal interest in protecting tribal sovereignty.

Id. at 673.

historical status within the United States. The decision undermines tribes' retained rights to regulate matters involving self-government.[213] It intrudes on tribal rights "to undertake and regulate economic activity within the reservation"[214] and on the longstanding right of tribes to make and enforce their own laws within their own reservation.[215] By permitting the NLRB to assert jurisdiction on reservation land, the rights of Indian tribes to regulate their own labor affairs cannot be accomplished.[216] Furthermore, the Sixth Circuit's ruling also infringes on tribes' rights to place restrictions on nonmembers from entering reservation land.[217]

In addition, the *Soaring Eagle* decision encroaches on Congress's exclusive and plenary power over Indian affairs.[218] The longstanding rule is that tribes retain their inherent sovereign powers until Congress expresses a clear and unequivocal intent to relinquish tribal rights.[219] The Supreme Court has consistently refrained from finding that tribal rights have been abrogated without a clear finding of congressional intent. The Supreme Court's clear statement rule operates to avoid permitting courts to make interpretative questions that would be more appropriately addressed through the legislative process.[220] Construing generally applicable federal statutes to apply to Indian tribes in the absence of congressional intent, has the effect of "strip[ping] Indian tribes of their retained inherent authority to govern their own territory."[221]

Eventually, the Supreme Court may take the opportunity to address the issue presented to the Sixth Circuit in *Soaring Eagle*. For now, the enactment of the Tribal Labor Sovereignty Act of 2015, which would exclude Indian tribes from the NLRA's definition of "employer" would be a resolution to the issue presented to the Sixth Circuit in *Soaring Eagle*. The unique and historical nature of Indian tribes demands that tribal sovereignty be preserved in the context of applying federal statutes to tribes.

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213. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

214. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983).

215. Williams v. Lee, 358 U.S. 217, 220 (1959).

216. *See* Intermill, *supra* note 3, at 67.

217. *See* Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648, 677 (6th Cir. 2015) (White, J., concurring in part and dissenting in part).

218. *See* Smith, *supra* note 20, at 506.

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

220. Limas, *supra* note 26, at 706–07.

221. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002).

Ultimately, Indian tribes across the nation have a strong interest in retaining their independence and the right to self-government over their territory and members to the greatest extent possible.