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Wenona T. Singel
Michigan State University College of Law, singel@law.msu.edu

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WENONA T. SINGEL*

INTRODUCTION

On May 28, 2004, the National Labor Relations Board (NLRB or "the Board") reversed thirty years of precedent when it applied a new test to determine whether the San Manuel Indian Bingo and Casino, a tribally-owned casino located on reservation land, was subject to the NLRB's jurisdiction under the National Labor Relations Act (NLRA).[1] Until the Board issued its opinion, tribes were able to conduct their affairs on reservation lands knowing that labor concerns were governed by tribal law, without interference from the federal government. Now, on-reservation tribal activities are no longer immune from the purview of federal labor law, and tribes are forced to regroup and determine whether the Board's confusing and subjective test will subject their activities to the NLRA.

The application of the NLRA to tribes is also significant because it marks the growing application of the judicially-created *Tuscarora-Coeur d'Alene* approach.[2] This hybrid analytical framework has never been reviewed by the United States Supreme Court, yet six courts of appeals and the NLRB have adopted it to support determinations that federal employment statutes of general applicability apply to Indian tribes, unless the law "touches exclusive rights of self-government in purely intramural matters" or would abrogate treaty rights, or unless there is proof in the legislative history that Congress did not intend the law to apply to tribes.[3]

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*Visiting Assistant Professor, University of North Dakota School of Law. Appellate Judge and Member, Little Traverse Bay Bands of Odawa Indians. J.D., Harvard Law School; A.B., Harvard College. Thank you to Tiffany Johnson, Katrina Turman, Doug Murch, and Marah DeMeule of the North Dakota Law Review for their assistance. I also wish to thank Matthew L.M. Fletcher for his constant encouragement.

1. San Manuel Indian Bingo & Casino, 341 NLRB No. 138, 2004 WL 1283584, at *1 (May 28, 2004).

2. *See generally* William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEMPHIS L. REV. 1365, 1379 (1995) (describing the creation of the *Tuscarora-Coeur d'Alene* approach, citing Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960), and Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)).

3. *See* EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071 (9th Cir. 2001); Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126 (11th Cir. 1999); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996); EEOC v. Fond du Lac Heavy Equip. &

In opposition to these courts of appeals, the Tenth Circuit applies an analysis rooted in recognition of tribal inherent sovereignty and reserved rights.[4] Under this analysis, the court acknowledges Congress's plenary power over Indian affairs, yet refrains from concluding that a statute works as a divestment of tribal sovereignty unless Congress has clearly expressed an intent to do so.[5]

The difference in these competing modes of analysis represents a fundamental conflict in how the courts construe tribal sovereignty. For some, the hallmark of sovereignty is its inherent nature, and any diminishment of sovereignty or abrogation of tribal sovereign immunity requires an explicit expression of Congress, with ambiguities construed against the backdrop of the Indian canon of construction.[6] For others, the hallmark of sovereignty is the doctrine of implicit divestiture.[7] From this approach, the courts are untethered from the foundational principles of federal Indian law and Congressional statements on Indian sovereignty and are free to make their own assessments of whether sovereignty is consistent with particularized circumstances.

This article argues that the *San Manuel* decision and the *Tuscarora-Coeur d'Alene* line of cases adopt the wrong approach to determine whether federal statutes of general applicability that are silent as to tribes effectively divest tribes of their sovereign powers. Part I describes the Board's decision in the San Manuel Indian Bingo and Casino matter. Part II discusses how the Board's analysis departs from the foundational principles of federal Indian law, the Indian canon of construction, and even the Supreme Court's developing implicit divestiture doctrine, leading the Board to apply an overly-restrictive, subjective test that minimizes sovereignty and ignores congressional policy. Part III describes the NLRA and argues that Congress did not intend for it to divest tribes of their sovereign powers. Part IV proposes strategies that tribes can adopt to continue to assert tribal sovereignty in labor relations.

Const. Co., Inc., 986 F.2d 246 (8th Cir. 1993); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989); NLRB v. Navajo Tribe, 288 F.2d 162 (D.C. Cir. 1961).

4. *E.g.*, NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (en banc).

5. *See id.* at 1195.

6. *See generally* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 5-7 (1995).

7. *Id.*

I. THE DECISION TO ASSERT JURISDICTION OVER THE SAN MANUEL

The San Manuel Band of Serrano Mission Indians is a federally recognized Indian tribe with a reservation located in San Bernardino County, California.[8] The Tribe owns a 100,000 square-foot gaming operation on reservation lands and employs over 1,700 Indian and non-Indian employees at the facility.[9] The facility provides an essential stream of revenues, all of which are used to fund government services such as water and sewer, road construction, educational services, housing, and job training.[10]

On June 28, 2003, the Tribe entered into a collective bargaining agreement with Communication Workers of America (CWA) pursuant to an employee election held in accordance with the Tribe's labor relations ordinance.[11] The agreement governed employment matters such as wages, seniority, vacation time, sick leave, holidays, grievances, training, and health and safety matters.[12]

In 1998 and 1999, separate complaints were filed with the NLRB against the Tribe's casino alleging that the casino violated the NLRA by rendering aid, assistance, and support to the CWA by allowing CWA agents access to the casino facility while denying similar access to agents of another union, the Hotel Employees & Restaurant Employees International Union (HERE).[13] The tribe moved to dismiss for lack of jurisdiction, arguing that NLRA did not govern its on-reservation activities.[14]

The Board held that the NLRA applied to the Tribe's gaming operations, and as a result, it concluded that it did indeed have jurisdiction to review the merits of the complaint.[15] The Board reached its conclusion in two steps. First, it reassessed earlier NLRB precedent that had established that Tribes and their enterprises were exempt from the NLRA's definition of employer.[16] Section 2(2) of the NLRA provides that the definition of "employer" does not include "[t]he United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any person subject to the Railway Labor

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8. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *1 (May 28, 2004).

9. San Manuel Band of Mission Indians website, *Economic Diversification*, *at* http:www.sanmanuel-nsn.gov/economic.php (last visited Feb. 12, 2005).

10. *San Manuel*, 2004 WL 1283584, at *11 (Schaumber, dissenting).

11. San Manuel Band of Mission Indians website, *supra* note 9.

12. *Id.*

13. *San Manuel*, 2004 WL 1283584, at *1.

14. *Id.*

15. *Id.*

16. *Id.* at *3.

Act . . . or any labor organization (other than when acting as an employer), . . ."[17] In earlier cases, the Board had concluded that tribal enterprises operating on reservation lands were "governmental entities" that qualified as "political subdivisions" and were therefore excluded from the definition of "employer."[18] The Board justified its reversal by explaining that the text of the NLRA never supported an exemption for tribal enterprises, but the Board had been willing to apply the exemption to Tribes by analogizing them to the NLRA's reference to political subdivisions of States.[19] In *San Manuel*, the Board emphasized that, in its opinion, this analogy was not only unsupported by Supreme Court precedent,[20] but also counter to the principle that exceptions to the NLRA must be narrowly construed.[21]

The Board then reviewed whether "federal Indian policy" provided a basis for exempting the casino from the NLRA.[22] Here the Board's reasoning represents a fundamental shift in its theory of tribal sovereignty under federal law. Prior to *San Manuel*, the Board had affirmed that tribes are free from outside intervention unless specifically authorized by Congress. For example, in *Fort Apache* it had pronounced that "[i]t is clear that individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary."[23] With *San Manuel*, the Board adopted a completely contrary rationale. This rationale begins from the premise that all federal statutes of general application are presumed to apply to Indian tribes unless the statute touches a tribe's exclusive rights of self-government in purely intramural affairs,

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17. 29 U.S.C. § 152(2) (1998).

18. *See* Fort Apache Timber Co., 226 NLRB 503 (1976) (Fort Apache) (finding that tribal mining company located on Indian land was a "governmental entity" and therefore not an employer within the meaning of Section 2(2) of the Act); *see also* S. Indian Health Council, 290 NLRB 436 (1988) (Southern Indian) (holding that a nonprofit health care clinic operated on a reservation and the consortium of seven Indian tribes that operated the clinic were "governmental entities" excluded from the definition of "employer" under the NLRA).

19. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *4 (May 28, 2004).

20. *Id.* at *6; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Burlington N. R.R. Co. v. Blackfeet Tribe, 924 F.2d 899, 905 (9th Cir. 1991), *overruled on other grounds* Big Horn County Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. 2000); Smart v. State Farm Ins. Co., 868 F.2d 929, 936 (7th Cir. 1989); United States v. Barquin, 799 F.2d 619, 621 (10th Cir. 1986).

21. *San Manuel*, 2004 WL 1283584, at *1; *see also* L.A. County Museum of Art v. NLRB, 688 F.2d 1278, 1282 (9th Cir. 1982).

22. *San Manuel*, 2004 WL 1283584, at *7.

23. *Fort Apache Timber Co.*, 226 NLRB at 506.

abrogates a treaty right, or can be deemed to exempt tribes on the basis of the act's language or legislative history.[24]

The Board relied on the Supreme Court's 1960 decision in *Federal Power Commission v. Tuscarora Indian Nation*[25] for the premise that statutes of "general application" apply to the conduct and operations of Indian tribes.[26] In *Tuscarora*, the Court held that the Federal Power Act (FPA) applied to Indian land as well as non-Indian land, thereby allowing the Tuscarora Indian Nation's land to be taken for a hydroelectric power project.[27] In its analysis, the Court stated, "a general statute in terms applying to all persons includes Indians and their property interests."[28]

In support of its reliance on *Tuscarora* as authority for *San Manuel*, the Board points to a line of cases from the Second, Seventh, Ninth, and Eleventh Circuit Courts of Appeals that have used *Tuscarora* as the starting point for determining whether other federal employment laws apply to tribal activities.[29] Notably, however, each of the circuits that have relied on *Tuscarora* in the federal employment context have found that the opinion's blanket statement regarding general statutes and their application to Indians conflicts with other established principles of federal Indian law. Rather than dispense with using the case as precedent for extending federal employment statutes to tribal employers, however, these courts have identified three exceptions to the rule.[30]

The Ninth Circuit first identified three exceptions to *Tuscarora*'s rule in *United States v. Farris*.[31] That case involved the application of a federal criminal statute to individual tribal members. In 1985, the Ninth Circuit reiterated these three exceptions in a case involving the application of the Occupational Safety and Health Act to a tribally-owned farm. In this opinion, *Donovan v. Coeur d'Alene Tribal Farm*,[32] the court observed that statutes of general applicability should not be applied to the conduct of

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24. *San Manuel*, 2004 WL 1283584, at *7-*8.

25. 362 U.S. 99 (1960).

26. *Tuscarora*, 362 U.S. 116 (1960).

27. *Id.*

28. *Id.*

29. *See* Fla. Paraplegic, Ass'n. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129-30 (11th Cir. 1999) (ADA); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); Smart v. State Farm Ins. Co., 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (Coeur d'Alene) (OSHA).

30. *Id.*

31. 624 F.2d 890, 893-94 (9th Cir. 1980) (holding that the provision of Organized Crime Control Act of 1970 proscribing gaming applied to individual Puyallup tribal members operating a casino on reservation land).

32. 751 F.2d 1113 (9th Cir. 1985).

Indian tribes if (1) the law "touches exclusive rights of self-government in purely intramural matters," (2) the application of the law would abrogate treaty rights, or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.[33] The general premise made in *Tuscarora*'s holding as modified by *Coeur d'Alene's* recognition of three exceptions has since been referred to as the *Tuscarora-Coeur d'Alene* approach.

Though this is the first time the Board has applied the *Tuscarora-Coeur d'Alene* approach to a tribe's on-reservation conduct, the Board is no stranger to this line of cases. Prior to *San Manuel*, the Board applied *Tuscarora* and *Coeur d'Alene* to off-reservation tribal activities.[34] This practice began twelve years earlier in *Sac & Fox*, when the Board reviewed whether the NLRA applied to an off-reservation tribal manufacturing business.[35] The Board determined in *Sac & Fox* that the *Fort Apache* and *Southern Indian* precedents were distinguishable because in those cases, the Board stressed that the tribal activity in question was occurring on reservation land.[36] In such on-reservation instances, the Board found that the assertion of jurisdiction "would interfere with the tribes' powers of internal sovereignty."[37] With *Sac & Fox's* off-reservation operation, the Board concluded that the conduct was distinguishable and therefore did not qualify under the "political subdivision" exemption from the NLRA.[38] Once the Board freed *Sac & Fox's* conduct from the "political subdivision" exemption, it applied *Tuscarora* and *Coeur d'Alene* and concluded that the Board had jurisdiction over the activity.[39]

Applying *Tuscarora-Coeur D'Alene* to *San Manuel*, the Board determined that there was no barrier to the assertion of jurisdiction.[40] The Board held that the NLRA is a statute of general applicability, and that none of the exceptions provided in *Coeur d'Alene* applied.[41] It found that no treaty would be abrogated by assertion of jurisdiction under the NLRA and no legislative history existed that indicated that Congress intended to

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33. *Coeur d'Alene*, 751 F.2d at 1115; *see also Mashantucket Sand & Gravel*, 95 F.3d at 177; *Smart*, 868 F.2d at 932-933.

34. Sac and Fox Industries, Ltd., 307 NLRB 241 (1992).

35. *Id.* at 242.

36. *Id.* at 242-43.

37. *Id.* (citing Fort Apache Timber Co., 226 NLRB 503, 505-06 (1976) and S. Indian Health Council, 290 NLRB 436, 437 (1988)) .

38. *Id.* at 245.

39. *Id.* at 242-43.

40. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *9 (May 28, 2004).

41. *Id.*

exclude tribes from the NLRA's application.[42] The Board also considered whether assertion of jurisdiction would "touch exclusive rights of self-governance in purely intramural matters," and it concluded that it would not.[43] It held that "intramural matters" include matters such as "tribal membership, inheritance rules, and domestic relations."[44] It distinguished such matters from the casino, which it described as "a typical commercial enterprise operating in, and substantially affecting, interstate commerce . . . [with] employees [who] are not members of the tribe."[45] As a result, the Board concluded that "the tribe's operation of the casino is not an exercise of self-governance,"[46] and it therefore did not fit into *Coeur d'Alene*'s first exception making it subject to the Act.

II. THE BOARD'S DEPARTURE FROM SUPREME COURT PRECEDENT

A. THE BOARD'S FAILURE TO RECOGNIZE FOUNDATIONAL TENETS OF FEDERAL INDIAN LAW

The Board's decision that the NLRA applies to the San Manuel Band's on-reservation casino operation is problematic for several reasons. At the outset, the decision fails to recognize the foundational principles of federal Indian law, and as a result, its analysis is unmoored from a deeply-rooted judicial tradition that affords a certain respect for tribal self-government and defers to the exercise of congressional power.

The Board's analysis does open with a quote from Felix Cohen, that "Indian tribes consistently have been recognized . . . by the United States as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."[47] The Board also quotes the Supreme Court's decision in *McClanahan v. State Tax Commission of Arizona*[48] for the principle that tribal sovereignty predates that of the Federal government.[49]

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at *14.
47. *Id.* at *3 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 232 (1982)).
48. 411 U.S. 164 (1973).
49. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *3 (May 28, 2004)
(citing *McClanahan*, 411 U.S. at 172).

The Board's nod to Felix Cohen omits several important principles that describe the place of Indian tribes in the federal system. These principles, first articulated by Chief Justice John Marshall in the Marshall trilogy,[50] are derived from the nation's historic relationship with Indian tribes and the references made to tribes in the Commerce Clause of the United States Constitution.[51] The cases of the Marshall trilogy are widely recognized as insightful descriptions of the Framers' understanding of the relationship between the federal government and Indian tribes because their author, Justice Marshall, was a contemporary of the Framers of the Constitution and was knowledgeable of the debates regarding the status of Indian tribes.[52]

In the first case of the Marshall trilogy, *Johnson v. McIntosh*,[53] Justice Marshall concluded that upon "discovery," the rights of Indian tribes to complete sovereignty were "necessarily diminished,"[54] and that the tribes had lost their capacity to make treaties or enter into land transactions with any sovereign other than the discovering nation.[55] In *Cherokee Nation v. Georgia*,[56] Marshall explained that although tribes were not equivalent to foreign nations, the Cherokee Nation remained "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."[57] Tribes are "domestic dependent nations,"[58] and their relationship to the United States "resembles that of a ward to its guardian."[59]

In the third case of the trilogy, *Worcester v. Georgia*,[60] Marshall affirmed that the Commerce Clause of the United States Constitution vested sole authority to manage Indian affairs in the Congress.[61] Congress's power in this arena precluded the assertion of state authority over Indian

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50. 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).

51. The Constitution provides that Congress shall have the power to regulate commerce "with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3.

52. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 270 (2001); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 70 (1996) (describing Chief Justice John Marshall along with Madison and Hamilton as "three influential Framers").

53. 21 U.S. (8 Wheat.) 543 (1832).

54. *Johnson*, 21 U.S. at 574.

55. *Id.* at 573.

56. 30 U.S. (5 Pet.) 1 (1831).

57. *Cherokee Nation*, 30 U.S. at 16.

58. *Id.* at 17.

59. *Id.*

60. 31 U.S. (6 Pet.) 515 (1832).

61. *Worcester*, 31 U.S. at 538.

tribes.[62] Furthermore, Congress's authority to manage Indian affairs was not aimed at the destruction of tribal sovereignty.[63] Rather, the relationship between the tribes and the federal government was "that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[64]

Marshall's references to Congress's power to manage Indian affairs and his references to the guardian-ward relationship between tribes and the United States became the Supreme Court's first articulation of the plenary power doctrine and the federal trust responsibility. Marshall also understood that the political authority of Indian tribes is an inherent sovereignty predating the United States.[65] He also explained that treaties between the federal government and Indian tribes served to cede pre-existing tribal rights and expressly retain others.[66] Marshall's analysis of the Cherokee Nation's treaties with the United States also led him to explain that unless Congress acted through legislation or the executive entered into a treaty, tribes retained their inherent sovereign rights.[67]

The Marshall trilogy ultimately gave rise to the Indian canon of construction. The Indian canon is an approach to the interpretation of treaties and statutes affecting Indian rights that gives special consideration for the retained rights and inherent sovereignty of tribes and for the trust relationship between tribes and the federal government.[68] In *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*,[69] the Supreme

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62. *Id.* at 561.

63. *See id.* at 555.

64. *Id.*

65. *Id.* at 559 (describing the Indian nations as "distinct, independent political communities, retaining their natural rights, as the undisputed possessors of the soil, from time immemorial").

66. *Id.* at 553-54.

67. *Id.* at 561. According to Marshall,

> 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 acts of Congress.

Id.

68. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 41 (1999) (noting that *Worcester v. Georgia* is generally accepted as the genesis of the canons of construction for federal Indian law); *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured") (citation omitted).

69. 502 U.S. 251 (1992).

Court stated that "[w]hen we are faced with . . . two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in [the United States Supreme] Court's Indian jurisprudence: '[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'"[70] This canon of construction has been applied in several cases to prevent ambiguous statutes from creating an implied diminishment of tribal rights.[71] The Indian canon of construction also counsels that tribal self-governance rights should be upheld unless Congress has made its intent to abridge them "unmistakably clear."[72]

Over time, the principles established in Marshall's opinions have been repeatedly cited as guideposts in the field of Indian law.[73] Through the mid-1980s, the cases were consistently invoked.[74] Although today's Supreme Court rarely recites the Marshall cases, they have not been overruled,[75] and their presence and affirmation in nearly 150 years of decisions has left an indelible mark on Indian law jurisprudence.[76] Similarly, although the canons of construction have played a less prominent role in the Rehnquist Court's jurisprudence,[77] they have not been overruled and continue to provide critical elements of Indian law opinions.[78]

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70. *Yakima Nation*, 502 U.S. at 269 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

71. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Bryan v. Itasca County, 426 U.S. 373 (1976); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941) (finding that statute creating Colorado River Reservation did not extinguish tribe's aboriginal title and rights to ancestral lands); Choate v. Trapp, 224 U.S. 665, 675-76, 678 (1912).

72. COHEN, *supra* note 47, at 283 ("congressional intent to override particular Indian rights [must] be clear"); *see also Yakima Nation*, 502 U.S. at 258 ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'") (citation omitted); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985).

73. Getches, *supra* note 52, at 272.

74. *Id.* at 272.

75. *But see* Nevada v. Hicks, 533 U.S. 353, 361 (2001) (noting that the Court has long departed from the notion in *Worcester v. Georgia* that "the laws of [a State] can have no force" within reservation boundaries).

76. *Id.* at 274.

77. Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. REV. 283, 307 (1998) ("The Court will recite the canons, state that they apply, and then interpret the treaty or statute at issue to find that no ambiguity exists."). In *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001), the Court also determined that the canon that assumes Congress intends its statutes to benefit the Indian tribes may be offset by the canon that warns against interpreting statutes as providing tax exemptions unless those exemptions are clearly expressed.

78. Pourier v. S.D. Dept. of Revenue, 658 N.W.2d 395, 399 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004) (affirming that the Indian canon forms the necessary background to consideration of whether the Hayden-Cartwright Act permits state tax of on-reservation fuel sales from Indian-owned corporation to tribal members).

In stark contrast to an approach that recognizes that the foundational principles of federal Indian law have actual legal import, the Board in *San Manuel* depicts federal Indian law as a policy that it may choose to apply or ignore.[79] The Board's description of the legal status of tribes within the federal system as a "policy" rather than "law" is a pernicious attempt to diminish the legal status of Indian tribes to a mere value of the "legal culture" that should be weighed against competing values.[80] Policies do not mandate legal outcomes, they merely articulate broad goals.

The Board also does more than simply mischaracterize federal Indian law as a "policy." To the extent its analysis hinges on "policy," it has the policy wrong. The Board's discussion of federal Indian policy is limited to a selective reference to federal case law and a statement that tribal commercial activities do not implicate the special attributes of tribal sovereignty.[81] Neither of the principle cases addressed by the Board affirm past or present congressional statements of federal Indian policy.[82] Similarly, Congress has never pronounced a policy that tribal sovereignty does not extend to tribal commercial activities. On the contrary, the current congressional policy toward Indian tribes promotes tribal self-determination and recognizes that economic development is essential to this aim.[83]

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79. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *2 (May 28, 2004) ("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."); *id.* at *7 ("Having determined that the Act does not preclude the Board's assertion of jurisdiction over the Respondent, we next address whether Federal Indian policy requires that the Board decline jurisdiction."); *id.* at *12. Further,

> [b]ecause application of the *Tuscarora-Coeur d'Alene* standard poses no impediment to the assertion of the Board's jurisdiction, the final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction. Our purpose in undertaking this additional analytical step is to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture.

Id.

80. *See id.*

81. *Id.* at *8.

82. *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 123-24 (1960) (finding that tribally-owned fee lands were subject to condemnation under the Federal Power Act); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (finding that OSHA applied to a tribally-owned farm).

83. For example, the Indian Gaming Regulatory Act states that its purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1) (2000). The Indian Financing Act of 1974 states,

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Ultimately, the Board's failure to recognize the foundational principles of federal Indian law and its failure to apply the Indian canon of statutory construction led it to adopt an analysis that is unhinged from a full understanding of the place of Indian tribes in the federal system and the trust relationship between the federal government and Indian tribes. The Board's analysis, which consists of the adoption of the *Tuscarora-Coeur d'Alene* approach and the determination that the approach does not preclude the Board's assertion of jurisdiction over San Manuel's gaming operation, trivializes sovereignty, as dissenting Board member Peter Schaumber aptly described.[84]

What follows is a review of the problems inherent in the Board's application of *Tuscarora* and *Coeur d'Alene*. Also discussed is why this rule represents the turning of federal Indian law on its head because it replaces the foundational principles of federal Indian law with the understanding that the true hallmark of federal Indian law is the concept of implicit divestiture.[85] Finally, if the federal courts continue to apply this approach, they will progressively confine the concept of tribal sovereignty to a narrow, meaningless scope.

B. THE BOARD'S MISGUIDED RELIANCE ON THE "*TUSCARORA-COEUR D'ALENE* APPROACH"

1. *Reliance on* Tuscarora's *Dictum*

In its analysis, the Board's decision follows the misguided lead of five courts of appeals which have held that *Federal Power Commission v. Tuscarora Indian Nation*[86] is the seminal case on whether statutes of general application apply to Indian tribes.[87] In reality, the language relied

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Id. § 1451. The Indian Self-Determination and Education Assistance Act of 1975, and the Indian Reorganization Act of 1934, have similar purposes. *Id.* § 450, *Id.* § 461.

84. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *19 (May 28, 2004).

85. *See infra* notes 144 to 153 and accompanying text.

86. 362 U.S. 99 (1960).

87. Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (applying *Tuscarora* to conclude that OSHA governed a tribal construction company); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248 (8th Cir. 1993) (applying *Tuscarora's* general rule but finding that the ADEA did not apply because it would interfere with the tribe's right of self-government); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (applying *Tuscarora* in opinion concluding that OSHA governed activities of tribally-owned farm); Fla. Paraplegic, Assoc. v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1129-30 (11th Cir. 1999) (applying *Tuscarora* to find that Title III of the ADA applies to Indian tribes); Navajo Tribe v. NLRB, 288 F.2d 162, 165 n.4 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 928 (1961) (applying *Tuscarora* to conclude that the NLRA is applicable to a non-Indian uranium mill on the Navajo reservation). In *Smart v. State Farm Insurance Co.*, the Seventh Circuit applied

upon in *Tuscarora* consists of decontextualized dictum which the federal courts have seized as justification for a massive effort to minimize tribal sovereignty.

The question before the Supreme Court in the *Tuscarora* case dealt with whether fee lands owned by the Tuscarora Nation could be condemned under the FPA to make way for a storage reservoir for a power project.[88] The FPA permitted the taking of land generally, but excepted lands constituting "reservations" where the taking would "interfere with or be inconsistent with the purpose for which such reservation was created or acquired."[89] The Court found that the Tuscarora Nation's fee lands were not "reservations" because they did not meet the NLRA's definition, which required that the lands be owned by the United States.[90]

Upon finding that the FPA did not exempt the fee lands on its face, the Court considered whether the taking of the lands violated the long-standing principle that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[91] The Court considered the fact that its own more recent precedent had determined that a tax law applicable to persons generally is also applicable to individual Indians.[92] As a result, the Court decided to apply the FPA to the Indian-owned fee lands, stating "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[93]

Numerous federal courts and commentators have criticized *Tuscarora's* dictum.[94] Many criticize the Court's adoption of the dictum as

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Tuscarora to find that ERISA governed a group policy provided to a tribal employer. Smart v. State Farm Ins. Co., 868 F.2d 929, 938 (7th Cir. 1989). But four years later, in *Reich v. Great Lakes Indian Fish & Wildlife Commission*, the Seventh Circuit's Judge Posner ignored *Tuscarora* and applied principles of comity and the Indian canon of construction to find that the FLSA did not apply to the Commission. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993).

88. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 100 (1960).

89. *Id.* at 107-11 (quoting 16 U.S.C. 797(e) (2001)).

90. *Id.* at 110-14.

91. *Id.* at 115-16 (quoting Elk v. Wilkins, 112 U.S. 94, 99-100 (1884)).

92. *Id.* at 116 (citing Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418 (1935); Okla. Tax Comm'n v. United States, 319 U.S. 598 (1943)).

93. *Id.*

94. NLRB v. Pueblo of San Juan, 266 F.3d 1186, 1199 (10th Cir. 2002) (en banc); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996); EEOC v. Cherokee Nation, 871 F.2d 937, 938 n.3 (10th Cir. 1989); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1135-36 (N.D. Okla. 2001); *see also* COHEN, *supra* note 47, at 284; Vicki J. Limas, *Application of Federal Labor & Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 696-99 (1994); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 105-07 (1991); Maureen M. Crough, Comment, *A Proposal for the Extension of the Occupational Safety and Health Act to Indian-Owned*

a general rule because the case did not involve the potential impairment of tribal sovereignty.[95] Since the case dealt with an attempt to condemn fee lands rather than reservation lands, its holding is relevant for the rights of Indians as individuals rather than as governments. There is no evidence that the Tuscarora Nation raised, nor did the Court consider, whether the FPA would apply if it impaired the self-governance rights of the Tuscarora Nation.[96]

Ironically, in a discussion about whether a statutory restraint on alienation of Indian lands operates to prevent the federal government from making conveyances without a treaty or convention as required by the statute, the *Tuscarora* Court identified the test for determining whether a statute validly impairs rights of self-government.[97] It explained that "[t]here is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[98] It is conceivable that the Court would have relied on this rule had the case dealt with tribal sovereignty rights. Nineteen years earlier, the Court had spoken out against the implied diminishment of Indian rights, citing the Indian canon against implied repeals.[99] The Court stated that "[a]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."[100] Two years earlier, this principle was reaffirmed in *Williams v. Lee*.[101] In addition, the Supreme Court's rulings

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Businesses on Reservations, 18 U. MICH. J.L. REFORM., 473, 486-87 (1985); Judith Royster & Rory SnowArrow Faussett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 591 (1989).

95. *See Pueblo of San Juan*, 266 F.3d at 1199 ("The *Tuscarora* Court's remarks concerning statutes of general applicability were made in the context of property rights, and do not constitute a holding as to tribal sovereign authority to govern."); Buffalo & Wadzinski, *supra* note 2, at 1393 ("The *Tuscarora* rule of general applicability does not address tribal self-governance and tribal sovereign immunity because those issues were not involved in the formation of the rule."); Crough, *supra* note 94, at 486-87 ("The Tuscarora rule's expansive reading of the original case's dictum is unjustified because tribal sovereignty was not at issue in the cases on which the dictum is based . . . ."); Royster & SnowArrow, *supra* note 94, at 591.

96. In support of its statement on statutes of general application, the Court also relied on case law that dealt with the rights of individual Indians. *See Superintendent of Five Civilized Tribes*, 295 U.S. at 421 (applying federal income taxes to individual Indians); *Oklahoma Tax Comm'n*, 319 U.S. at 612 (applying state taxes to individual Indians).

97. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) (quoting United States v. United Mine Workers, 330 U.S. 258, 272-73 (1947)).

98. *Id.*

99. Blurton, *supra* note 68, at 43-44 (quoting United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941)).

100. *Id.*

101. Williams v. Lee, 358 U.S. 217, 221 (1958) (concluding that a clear statement of congressional intent was necessary to allow state civil or criminal jurisdiction over non-Indian reservation activity).

after *Tuscarora* belie the proposition that the case introduced a new rule that allowed congressional silence to effectively diminish tribal sovereignty. In *Menominee Tribe of Indians v. United States*,[102] the Court cautioned that federal statutes should not be used as a "backhanded way of abrogating . . . rights of these Indians."[103] In the case of *United States v. Wheeler*,[104] the Court clarified how the rule against implied repeals of tribal rights coexists with the principle first expressed in *Johnson v. McIntosh* that Indian tribes lost their complete sovereignty upon discovery.[105] The Court explained,

> 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*.[106]

As *Wheeler* makes clear, the sovereign rights of tribes in the modern era may be diminished by implication only to the extent necessary as a result of their dependent status.[107] In all other cases, Congress must clearly act to limit tribal rights.[108] This rule, though providing for some limited implied repeal of tribal rights, is still significantly more protective of tribal rights than the dictum of *Tuscarora*.

Others criticize the elevation of *Tuscarora's* dictum into a general rule for statutory construction because the statute involved was arguably not a statute of general applicability itself.[109] Unlike a statute of general applicability which is silent regarding tribes, the FPA had specific provisions to accommodate tribal rights.[110] The statute provided that if the lands sought to be taken were part of a "reservation," then the lands could not be condemned unless the Federal Power Commission determined that the taking would not interfere with or be inconsistent with the purpose for

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102. 391 U.S. 404 (1968).

103. Blurton, *supra* note 68, at 44 (quoting Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)).

104. 435 U.S. 313 (1977).

105. *Wheeler*, 435 U.S. at 323

106. *Id.* at 323 (emphasis added).

107. See *infra* notes 144-153 and accompanying text for a fuller discussion of tribal rights and implicit divestiture.

108. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) (Univ. of New Mexico Press 1971).

109. Skibine, *supra* note 94, at 104-05 ("*Tuscarora* involved neither Indians within an Indian reservation nor a general law that was silent with respect to its application to Indians."); Limas, *supra* note 94, at 698.

110. 16 U.S.C. §§ 796(2), 797(e) (2000).

which the reservation was created.[111] Since the FPA squarely dealt with tribal rights and was not a true statute of general application, its dictum on statutes of general application lacks salience.

2. *Reliance on* Coeur d'Alene's *Synthesis*

A further mistake of the Board in *San Manuel* is its reliance on *Donovan v. Coeur d'Alene Tribal Farm*[112] as the federal courts' best attempt to create a coherent framework from several lines of authority on the applicability of general federal statutes to Indian tribes. In *Coeur d'Alene*, the Ninth Circuit accepted the statement 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," but it identified three specific exceptions. [113] The first provides that statutes of general application which are silent regarding tribes will not apply if "the law touches 'exclusive rights of self-governance in purely intramural affairs.'"[114] The second provides that the statute will not apply if "the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties.'"[115] The third prevents application if "there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. . . ."[116] The court held that when any of these three situations are met, "Congress must *expressly* apply a statute to Indians before we will hold that it reaches them."[117]

By affirming *Tuscarora*'s rule and asserting that deviations from it constitute exceptions rather than proof of its invalidity, *Coeur d'Alene* establishes a rebuttable presumption stacked against tribal interests. Although the presumption involves instances where a statute should not apply, it still places the burden on tribal parties to prove that their conduct fits an exception. The presumption also leads to the inference, adopted by many courts, that the exceptions must be narrowly interpreted to prevent them from "swallowing the rule."[118] Since the *Tuscarora* dictum did not arise from a reasoned analysis that addressed tribal self-governance, and

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111. *Id.*

112. 751 F.2d 1113 (9th Cir. 1985).

113. *Coeur d'Alene*, 751 F.2d at 1115-16.

114. *Id.* at 1116 (quoting United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (finding that the Organized Crime Control Act of 1970 applied to prohibit individual Puyallup tribal members from operating a casino on tribal lands)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996); Smart v. State Farm Ins. Co., 868 F.2d 929, 935 (7th Cir. 1989).

since it does not articulate a rule that comports with Supreme Court precedent establishing the Indian canon of construction, *Coeur d'Alene* is wrong to establish *Tuscarora* as a hurdle that tribes must overcome.

A second problem inherent in *Coeur d'Alene's* analysis is its attempt to cabin the exceptions to *Tuscarora* to only three examples. The exceptions identified in *Coeur d'Alene*, adopted from the Ninth Circuit's opinion in *United States v. Farris*, merely constituted precedents that appeared to deviate from *Tuscarora's* dictum.[119] Neither the *Farris* court nor any of its authorities claimed that the universe of possible exceptions to *Tuscarora* had been exhausted. Given time, the courts may have identified new examples of deviances from *Tuscarora*, or they may have formed a more coherent analysis that provided a more unified approach.

a. The First Exception: When the Law Touches on "Exclusive Rights of Self-Governance in Purely Intramural Matters"

Coeur d'Alene provides that *Tuscarora* does not apply when "the law touches on 'exclusive rights of self-governance in purely intramural matters.'"[120] This standard has been widely criticized as subjective, trivializing tribal sovereignty, ignorant of tribal government institutions, and inconsistent with the Supreme Court's authority on the powers of tribal self-government.[121]

i. The First Exception Lacks a Rational Tie to Supreme Court Precedent

First, the standard for *Coeur d'Alene's* first exception forms an inappropriate test because it departs from the Supreme Court's case law on tribal political authority and from congressional policy in Indian affairs. The principle cases that the *Farris* court relied upon in forming this standard were the Supreme Court's opinion in *Santa Clara Pueblo v. Martinez*[122] and the Ninth Circuit's opinion in *Arizona ex rel. Merrill v. Turtle*.[123] Neither of these cases stood for the proposition that Indian tribes are generally subject to federal statutes of general application outside

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

120. *Id.*

121. *E.g.*, Buffalo & Wadzinski, *supra* note 2, at 1392-96; Limas, *supra* note 94, at 740-46; Skibine, *supra* note 94, at 139.

122. 436 U.S. 49 (1978).

123. 413 F.2d 683 (1969), *cert. denied*, 396 U.S. 1003 (1970).

"exclusive rights of self-governance in purely intramural matters."[124] In *Martinez*, the Supreme Court considered whether the sovereign immunity of the Santa Clara Pueblo barred a female member from suing it under the Indian Civil Rights Act.[125] In its analysis, the Court examined the nature of tribal political authority.[126] It explained,

> 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." . . . They have the power to make their own substantive law in internal matters and to enforce that law in their own forums.[127]

The Court's description of tribal sovereignty in *Martinez* compiled statements made in earlier Supreme Court opinions, such as *Worcester v. Georgia* and *United States v. Wheeler*.[128] The inclusion of this language in the opinion affirmed the Santa Clara Pueblo's authority to interpret the Indian Civil Rights Act in its own forum and in accordance with its own interpretative powers and cultural values. The Court used this language to justify its decision to respect tribal sovereignty and bar a tribal member from suing the tribe in federal court. Accordingly, this language is merely a positive assertion of the tribe's legal authority. The attempt by the *Farris* court and *Coeur d'Alene* court to mold this language into a restrictive description of the boundaries of tribal political authority is unjustified. Other than a recognition later in the opinion that Congress has the plenary power to limit or modify the power of self-government, including the power to waive tribal sovereign immunity through an "unequivocal expression" of "legislative intent," *Martinez'* description of tribal authority does not mark the boundaries of tribal sovereignty in an attempt to encapsulate a defined safe zone beyond which general federal statutes can freely effect implied repeals of sovereign rights.

Furthermore, the precise language of the *Martinez* decision differs from the *Farris* and *Coeur d'Alene* decisions in a small, yet important respect: whereas *Martinez* provided a positive affirmation of tribes' authority to regulate "their internal and social relations,"[129] *Farris* and *Coeur d'Alene*

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

125. *Martinez*, 436 U.S. at 51-52.

126. *Id.* at 55-56.

127. *Id.* (omitting internal citations).

128. *Id.*

129. *Id.* at 55.

delimited the scope of conduct which is immune from statutes of general application that are silent as to tribes to "purely intramural matters."[130] Assuming that "internal" and "social" have separate meanings, *Martinez'* reference to the tribal power to regulate "social relations" affirmed some form of tribal authority beyond internal matters to include dealings with nonmembers. Yet neither *Farris* nor *Coeur d'Alene* acknowledged this "social" element of tribal political authority over external relations. Thus, *Coeur d'Alene's* description truncates the meaning of *Martinez* to create the foundation for a hyper-limited standard for tribal sovereignty. To the extent the *Coeur d'Alene* court carves out an exception from *Tuscarora* for "exclusive rights of self-governance in purely intramural matters," the Court departs from the very case law that it identifies as its support.[131]

The *Farris* and *Coeur d'Alene* decisions also limit the potential meaning of the first exception to *Tuscarora* by repeating the mantra that tribal membership, inheritance rules, and domestic relations are the hallmarks of the sort of tribal conduct that is presumed to be governed exclusively by the tribe unless Congress clearly expresses an intent to abrogate tribal sovereign rights.[132] These examples are lifted from *Martinez*, which offered them as three examples of tribal authority to make substantive law.[133] Like the three exceptions to *Tuscarora*, the examples of tribal membership, inheritance rules, and domestic relations did not exhaust the potential matters of tribal self-government. Yet their inclusion as apt examples has served as a gatekeeper, decreasing the possibility that tribes will successfully argue for a more expansive interpretation of the sort of conduct which is presumed exempt from general statutes that are silent as to tribes.[134]

The *Farris* court also relied upon the Ninth Circuit's opinion in *Arizona ex rel. Merrill v. Turtle* to support its articulation of the first

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

131. *See id.*

132. *Farris*, 624 F.2d at 893 (citing as examples Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (membership); Jones v. Meehan, 175 U.S. 1 (1899) (inheritance rules); United States v. Quiver, 241 U.S. 602 (1916) (domestic relations)); *Coeur d'Alene*, 751 F.2d at 1116 ("We believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.").

133. *Martinez*, 436 U.S. at 55-56.

134. San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *9 (May 28, 2004) ("Intramural matters generally involve topics such as 'tribal membership, inheritance rules, and domestic relations'"); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996) (same).

exception to *Tuscarora*.[135] However, this opinion, like *Martinez*, is a positive affirmation of tribal self-government. The case affirmed that Arizona had no authority to extradite a Cheyenne resident of the Navajo reservation.[136] The case cites *Williams v. Lee's* statement that "[e]ssentially, 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."[137] In sum, the *Merrill* case does not serve as a proper description of the outer limits of tribal authority.

Assuming *Tuscarora*'s blanket statement that general statutes apply to Indians and their property interests was valid, a more legally consistent description of the exception for tribal self-government would track the Supreme Court's doctrine of implicit divestment. Since application of the first exception to the *Tuscarora-Coeur d'Alene* rule requires consideration of the boundary between the zone of tribal conduct where federal enactments are not presumed to apply and the zone of conduct where they are, it makes more sense to draw from a doctrine that addresses the implied limits of tribal powers to exercise self-government.

The Supreme Court began its fixation with implicit divestiture in *Oliphant v. Suquamish Indian Tribe*,[138] when it concluded that Indian tribes no longer retain criminal jurisdiction over non-Indians, despite the absence of any congressional act or treaty supporting its finding.[139] The Court stated that " . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"[140] Two weeks later, the Court decided *United States v. Wheeler*, in which it held that tribal prosecutions of members do not violate the double jeopardy clause because the power to prosecute such crimes is inherent rather than derived from the federal government.[141] In support of its conclusion that the sovereign power to prosecute was not implicitly lost, the Court stated that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[142] As a result, the Court explained, the Court

135. *Farris*, 624 F.2d at 893 (citing Arizona *ex rel.* Merril v. Turtle, 413 F.2d 683, 685 (1969), *cert. denied*, 396 U.S. 1003 (1970)) .

136. *Merrill*, 413 F.2d at 685.

137. Id. at 684 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

138. 435 U.S. 191 (1978).

139. *Oliphant*, 435 U.S. at 208.

140. *Id.*

141. United States v. Wheeler, 435 U.S. 313, 332-33 (1978).

142. *Id.* at 326.

had long recognized that tribes no longer have the power to freely alienate lands to non-Indians, they can no longer enter into direct relations with foreign nations, and they can no longer try nonmembers in tribal courts.[143]

In 1981, the Supreme Court revisited the doctrine of implicit divestiture in *Montana v. United States*.[144] That case concluded that tribes generally lack the authority to regulate hunting and fishing by non-Indians on non-Indian owned fee lands within a reservation.[145] It stated 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, and so cannot survive without express congressional delegation."[146] The Court, however, identified two exceptions to its rule.[147] A tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members, and a tribe may exercise civil authority over the conduct of non-Indians on fee lands when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[148]

Following *Montana*, the Court decided a series of cases that narrowly interpreted the *Montana* exceptions.[149] The Court has also extended *Montana's* analysis to tribal lands as well as non-Indian fee lands.[150] The cumulative effect of these decisions is that tribal civil jurisdiction over nonmembers is limited to instances where the tribal interest is extremely high or where the exercise of civil jurisdiction is rationally related to a private consensual relationship between the tribe and nonmember.[151]

The Court's development of implicit divestiture shows that the limits of tribal political authority are drawn where tribal relations with nonmembers

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143. *Id.*

144. 450 U.S. 544 (1981).

145. *Montana*, 450 U.S. at 544.

146. *Id.* at 564.

147. *Id.* at 565-66.

148. *Id.*

149. Brendale v. Confederated Tribes & Bands of Yakima Nation, 508 U.S. 679 (1993) (rejecting tribal authority to zone all non-Indian lands within a reservation); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (rejecting tribal civil jurisdiction over car accidents that take place on state-owned lands within a reservation); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (rejecting tribal authority to tax non-Indian owners of land within a reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (rejecting tribal civil jurisdiction over a state officer who enters tribal land to enforce a search warrant).

150. *Hicks*, 533 U.S. at 364-65.

151. Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 652 (2003) ("The exception in *Montana* for economic interests and political integrity has been interpreted exceedingly narrowly."); *Atkinson Trading Co.*, 532 U.S. at 656 (stating that *Montana's* consensual relationship exception requires that the tribal regulation have a nexus to the consensual relationship); *Hicks*, 533 U.S. at 359 n.3 (interpreting the *Montana* reference to consensual relationships as private and not far removed).

are concerned. It would be wrong to conclude that tribes lack the power of self-government in all matters involving nonmembers, however. The *Montana* Court's two exceptions were founded on a long history of the recognition of tribal civil jurisdiction over nonmembers.[152] This history, as synthesized by *Montana*, creates a more appropriate substitute for *Coeur d'Alene's* first exception to *Tuscarora*. The exception should therefore provide that the *Tuscarora* presumption should never apply if the application of the federal statute in question would interfere with the tribe's self-government powers in internal matters. It should also provide that the *Tuscarora* presumption should not apply if the application of the federal statute in question would interfere with the tribe's self-government in matters where it is exercising civil jurisdiction over nonmembers who are engaged in conduct that threatens the tribe's political integrity, economic security, or health or welfare, or who have formed a consensual relationship with the tribe, and the nature of the consensual relationship is connected to the exercise of jurisdiction. Under this standard, general federal labor laws that are silent with respect to tribes should not presumptively apply in the tribal context. This is because all tribal employment consists of a consensual relationship between the tribal employer and employee, and the tribal regulation of employment matters is directly connected to this relationship.

In sum, the Ninth Circuit's first exception to the *Tuscarora* dictum is not consistent with the Supreme Court's federal Indian law jurisprudence. Rather than using Supreme Court precedent that describes the outer limits of tribal political authority over non-members, the *Coeur d'Alene* and *Farris* courts established a *sui generis* standard that diverges from precedent and places artificial limits on tribal authority.

ii. The First Exception Invites Subjectivism

The first exception to *Coeur d'Alene*, which forces the court to determine whether a law touches "exclusive rights of self-governance in purely intramural matters," also invites an extreme form of subjective jurisprudence.[153] The case law currently available on this question is sparse, relative to the large potential for the application of this standard to myriad unique tribal circumstances. As a result, the courts lack objective tests that adequately address how to resolve disputes under this prong. Currently, the tests that the federal courts and the NLRB have fashioned are

152. Montana v. United States, 450 U.S. 544, 565-66 (1981).

153. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 at 116 (citing U.S. v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980).

either so limiting that they barely permit an exception to arise, or they are so loosely defined that they fail to create a standard at all. The risk with courts that interpret the test in an overly restrictive way is that they create an insurmountable hurdle to the exercise of tribal sovereignty. For example, the Ninth Circuit applies this standard by looking to whether the conduct in question is one of "those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated."[154] Under this interpretation, any conduct that affects interstate commerce or involves the employment of non-Indians is not deemed to constitute a purely intramural matter or implicate tribal self-government.[155] Alternatively, tests that fail to create an objective standard invite subjective determinations that increase the opportunity for courts to impose their own normative constructs onto tribes, forcing tribes to conform to the court's vision of legitimate tribal self-government. The ambiguity inherent in this exception to *Tuscarora* is most evident with the requirement that a general statute touch "exclusive rights of self-governance."[156] The opinions that apply this standard have failed to interpret the meaning of this phrase, and have instead made conclusory statements that the tribal operation of businesses affecting interstate commerce are not essential to tribal self-government.[157]

In addition, if a tribal interest argues that the first exception applies, the rebuttable presumption forces the tribal party to place the legitimacy of tribal sovereignty on trial for a federal decision maker's review. As tribes and other tribal interests attempt to show that the application of the law would touch "exclusive rights of self-governance in purely intramural matters," they are forced to submit the legitimacy of tribal governance to a largely homogenous pool of non-Indians at the bench.[158] Since many

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154. Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004).

155. *See id.*, NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 999-1000 (9th Cir. 2003); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180-81 (2d Cir. 1996); U.S. Dept. of Labor v. Occupational Safety & Health Review Comm'n, 935 F.3d 182, 184 (9th Cir. 1991); Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999).

156. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 at 116 (citing U.S. v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980).

157. *See, e.g.*, *Fla Paraplegic Ass'n*, 166 F.3d at 1129.

158. For example, in the *San Manuel* decision, the Board stated,

> [w]hen the Indian tribes [participate in the national economy in commercial enterprises] the special attributes of their sovereignty are not implicated.... [However,] at times, the tribes continue to act in a manner consistent with that mantle of uniqueness. They do so primarily when they are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes.

judges and other tribunals such as the NLRB lack familiarity with tribal law and tribal institutions of self-government, these arbiters are poorly equipped to recognize when conduct in Indian Country implicates tribal self-government interests.[159]

iii. The First Exception Minimizes Sovereignty

The Board's use of the "exclusive rights of self-government in purely intramural affairs" standard is also inappropriate because it minimizes and trivializes tribal sovereignty. First, the "purely intramural" standard led the Board to express doubt that tribal sovereignty is at stake when the San Manuel Band engages in conduct involving non-Indians. As discussed above, this presumption is inconsistent with the Supreme Court's opinions on the scope of tribal jurisdiction over non-Indians.[160] Particularly in cases involving consensual relationships with nonmembers, the Supreme Court recognizes that tribes possess civil jurisdiction to regulate the conduct of non-members as long as the regulation has a nexus with the nature of the consensual relationship.[161] The right to enact and enforce laws governing the employment relationship satisfies this nexus requirement, since the laws directly relate to the consensual employment relationship between tribal employers and employees. Similarly, tribes possess jurisdiction to enforce tribal employment laws against a non-Indian company employing non-Indians on the reservation, provided that the tribe or its members enter into a consensual commercial agreement relating to employment. The existence of tribal authority to regulate the employment relationship in these circumstances underscores the fact that these relationships implicate tribal self-government interests.

The Board's application of the "purely intramural" standard is also troubling because it conceives of tribes as isolated units comprised exclusively of members. In reality, non-members participate in nearly all aspects of tribal life.[162] They work as employees in both tribal business

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San Manuel Indian Bingo & Casino, 341 NLRB 138, 2004 WL 1283584, at *8 (May 28, 2004). The Board did not explain how it might identify when a tribe fulfills its traditional tribal or governmental functions.

159. Getches, *supra* note 52, at 276 ("Judges who are not steeped in the culture and values of Indian tribalism are ill-equipped to rework these complex and anomalous traditions case by case.")

160. *See supra* note 137 and text accompanying.

161. *See* Atkinson Trading v. Shirley, 532 U.S. 645, 656 (2001).

162. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC. REV. 1123, 1128 (1994).

enterprises and tribal government.[163] They live in tribal housing with their enrolled spouses, parents, or children.[164] They participate in tribal commerce, stay as guests in tribal hotels, and travel through tribal lands.[165] In addition, in many tribes, non-members participate in tribal government by serving as members of tribal boards, commissions, and judiciaries.[166] If more courts require the exclusive involvement of tribal members before finding that tribal conduct is "purely intramural," the standard will rarely, if ever, apply.

Second, the *San Manuel* decision expresses doubt that tribal sovereignty rights are involved when a tribe operates a commercial enterprise. The Board's perfunctory dismissal of the notion that commercial activities involve issues of sovereignty disregards the economic reality of tribes, the tribal governance issues involved in commercial conduct, and the prevailing congressional policy of the day.

It is widely recognized that Indian tribes are one of the most impoverished groups in the country.[167] In August 2004, the Census Bureau reported that the poverty rate for American Indians is nearly double the national average.[168] Tribal communities also suffer from high unemployment rates, high rates of insufficient and substandard housing, high suicide rates, high rates of diabetes, and low rates of educational achievement.[169] A significant factor contributing to these statistics is the absence of healthy economies on many tribal reservations.[170] Due to remoteness and lack of economic development, many tribes lack a tax base to sufficiently pay for needed governmental services.[171] Furthermore, reliance on federal funding without independent sources of governmental revenues serves to prolong

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163. *See generally* Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM (forthcoming 2005).

164. *See* Matthew L.M. Fletcher, United States v. Lara: *Affirmation of Tribal Criminal Jurisdiction Over Nonmember American Indians*, 83 MICH. B. J., July 2004, at 24, 25.

165. *E.g.*, Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997).

166. *E.g.*, Grand Traverse Band of Ottawa and Chippewa Indians, Grand Traverse Band Police Commission Ordinance (Jan. 11, 2000); Swinomish Tribe, Utilities Code, Tribal Utility Authority Membership, 11-02.070 (Nov. 5, 2003); The Confederated Tribes of the Grand Ronde Community of Oregon, Tribal Court Ordinance, Tribal Code § 310(e) (March 5, 2003).

167. *See* CARMEN DENAVAS-WALT ET AL, U.S CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003 12 (Aug. 2004), *available at* http://www.census.gov/prod/2004pubs/p60-226.pdf.

168. *See id.*

169. *See generally Fiscal 2006 Budget: Indian Affairs—Part 2*, Before the Senate Committee on Indian Affairs, 2005 WL 375968 (Feb. 15, 2005) (statement of Tex Hall, President National Congress of American Indians).

170. *See id.*

171. *See* Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1315 n.21 (D.D.C. 1987).

economic dependence and stagnation.[172] Consequently, tribal involvement in commercial activities is an essential governmental function for many tribes.

The revenues produced by tribal businesses fund services as diverse as utilities, including water, sewer, telecommunications and energy; health care; natural resource management; elders programs; social services; tribal court systems; law enforcement; tribal schools; and adult education.[173] Some fear that tribal commercial activities such as gaming result in large windfalls for a few tribal members.[174] However, the reality is that gaming is not a cash cow for most tribes, and federal law imposes restrictions on gaming revenues to ensure that the funds are used for governmental services.[175]

The Board is also wrong to dismiss the notion that tribal commercial activities fail to raise issues of self-governance. The Board takes the position of several courts of appeals when it demarcates tribal governmental activities from tribal commercial activities and presumes that self-government interests are limited to the first. First, for the reasons discussed above, tribal commercial activities are closely linked to governance because they play an essential role in funding government services and energizing tribal economies. Second, tribal commercial activities necessarily raise issues of governance because tribes regulate every aspect of commercial activity. Tribes govern the formation and maintenance of corporations, commercial transactions, the employment relationship, conduct that affects the environment, and land use.[176] Although the Supreme Court has recognized restrictions on the extent of tribal civil jurisdiction, these restrictions do not entirely prevent tribes from exercising political authority over these matters.[177] As a result, tribal commercial activities are tightly enmeshed in tribal self-governance decisions.

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172. *Cf.* ERIC HENSON & JONATHAN B. TAYLOR, NATIVE AMERICA AT THE NEW MILLENNIUM, 26-27 (2004) *available at* http://www.ksg.harvard.edu/hpaied/pubs.pub_004.htm.

173. *See, e.g.*, Grand Traverse Band of Ottawa & Chippewa Indians v. United States Att'y for the W. Dist. of Mich., 198 F. Supp. 2d 920, 924 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

174. *See* Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice?: How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 430 (1998).

175. *See* 25 U.S.C. § 2710(b)(2)(B).

176. *See generally* John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 MICH. B. J. 440 (1997).

177. *See, e.g.*, Burlington N. Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767 (9th Cir. 2003) (remanding for consideration whether the tribe had authority to regulate activities of non-Indian business conducting activities on tribal lands).

The Board's determination that tribal commercial activities do not invoke sovereignty concerns is also refuted by Congress's policy toward tribes.[178] As discussed above, Congress has expressly adopted a policy of furthering tribal self-determination through enacting laws that foster economic development.[179] The Indian Financing Act of 1974 and the Indian Self-Determination and Education Assistance Act are just two examples that "reflect Congress'[s] [sic] desire to promote the 'goal of Indian self-government, including the 'overriding goal' of encouraging tribal self-sufficiency and economic development."[180]

Third, the language "exclusive rights of self-government in purely intramural matters" trivializes tribal sovereignty because it lacks objectivity.[181] The only guidance that the *Coeur d'Alene* decision offers on its meaning was its statement that membership, inheritance rights, and domestic relations are included within its scope. Yet, as discussed earlier, these subjects do not represent exhaustive compilations of the tribal political authority. Many courts, however, approach their analysis of this exception by searching for evidence that the conduct in question is related to one of these three subject matters.[182] In these cases, the courts apply the exception in an exceedingly minimizing way.[183] Courts that do not apply this limitation, however, are left without a full sense of the scope of self-government activities that it might encompass. The result is that courts apply their own subjective determinations on a case-by-case basis, deciding in each particular factual situation whether the conduct in question appears to relate to tribal sovereignty rights.[184] This approach is also inappropriate because it invites the courts to determine the essential ingredients of tribal sovereignty on an ad hoc, "I know it when I see it" basis.

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178. *See, supra* note 83 and accompanying text.

179. *See, e.g.*, 25 U.S.C. § 1451 (2000) (declaring policy of Congress to allow Indian tribes to develop resources for economic development and self-government purposes).

180. 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, 693 (1994) (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991)).

181. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 at 116 (citing U.S. v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980).

182. *E.g.*, NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 999-1000 (9th Cir. 2003); EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1079 (9th Cir. 2001); Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996); Smart v. State Farm Ins. Co., 868 F.2d 929, 936 n. 5 (7th Cir. 1989); United States v. White, 237 F.3d 170, 173 (2d Cir. 2001); U.S. Dept. of Labor v. Occupational Safety & Health Comm'n, 935 F.2d 182, 184 (9th Cir. 1991).

183. *E.g.*, *Mashantucket Sand & Gravel*, 95 F.3d at 179-82 (applying Occupational Health & Safety Act to tribal business); *Occupational Safety & Health Comm'n*, 935 F.2d at 184 (applying rule to tribal mill even though "revenue from the mill is critical to the tribal government").

184. Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004).

b. *The Second Exception Selectively Adopts a Portion of the Rule Against Implied Repeals*

Coeur d'Alene also recognizes an exception to *Tuscarora's* presumption in cases where application of the law would abrogate treaty rights. This exception recognizes that "Congress does not intend to abrogate laws guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians."[185] This principle simply restates the Indian canon of construction, that the courts "do not construe statutes as abrogating treaty rights in a 'backhanded way'; in the absence of explicit statement, 'the intention to abrogate or modify a treaty right is not to be lightly imputed to the Congress.'"[186]

Through the treaty rights exception, *Coeur d'Alene* and the Board in *San Manuel* adopt the rule against implied repeals. However, both *Coeur d'Alene* and *San Manuel* fail to recognize that the Supreme Court has applied the rule against implied repeals in the absence of treaties as well.[187]

C. THE BOARD'S DENIAL OF SOVEREIGN IMMUNITY

Once the Board determined that it could assert jurisdiction over *San Manuel*, it neglected that "[t]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."[188] Similarly, the Eleventh Circuit has noted that "whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions."[189] Thus, upon concluding that the NLRA applied to the San Manuel's gaming operation, the Board was required to consider as separate issue whether the tribe's sovereign immunity had been waived by Congress or the tribe.

In general, where the application of a statute will abrogate tribal sovereign immunity, such abrogation may not be implied.[190] Rather, it must be "unequivocally expressed"[191] in "explicit legislation."[192] In the recent case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,*

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185. United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980).

186. United States v. Dion, 476 U.S. 734, 739 (1986) (quoting Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)).

187. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976); United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).

188. Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2d Cir. 2000).

189. Fla. Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1130 (11th Cir. 1999).

190. Santa Clara Pueblo v. Martinez, 435 U.S. 49, 58 (1978).

191. *Id.* (quoting United States v. King, 395 U.S. 1, 4 (1969)); see also United States v. Testan, 424 U.S. 392, 399 (1976).

192. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

Inc.,[193] the Supreme Court upheld the vitality of tribal sovereign immunity in off-reservation tribal commercial activities.[194] It noted that Congress could "alter its limits through explicit legislation."[195] But absent a clear mandate from Congress, the Supreme Court refused to find that tribal immunity was diminished.[196] It noted, "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area."[197] In the case of *San Manuel*, the Board's assertion of jurisdiction under the NLRA created the potential that the tribe would be subject to suit and penalized with fines. Such actions, which would abrogate the tribe's sovereign immunity, require a clear expression in explicit legislation. Since the NLRA includes no such expression, the Board's assertion of jurisdiction should be barred.

III. CONGRESS DID NOT INTEND FOR THE NLRA TO APPLY TO TRIBES

Viewed from the perspective of the foundational principles of federal Indian law and the Indian canon of construction, the language of the NLRA does not support the conclusion that the NLRA applies to tribes and divests them of their sovereign authority to govern tribal labor relations.

None of the NLRA's provisions specifically refer to tribes. Instead, it vests jurisdiction in the NLRB over "employers," and the NLRA excludes from the definition of employers "[t]he United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), . . ."[198] The Indian canon instructs that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit,"[199] and it requires that congressional abrogations of sovereignty be "unmistakably clear."[200] The NLRA lacks an "unmistakably clear" intent to abrogate tribal sovereignty. Furthermore, the NLRA's

193. 523 U.S. 751 (1998).
194. *Kiowa Tribe*, 523 U.S. at 760.
195. *Id.* at 759.
196. *Id.*
197. *Id.*
198. 29 U.S.C. § 152(2) (2000).
199. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).
200. County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 258 (1992) ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'").

silence regarding tribes does not effectively establish an intent to impinge tribal sovereign rights. Rather, statutory silence in interpretive questions involving Indian tribes often creates ambiguity.[201] In such cases, "the correct presumption is that silence does not work a divestiture of tribal power."[202]

In addition to the NLRA's language, its legislative history and the broader historical context surrounding its passage also provide no support for the theory that Congress intended the NLRA to apply to tribes and divest them of tribal sovereign powers. The NLRA was enacted by Congress in 1935 to encourage collective bargaining and protect the right of workers to freedom of association and self-organization.[203] The NLRA's statement of findings and policy recognizes that "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest."[204] The NLRA also recognizes in its statement of findings that the unequal bargaining power between workers and employers results in the depressing of wage rates and the purchasing power of wage earners.[205] The NLRA attempts to rectify these problems by creating a statutory basis for the promotion of collective bargaining.[206] It pronounces,

> [i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[207]

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201. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 494 (7th Cir. 1993).

202. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n.14 (1982)).

203. The discussion of the NLRA in this article pertains to the NLRA as it was passed in 1935. Although the NLRA was subsequently amended by the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1982)), and the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959), those amendments can be characterized more as minor adjustments than substantial modifications of the original law.

204. 29 U.S.C. § 151 (2000).

205. *Id.*

206. *Id.*

207. *Id.*

Its legislative history provides an even fuller sense of the NLRA's purpose. This legislative history was largely shaped by Senator Robert F. Wagner of New York, the legislator who authored the bill and lobbied passionately for its passage.[208] Wagner's primary concerns as evidenced in statements attributed to him in the Congressional Record were strengthening the economy by ensuring that workers could effectively bargain for higher wages and limiting incidents of workplace disruption by reducing the number and severity of strikes.[209]

The impetus to enact the NLRA also developed from a need to prevent extreme workplace violence between employers and employees.[210] Senator Wagner testified that "[t]his toll of private warfare cannot be measured by statistics alone, for it places the taint of hatred and the stain of bloodshed across the pathway to amicable and profitable business dealings."[211] Outside the halls of Congress during the consideration of Wagner's bill, employers commonly engaged in practices such as spying on unions, holding stockpiles of weapons, and employing company police and strikebreakers to keep employees in line.[212] In some cases, employers resorted to hiring private "detective companies" who systematically attempted to silence worker dissent through the use of force and even murder.[213] The passage of the NLRA "shifted the focus of the labor conflict away from violent confrontation toward the hearing rooms and courts" by offering workers an enforceable mechanism to collectively bargain with employers.[214]

When Congress enacted the NLRA, employment relations in Indian Country were not on its radar. Congress enacted the NLRA to respond to a

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208. Michael J. Heilman, *The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, 23 DUQ. L. REV. 1059, 1063 (1985).

209. *Id.* at 1071-72, 1073-74.

210. *Id.* at 1074 (citing 79 CONG. REC. S7573 (1935) (remarks of Sen. Wagner)).

211. *Id.*

212. *Id.* at 1075.

213. John M. Husband, *The Colorado Coal Wars of 1913 and 1914: Some Issues Still Debated Today*, 26 COLO. LAW. 147, 149 (1997) (quoting WALTER H. FINK, THE LUDLOW MASSACRE 75 (1914)). According to contemporary sources,

> When the operator saw a strike was inevitable, the Baldwin-Felts Detective Agency was employed, and hundreds of gunmen and hired assassins, many of whom had murdered women and children in the West Virginia strike, were brought into the state. More than a dozen machine guns were purchased and a systematic reign of terror that has known no equal in history of industrial conflicts was begun by these hired murders [sic] of John D. Rockefeller.

Id.

214. E. Christi Cunningham, *Identity Markets*, 45 HOW. L.J. 491, 554 n.405, 557 n.430 (2002)

growing labor relations crisis in industrial America.[215] At no point did Congress affirm that the NLRA would apply to employment relations in Indian Country.[216] Indeed, no reference was ever made in the NLRA's legislative history to tribes or tribal employment.[217]

The broader historical context surrounding the NLRA's passage strongly supports the conclusion that Congress did not intend for the NLRA to apply to tribal employment relations. Although legislative history is the "ultimate source" for determining Congress's purpose in making the law, the broader historical context of lawmaking is also instructive to show the conditions that motivate Congress's actions.[218]

The broader context of the NLRA's passage in July of 1935 included the making by Congress of "one of the most significant single pieces of legislation directly affecting Indians ever enacted by the Congress of the United States."[219] This legislation was the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act. [220] Enacted in June of 1934, the IRA effectively reversed the federal government's Indian affairs policy by terminating the era of allotment and encouraging greater tribal self-government.[221]

Immediately prior to the enactment of the IRA, Congress attempted to implement a policy of allotting tribally-owned lands to individual tribal members. This policy was largely implemented through the Dawes General

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215. *See* Local 1976, United Broth. of Carpenters and Joiners of America, A.F.L. v. NLRB, 357 U.S. 93 (1958); *see also* Brooks v. NLRB, 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace.").

216. *See* 29 U.S.C. § 152(2) (1982) (failing to include Indian tribes in the definition of "employer").

217. *See* NLRB. v. Pueblo of San Juan, 30 F. Supp. 2d 1348, 1354 (D.N.M. 1998) (citing Sac & Fox, Indus. Ltd., 307 NLRB 241, 242 (1992)).

218. See Heilman, *supra* note 208, at 1063-64, stating,

> The law is born as a response to secular events, and grows in response to them. If this were not so we would all still study Blackstone's Commentaries. Congress does not act *sua sponte*; it responds to the conditions of the nation. No statute or legislative discussion makes much sense in the abstract, eviscerated of the events that gave rise to it. If contemporary economic, social and political events are kept in mind, words on yellowed pages can become relevant and vital. Studying a statute while ignoring the events of the day is akin to using a skeleton to study anatomy.

Id.

219. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955 (1972)

220. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1934).

221. *Id.* The allotment era had commenced with the passage of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-358 (1994). The policy of allotment was the break up of communal ownership of tribal lands through the assignment of allotments, or parcels of land, to individual tribal members. *See id.* The allotments issued tribal members were subject to restrictions on alienation that generally expired after twenty-five years. *Id.* § 348. The policy of allotment resulted in the opening up of tribal lands to non-Indian settlement.

Allotment Act of 1887.[222] The allotment policy had several objectives.[223] It broke up the communally-held tribal land base; encouraged tribal members to adopt a sedentary; agricultural life on individually-held parcels; and opened tribal lands to non-Indian settlement.[224] The overarching aim of the allotment era was the forced dissolution of tribes and the assimilation of Indians into mainstream society.[225]

Ultimately, the Dawes Act and its policy of allotment became widely recognized as a terrible failure.[226] The Meriam Report of 1928 publicized the hardships incurred by the loss of the Indian land base and called for reforms in federal Indian policy.[227] The Commissioner of Indian Affairs, John Collier, pushed for reforms.[228] He envisioned a new era in which tribal governments would emerge from pervasive federal control to exercise their own self-determination.[229] Congress responded by reversing the course of federal Indian policy through its enactment of the IRA.[230]

In contrast to allotment, the IRA ushered in a new era of tribal self-governance.[231] The legislative history of the IRA indicates that Congress's intent in passing it was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[232] The IRA's first few sections served to stabilize and strengthen the tribal land base.[233] They prohibited any further allotment of reservation land, prevented existing allotments from converting to freely-alienable property by extending their existing trust restrictions,

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222. The Dawes General Allotment Act was preceded by several treaties which also sought to implement allotment on a case-by-case basis with individual tribes. See Treaty with the Omaha, Mar. 16, 1854, 10 Stat. 1043; Treaty with the Shawnee, May 10, 1854, 10 Stat. 1053; Treaty with the Sacs and Foxes of Missouri, May 18, 1854, 10 Stat. 1074; Treaty with the Kickapoo, May 18, 1854, 10 Stat. 1078, Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621. The Act was also followed by statutes such as the Curtis Act, ch. 517, 30 Stat. 495 (June 28, 1898), which forced allotment on the Cherokees, Chickasaws, Choctaws, Seminoles, and Creeks.

223. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. L. J. 1, 8 (1995).

224. *See id.*

225. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (citing *Hearings on H.R. 7902 before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy)).

226. *See* Royster, *supra* note 223, at 6.

227. *See generally* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed. 1928).

228. *See generally Readjustment of Indian Affairs, Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. (1934).

229. *Id.*

230. 25 U.S.C. §§ 461-479 (1934).

231. *See* Singer, *supra* note 151, at 649-50.

232. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. 1804, 73d Cong., 2d Sess., 6 (1934)).

233. *See* Royster, *supra* note 223, at 17.

and generally prohibited future transfers of Indian lands, unless the lands were transferred to the tribe itself.[234] Sections 16 and 17 of the IRA served as the vehicle for the affirmation of tribal self-government.[235] Under these provisions, the Secretary of Interior was authorized to approve tribal constitutions and charters of incorporations for tribes that elected to organize under the IRA.[236]

Thus, the IRA's enactment represented the denunciation of the assimilationist policy of allotment, the adoption of a new policy promoting tribal self-government, and an attempt by Congress to comprehensively set out in legislation several measures that defined tribal rights. These aspects of the IRA serve as an instructive backdrop for interpreting the intent of legislation subsequently passed by Congress. The need to interpret other federal laws in light of Congress's contemporaneous statements on Indian tribes was also underscored by the Supreme Court just three years before passage of the IRA in the opinion of *Choteau v. Burnet*.[237] In that decision, the Court addressed whether certain federal tax laws applied to reservation Indians.[238] The Court opined that since the prevailing Congressional policy at the time of the enactment of the tax legislation was the assimilation of Indians and the ultimate conferral of United States citizenship upon them, it was logical to conclude that the tax was intended to apply.[239]

When Congress enacted the NLRA in 1935, it did so on the heels of the single-most comprehensive piece of legislation ever passed on the subject of Indian tribes. It also acted in the wake of a Supreme Court decision that emphasized that laws of general application that were silent regarding Indians would be interpreted with reference to the prevailing policy of federal Indian law. Since Congress had so recently and comprehensively

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234. 25 U.S.C. §§ 461-462, 464 (1934).

235. *Id.* §§ 476-477.

236. *See id.* Section 17 of the IRA, which provided for the issuance of a charter of incorporation to a tribe for business formation, stated,

> Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty five years any trust or restricted land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Id. § 477 (1996).

237. Choteau v. Burnet, 283 U.S. 691, 694 (1931) (finding that whether Indians are exempt from the tax "requires a reference to the policy of the government with respect to Indians").

238. *Id.*

239. *Id.*

spoken on the subject of Indian tribes, the only reasonable conclusion that can be made based on the NLRA's failure to encompass tribes within its regulatory ambit is that Congress never intended the NLRA to apply.

IV. LABOR RELATIONS AND THE EXERCISE OF SOVEREIGNTY

Even if the federal courts and the NLRB continue to find that the NLRA applies to the on-reservation commercial activities of tribes, tribes still have strategies available to continue to exercise self-governance over tribal labor relations.

A. RIGHT-TO-WORK ORDINANCES

One successful example of such self-governance is the passage of "right-to-work" ordinances by tribal governments. Several tribes have recently passed such ordinances,[240] and more are likely to do so in an attempt to lessen the likelihood that employees will form unions in the wake of the Board's *San Manuel* decision.

Right-to-work laws prohibit unions and employers from entering into agreements that require employees to join and maintain membership in unions.[241] Such agreements are commonly known as union security agreements and employers that are subject to them are referred to as union shops. Generally, Section 8(a)(3) of the NLRA permits the formation of union security agreements,[242] but Section 14(b) of the NLRA also permits states and territories to enact right-to-work laws that prohibit them.[243] In states that have passed right-to-work laws, employees are entitled to refuse to join

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240. *See* Grand Traverse Band of Ottawa & Chippewa Indians, Resolution #04-22.1446 (Nov. 24, 2004), *codified at* 8 Grand Traverse Band Code § 801 and 18 Grand Traverse Band Code § 1701 (on file with author), Blue Lake Rancheria, Ordinance No. 03-03 (June 11, 2003) (on file with author). *See also*, NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191 fn. 4 (10th Cir. 2002) (en banc) (noting that the Navajo Nation, Crow Tribe and Osage Tribe have enacted right-to-work ordinances); DAVID KENDRICK, NAT'L INST. FOR LABOR RELATIONS RESEARCH, RIGHT TO WORK STATES CONTINUE TRADITION OF ECONOMIC GROWTH (June 10, 1998) (noting that the Seneca-Cayuga Tribe had enacted a right-to-work law), *at* http://www.nilrr.org/growth.htm.

241. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1190 n.3; *see also* 8 Grand Traverse Band Code § 801(a)(2) ("No person shall be required, as a condition of employment on GTB lands, to . . . become or remain a member of a labor organization . . . ."); 18 Grand Traverse Band Code § 1701(a)(2) (same).

242. 29 U.S.C. § 158(a)(3) (2000) ("nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later . . .").

243. *Id.* § 164(b) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.")

a union or pay union dues after beginning work, even if the employees in the workplace are represented by a union. Thus, right-to-work laws give employees the option of acting as free riders, since employees can receive the benefit of union representation in collective bargaining while also refusing to pay union dues.[244] Perhaps as a result of this free rider phenomenon, right-to-work laws have been shown to decrease the likelihood that new organizing activity will take place in the workplace.[245] As of 2004, twenty-three states had enacted right-to-work laws.[246]

In *National Labor Relations Board v. Pueblo of San Juan*,[247] the Tenth Circuit reviewed whether the Pueblo of San Juan had authority to pass a right-to-work statute that it had enacted, despite the fact that Section 14(b) of the NLRA does not explicitly permit tribes to pass legislation of this sort.[248] The district court concluded that the tribe did have this authority.[249] On appeal, the Board argued that the Pueblo's right-to-work ordinance was preempted by federal law.[250] A divided Tenth Circuit panel held that the NLRA did not preempt the tribal law[251] and an en banc panel of the Tenth Circuit affirmed that result, 9-1.[252]

The holding of *Pueblo of San Juan* was also acknowledged without dissent by the NLRB. In reaching its holding in *San Manuel*, the Board concluded that *Pueblo of San Juan* was distinguishable because it did not involve a claim of complete exemption from the NLRA.[253] As a result, both the NLRB and the Tenth Circuit recognize the authority of tribes to

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244. *See* WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 54 (4th ed. 2004).

245. DAVID T. ELLWOOD & GLENN A. FINE, THE IMPACT OF RIGHT-TO-WORK LAWS ON UNION ORGANIZING 32 (Nat'l Bureau of Econ. Research, Working Paper No. W116, 1983).

246. THE DEVELOPING LABOR LAW 489 (Peter A. Janus et al. eds., 4th ed., supp. 2004). States with right-to-work laws include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming. *See id.*

247. 280 F.3d 1278 (10th Cir. 2000), *aff'd on reh'g*, 276 F.3d 1186 (10th Cir. 2002) (en banc).

248. *See Pueblo of San Juan*, 280 F.3d at 1281.

249. *See id.*

250. *See id.* at 1282.

251. *See id.* at 1286.

252. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir.).

253. See San Manuel Indian Bingo & Casino, 341 NLRB No. 138, 2004 WL 1283584, at *6 n.16 ("Moreover, the facts of *Pueblo of San Juan* are distinguishable. There, the Board sought declaratory and injunctive relief to challenge a right-to-work ordinance enacted by the tribe. Here, the Respondent seeks to avoid the application of the Act to its commercial activities."). The Board's statement in this quote neglects the fact that *San Manuel* also involved an indirect challenge to a tribal ordinance, since the San Manuel had enacted a Tribal Labor Relations Ordinance that conflicted with the NLRA.

pass right-to-work laws, and the right has not been challenged in any other circuit.

Pueblo of San Juan possesses significance for tribes for two reasons. First and most obviously, the opinion creates a window of opportunity for tribes to exercise some degree of self-governance in the employment relations context. By recognizing that tribes have the prerogative to make decisions about whether to permit union shops, the opinion allows tribes to take ownership over an important aspect of labor relations. Rather than fully relinquishing tribal regulatory control over labor relations to the NLRB, the *Pueblo of San Juan* decision creates a window for tribes to assess labor relations needs, weigh policy options and enact and implement laws that attempt to resolve those needs. These actions are all part of the effective operation of self-governance and part of the means toward achieving self-determination as well.[254]

Second, the rationale of *Pueblo of San Juan* is significant because it affirms the foundational principles of Indian law,[255] it applies the Indian canon of construction to its interpretation of the NLRA,[256] and it places the burden of proving that Congress has abrogated tribal sovereign powers squarely on the Board.[257] In addition, the court distinguishes *Federal Power Commission v. Tuscarora* on the basis that *Tuscarora* merely involved issues of ownership, and did not involve the divestment of tribal sovereign powers.[258] The court's analysis ultimately leads it to conclude that "Congress'[s] silence as to the tribes can hardly be taken as an affirmative divestment of their existing 'general authority, as sovereign[s], to control economic activity' on territory within their jurisdictions."[259]

B. NEW DIRECTIONS FOR REGULATING TRIBAL LABOR RELATIONS

The likely outcome of the *San Manuel* and *Pueblo of San Juan* decisions is that tribes will attempt to minimize the threat of unionization by passing right-to-work statutes. Although this strategy allows tribes to

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254. *See Pueblo of San Juan*, 280 F.3d at 1200 ("The legislative enactment of the Pueblo's right-to-work ordinance was also clearly an exercise of sovereign authority over economic transactions on the reservation.").

255. *See id.* at 1192 (linking *Worcester v. Georgia* to the principle that tribes retain their existing sovereign powers until Congress acts).

256. *See id.* at 1194 ("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.").

257. *See id.* at 1190 ("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'").

258. *See id.* at 1198-99.

259. *See id.* at 1198 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)).

exercise some degree of self-governance over labor relations, this strategy is at bottom a reactive and insufficient approach that will thwart the ability of tribes to develop more progressive and comprehensive labor policies that satisfy the specific needs of tribal communities.

First, the passage of right-to-work ordinances is insufficient because it serves as an inferior substitute for the implementation of comprehensive tribal labor policies. Those tribes that pass right-to-work ordinances are quite possibly driven by the fear that employees will form unions in the wake of the *San Manuel* decision, and they look to right-to-work ordinances as a form of insurance against union activity. The problem with this approach is that right-to-work ordinances do not insure against unions, but merely reduce the likelihood of new organizing activity.[260] In addition, the passage of a right-to-work ordinance is essentially defensive. Once confronted with the threat of NLRA enforcement, tribes are forced to divert their attention away from the pursuit of a vision for community labor relations that may in fact embrace unions and promote organizing activity but impose restrictions on bargaining tactics where the employer provides essential public services.[261]

The passage of right-to-work ordinances is also insufficient because it permits tribes to be treated like states for the purposes of the power to enact right-to-work statutes, but it denies tribes other privileges granted states under the law. Most obvious, of course, is the fact that states are exempt from the definition of "employer" under the NLRA. If tribal sovereignty interests are sufficient to support the authority to enact right-to-work statutes, the same sovereignty interests should also support the authority of tribes to enact tribal labor laws that govern public employment.

In addition, tribes should press for the right to assume jurisdiction over labor disputes, just as Sections 10 and 14(c)(2) of the NLRA permit states to assume such jurisdiction.[262] Unions, employees, and employers could all

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260. ELLWOOD & FINE, *supra* note 245, at 32.

261. There are many reasons to believe that tribal labor policy would differ in significant ways from the standards of the NLRA if tribes had the freedom to legislate in this area. Since tribally-owned commercial enterprises provide revenues that fund public services, tribes have an interest in maintaining revenue flows and restricting business interruptions. Much like the states and the federal government, tribes must ensure that the collective bargaining process does not jeopardize the continued provision of essential public services. For this reason, a tribal labor policy may include restrictions on the unfettered right to strike or restrictions on the subject matters eligible for collective bargaining.

262. 29 U.S.C. § 160(a) (2000) provides that,

> the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination

benefit immensely by tribal assumption of jurisdiction over labor disputes. The NLRB averages 747 days—more than two years—to conclude a case from the date of the filing of the charge to the decision.[263] For an employee wrongfully discharged who must continue to make mortgage and car payments, this delay virtually ensures that damages will be paid long after the house is foreclosed and the car repossessed.[264] Some tribes have relatively small dockets and could adjudicate labor disputes in a more efficient and streamlined process.[265] Where appropriate, tribes could also offer parties the option of resolving their disputes in traditional dispute resolution forums. Several tribes operate traditional dispute resolution forums that have substantial benefits, including greater cultural relevance for the parties,[266] more efficient processes, and increased success at cooperative problem solving. Such traditional dispute resolution forums pose significant advantages in comparison to more adversarial processes that tend to polarize and entrench the parties.

V. CONCLUSION

In conclusion, the Board's decision to apply the NLRA to San Manuel's gaming operation rests on an analysis that departs with Supreme Court precedent and congressional policy. The Board's decision also perpetuates a pattern of adoption of the *Tuscarora-Coeur d'Alene* approach, despite the fact that the approach also departs from existing doctrine. If the courts and the Board continue their use of the rule, they will minimize and trivialize tribal sovereignty on a case-by-case, ad hoc basis, resulting in the slow erosion of recognized tribal rights. The best weapon that tribes can deploy in response to this pattern is the continued exercise of sovereign powers through the enactment, implementation and enforcement of tribal

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> of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Id. § 164(c)(2) (2000) provides that,

> [n]othing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.

263. *See* GOULD, *supra* note 244, at 132.

264. *Id.*

265. Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 522 (2004) (contrasting the 50,000 cases on the Navajo Nation's docket each year with the small docket of many Minnesota tribes).

266. Robert F. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 250-51 (1997).

legislation such as right-to-work laws, public employment labor relations laws, and procedures for the transfer and assumption of jurisdiction over tribal labor disputes.