



<http://caselaw.findlaw.com>

FILED

United States Court of Appeals  
Tenth Circuit

JAN 11 2002

PATRICK FISHER  
Clerk

I

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,  
Plaintiff\_Appellant,  
and

No. 99\_2011

No. 99\_2030

LOCAL UNION NO. 1385,  
WESTERN COUNCIL OF INDUSTRIAL  
WORKERS,

Intervenor\_Appellant,

v.

PUEBLO OF SAN JUAN,

Defendant\_Appellee.

NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION,  
Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
(D.C. No. CIV\_98\_35\_MV/RLP)

ON REHEARING EN BANC

Nancy E. Kessler Platt, Supervisory Attorney, (Leonard R. Page, Acting Gene

Counsel, John H. Ferguson, Associate General Counsel, Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Margery E. Lieber, Assistant General Counsel, and Eric G. Moskowitz, Deputy Assistant General Counsel, with her on the brief) of the National Labor Relations Board, Washington, D.C., for Plaintiff-Appellant.

Lee Bergen (Wayne H. Bladh, Daniel I.S.J. Rey-Bear, Thomas J. Peckham, with him on the brief) of Nordhaus, Haltom, Taylor, Taradash & Bladh, Albuquerque, New Mexico for Defendant-Appellee.

Harlan Bernstein of Jolles & Bernstein, PC, Portland, Oregon, Matthew E. Or of Catron, Catron & Sawtell, PA, Santa Fe, New Mexico, Michael T. Garone of Jolles, Bernstein & Garone, Portland, Oregon, and Morton S. Simon of Simon, Oppenheimer & Ortiz, Santa Fe, New Mexico, on the briefs for Intervenor-Appellant.

Mickey D. Barnett, Law Offices of Mickey D. Barnett, P.A., Albuquerque, New Mexico and John C. Scully, Springfield, Virginia, filed an amicus curiae brief for the National Right to Work Foundation.

Before TACHA, Chief Judge, HOLLOWAY, Senior Circuit Judge, SEYMOUR, Circuit Judge, BRORBY, Senior Circuit Judge, and EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges. Judge BRISCOE is filing a concurring opinion. Judge LUCERO is filing a concurring opinion in which he joins Parts I, II and IV of the majority opinion. Judge MURPHY dissents.

HOLLOWAY, Senior Circuit Judge.

---

In 1996 the San Juan Pueblo tribal council enacted a right\_to\_work ordinance and also adopted a lease containing similar right\_to\_work provisions. These were challenged by the instant declaratory judgment and injunction suit brought by the National Labor Relations Board (NLRB or the Board) and Local Union No. 10 of the Western Council of Industrial Workers (the Union) as an intervenor. The Union brought this appeal from the district court's decision granting summary judgment in favor of the Pueblo.

#### I

The relevant facts are undisputed. San Juan Pueblo is a federally recognized Indian tribe located in New Mexico. Most of its 5,200 members live on tracts that are held in trust by the United States for the Pueblo. The Pueblo is governed by a tribal council, which is vested with legislative authority over tribal law.

federally\_approved leases, the Pueblo leases certain portions of its tribal non\_tribal businesses as a source of generating tribal income and as a near employment for tribal members. The origins of this case lie in a labor dispute involving a lumber company operating on leased lands since August, 1996. The history of the leases as well as the dispute, which has now been settled, is in the District Court's opinion. *NLRB v. Pueblo of San Juan*, 30 F. Supp. 2d 1350751 (1998).

On November 6, 1996, the San Juan Pueblo Tribal Council enacted Tribal Ordinance No. 96\_63 which it amended on February 4, 1998. The ordinance in substance is a so-called "right\_to\_work" measure. The Pueblo asserts that the ordinance is a valid exercise of its inherent sovereign authority. *Id.* at 1350751. When amended, the ordinance prohibits the making of agreements containing union security clauses covering any employees, whether tribal members or not. Section 6(a) of the ordinance reads:

No person shall be required, as a condition of employment or continuation of employment on Pueblo lands, to: (i) resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay any charity or other third party, in lieu of such payments any amount equivalent to or a pro\_rata portion of dues, fees, assessments or other charges regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization.

Supplemental Brief on Rehearing en Banc (NLRB) at 4. The ordinance prohibits employers and unions from entering into agreements requiring employees to refrain from membership in or pay dues to a union, called union security agreements. The Pueblo's lease with the lumber company similarly provides:

Lessee will not enter into any contract or other arrangement which would require a Tribal member to be a member of a union, league, guild, club, or association (hereinafter collectively referred to as "union") in order to be entitled to all of the priorities to be accorded him pursuant to this Property Lease. Tribal members will not be required to join or maintain membership in, or pay any dues or assessments to, any union in order to be hired and benefit from the priorities stated in this Lease.

Brief on Appeal for the NLRB, at 5. The "priorities" mentioned in the lease to terms of employment for employees who are tribal members. *Id.* at 5 n.3.

On January 12, 1998, the NLRB filed the instant suit in the United States District Court for the District of Columbia for a Permanent Injunction and for a Declaratory Judgment, alleging that the ordinance and lease provisions, insofar as they prohibit compliance with union security agreements, are preempted by federal law. Specifically, the Board argued that the ordinance provisions are invalid under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, (1) due to preemption by the National Labor Relations Act, 29 U.S.C. § 151, et seq. (hereinafter the NLRA). Leave to intervene was granted to the parties upon the parties' stipulation.

The district court issued a Memorandum Opinion and Order on November 12, 1998, granting the Pueblo's motion for summary judgment and denying such motion of the NLRB and the Union. *NLRB v. Pueblo of San Juan*, 30 F. Supp. 2d 1348 (D.C. 1998). On appeal, a divided panel affirmed the district court's decision. We granted certiorari of the NLRB and the Union for rehearing en banc which we have held. We now affirm the district court's decision.

(1) "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, art. VI, cl. 2.

## II

### A

The Pueblo's sovereign authority to regulate labor relations and inherent limitations on that authority

The central question before us is whether, in light of the United States Constitution's Supremacy Clause, and Congress' plenary power over Indian affairs, the NLRA prevents the Pueblo from enacting a "right\_to\_work law" or entering into a lease with provisions making prohibitions similar to those in right\_to\_work

We believe the question of the validity of the lease provisions here is subsumed within the larger question of the validity of the ordinance. Because this is a matter of law, we review the district court's order de novo. *Mt. Olivet Cemetery and the Union*, as plaintiffs attacking the exercise of sovereign tribal power, show that it has been modified, conditioned or divested by Congressional action. *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486, 488 (10th Cir. 1983). As noted in *Southland Royalty*, "[a]mbiguities in federal law have been construed generously in order to comport with . . . tribal notions of sovereignty and federal policy of encouraging tribal independence.'" *Id.* at 490.

In their challenges to the district court's decision and our panel's decision, the NLRB and the Union argue that § 8 (a) (3) of the National Labor Relations Act, 29 U.S.C. § 158 (a) (3), clearly protects the rights of a union and an employer to enter into union security agreements meeting the requirements of § 8 (a) (3). Moreover, the NLRB and the Union maintain that Congress intended by the force of the National Labor Relations and Taft-Hartley Acts to preempt state and local regulation of union security agreements with the narrow exception of § 14 (b), 29 U.S.C. § 164 (b), allowing only states and territories to prohibit otherwise permitted union shop provisions. Appellee's Opening Brief at 9-10. We disagree and instead are convinced by the Pueblo's argument that, as an Indian tribe, it retains the sovereign power to enact a right-to-work ordinance, and to enter into the lease agreement with right-to-work provisions because Congress has not made a clear retrenchment of such tribal power as required to do so validly.

(2) Congress' power over Indian matters derives from the Constitution's Commerce Clause, in art. I, § 8, cl. 3, and its treaty power, art. II, § 2, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

(3) A "right-to-work" law, as the term is used here, is a statute which the NLRA permits states and territories to enact to invalidate agreements establishing "union shops." A closed shop, originally permitted under the NLRA, is created when an employer and a union agree that only people who are already union members may be hired. This was outlawed in 1947 by the Taft-Hartley Act's amendment of the NLRA, 29 U.S.C. § 158 (a) (3). A union shop is created when an employer and a union agree to require employees, as a condition of continued employment, to have membership in a labor union "on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158 (3). Such an agreement between an employer and a union is a union security agreement. Provided they comply with other requirements of 29 U.S.C. § 158, and provided no right-to-work law forbids them, the NLRA permits union shop agreements and union security agreements.

We begin by noting what the district court also took pains to point out that the general applicability of federal labor law is not at issue. NLRB Pueblo, 30 F. Supp 2d at 1351. Furthermore, the Pueblo does not challenge supremacy of federal law. The ordinance, as amended, does not attempt to repeal the NLRA or any other provision of federal law. The suggestion that tribes including those that have already enacted right\_to\_work laws,(4) might "enact ordinances allowing precisely what generally applicable federal law prohibits" has no support in this record. Furthermore, there is no danger that the Pueblo or the State of New Mexico might enact conflicting laws, since state right\_to\_work laws are of no effect in federal enclaves such as Indian reservations, see *Lord v. IBEW*, No. 2088, 646 F.2d 1057, 1062 (5th Cir. 1981) (finding state right\_to\_work law inapplicable in federal enclave in spite of § 14 (b) of the NLRA), cert. denied, 458 U.S. 1106 (1982); *New Mexico Fed'n of Labor v. City of Clovis*, 735 F. Supp. 999, 1002-03 (D.N.M. 1990) (indirectly noting the inapplicability of state right\_to\_work laws in federal enclaves).

Rather, the central question here is whether the Pueblo continues to exercise the same authority to enact right\_to\_work laws as do states and territories.

(4) These include the Navajo Nation, the Crow Tribe, and the Osage Tribe. See Amicus Curiae brief of the National Right to Work Foundation in Support of Appellee Pueblo of San Juan at 17.

(5) NLRB brief at 12.

Congress in enacting §§ 8 (a) (3) and 14 (b) of the NLRA, 29 U.S.C. §§ 158 and 164 (b), intended to strip Indian tribal governments of this authority over their sovereign. Pursuant to the Supremacy Clause, the federal government has the authority to preempt state and municipal authority in a particular field. *Wardair Carriers v. Florida Dept. of Revenue*, 477 U.S. 1 (1986). Likewise, Congress in the

of its plenary power over Indian affairs may divest Indian tribes of their sovereign authority, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), a Pueblo does not dispute.

Indian tribes are not states for constitutional purposes, and the preemption analysis is not exactly the same. See *Reich v. Mashantucket Sand & Gravel*, 174, 181 (2d Cir. 1996) ("[T]ribes are not states under OSHA . . . and thus does not preempt tribal safety regulations in the same manner in which it preempt state laws."). We need not delineate precisely the scope of federal preemption of tribal laws here, however. A well-established canon of Indian law states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 766 (1985). The Supreme Court has also explained that this canon means that "doubtful expressions of legislative intent must be resolved in favor of the Indians." *South Carolina v. Catawba Tribe of Indians*, 476 U.S. 498, 506 (1986). The same principle applies to other statutes, even where they do not mention Indians at all.

*Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (construing the Age Discrimination in Employment Act).

In resolving questions of preemption of state law, the test is one of congressional intent. *Wardair Canada*, 477 U.S. at 6. In order to find preemption of tribal laws, similarly it is necessary to determine whether Congress intended to divest the San Juan Pueblo of its power as a sovereign to pass right-to-work ordinances. The burden to show such congressional intent to divest the Pueblo of its power to enact its right-to-work ordinance and to enter into the lease agreement rests on the Union and the NLRB. See *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (requiring party arguing preemption to carry burden of presenting clear evidence of Congressional intent); *Southland Royalty Co. v. Navajo Tribe*, 728 F.2d 486, 488 (10th Cir. 1983) (tribe's general authority as sovereign included taxing power and the burden on those attacking that power was to show that it had been modified, conditioned or divested by Congressional action). We find no showing

here that satisfies the burden of the Board and the Union to demonstrate congressional intent to preempt the Pueblo's authority to enact the ordinance to enter into the lease agreement. In sum, from §§ 8 (3) and 14 (b) of the NIPRA they now stand, we find that the Board and the Union are reduced to arguing that there is implied preemption of tribal sovereign authority to enact a right-of-way ordinance or to enter into the challenged lease agreement. However, implied preemption of such sovereign authority does not suffice. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (" . . . [T]he proper inference from silence is that the sovereign power . . . remains intact.").

Indian tribes are neither states, nor part of the federal government, nor subdivisions of either.<sup>(6)</sup> Rather, they are sovereign political entities with their own sovereign authority not derived from the United States, which they predate. *McClanahan*, 411 U.S. at 172 ("the . . . Indian [tribes'] . . . claim to sovereignty predates that of our own Government."). The Pueblo, like all Indian tribes, does not rely on a federal delegation of powers. "Indian tribes consistently have been recognized . . . by the United States, as `distinct, independent political entities, qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Felix S. Cohen, *Handbook of Federal Indian Law* 232 (1982) (footnotes omitted) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). Tribes retain those attributes of inherent sovereignty not withdrawn either expressly or necessarily as a result of the tribes retain their existing sovereign powers." *Id.* We are persuaded that the Pueblo's powers include the authority to adopt the ordinance challenged here by the Board and the Union and to enter the lease agreement.

In addition to broad authority over intramural matters such as membership, Indian tribes retain sovereign authority to regulate economic activity within their territory, see, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (recognizing "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . . ."); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980) (observing that tribes possess

civil jurisdiction over the activities of nonmembers on reservation land if tribes have a significant interest, and that there was no evidence that Cor departed from that view). But see *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (holding that tribal interest in tourism activity by nonmember on non-Indian owned land within the reservation was inadequate to support tribal power to tax).

However, courts have described the tribes' status as necessarily resulting in the loss of their power to "engage in foreign relations, alienate their land to non-Indians without federal consent, or prosecute non-Indians in tribal courts."

(6) As we have previously explained,

Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.

*Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

do not accord the full protections of the Bill of Rights." *Colville*, 447 U.S. 371 (1980) (tribes may regulate certain activities by non-Indians where such activities do not disturb tribal political integrity, economic security, health, or welfare. See, e.g., *Atkinson Trading Co.*, 532 U.S. 645 (2001) (imposition of hotel occupancy tax on non-Indian guests of non-Indian owned hotel on non-Indian land served by federal and state highways on a reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal jurisdiction over a case arising from an accident between nonmembers on a state right-of-way on a reservation); *Rice v. Rehner*, 463 U.S. 713, 736 (1983) (tribal jurisdiction over sales on a reservation, where the federal government and states had long exercised concurrent regulatory authority over such trade); *Montana v. United States*, 450 U.S. 544 (1981) (non-Indian fishing and hunting on non-Indian land on a reservation).

In general the cases where, absent congressional guidance, tribes have been found to lack regulatory authority have been those involving nonmembers' activities on non-Indian-owned fee land that was found to have no direct effect on the reservation. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers on non-Indian-owned fee land that was found to have no direct effect on the reservation."

nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements," and "exercise civil authority over the conduct of non-Indians on fee lands with reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

United States, 450 U.S. at 565\_66. See also William Canby, *American Indian Law* 275\_76 (1998) (summarizing recent federal precedents regarding limitations on tribal regulatory jurisdiction). These limiting precedents, however, are not applicable where the NLRB seeks a declaratory judgment prohibiting the application of an ordinance to all persons everywhere on the reservation, and where the only precedent of regulation cited pertains to consensual commercial dealings between the tribe and its members on the one hand, and a lumber company operating on lands leased from the tribe on the other.

#### B

Whether a valid divestiture has been made of the Pueblo's sovereign authority to regulate labor relations by enactment of the right\_to\_work ordinance or adoption of the lease containing right\_to\_work provisions

The retained sovereign authority of Indian tribes is subject to divestiture by Congress. Divestiture may occur by treaty or statute, *United States v. Wheeler*, 437 U.S. 313, 323 (1978), the latter being relied on by the Board and the Union. Divestiture may also occur necessarily as a result of tribal status, *id.*, or "inconsistent with overriding national interests." *Merrion*, 455 U.S. at 14. However, divestiture is disfavored as a matter of national policy, *EEOC*, 87 Fed. Cl. at 939, and will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority. We have explained

[w]e believe that unequivocal Supreme Court precedent dictates that in

cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), . . . and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canon of construction to the benefit of Indian interests.

Id. (emphasis added).

Indian interests, as the Supreme Court has interpreted them, include tribal sovereignty, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (looking to "traditional notions of sovereignty and with the federal government's encouraging tribal independence" for guidance in interpreting ambiguous or conflicting federal enactments), and maintaining tribal authority over civil matters on tribal territory, see, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959) (upholding tribal authority over a business transaction involving a non-Indian on a reservation), pointing out that "[t]he cases in this Court have consistently guarded the rights of Indian governments over their reservations"). Doubtful or ambiguous expressions therefore, are to be construed as leaving tribal sovereignty undisturbed.

The Government has assumed trust responsibility for Indians and tribes, including the pueblos. *United States v. Sandoval*, 231 U.S. 28 (1913). The canons of construction favoring Indians reflect this. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and Indians."). Rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Id.* at 225. See, e.g., *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978) (construing Indian Civil Rights Act narrowly so as to avoid limiting tribal sovereignty); *Itasca County v. United States*, 426 U.S. 373 (1976) (upholding right of Indians to be free from taxation in spite of provisions of Public Law 280). We further note that the canon requiring resolution of ambiguities in favor of Indians is to be given the widest possible scope," remembering that "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *DeCoteau v. Dist. Court*, 420 U.S. 425, 447 (1975).

Where tribal sovereignty is at stake, the Supreme Court has cautioned us to tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60. The Court's teachings also require us to consider

sovereignty as a "backdrop," against which vague or ambiguous federal enactments must always be measured," and to construe "[a]mbiguities in federal law . . . generously in order to comport with . . . traditional notions of sovereignty and the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 413 U.S. at 143-44. Courts are consistently guided by the "purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 490 F.2d 496 (7th Cir. 1993). We therefore do not lightly construe federal law as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.

Statutes are entitled to the presumption of non-preemption. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This is especially true in the context of tribal law. As noted, it is well established that federal statutes are to be construed liberally in favor of Indians and tribes, and that any ambiguities or doubtful expressions of legislative intent are to be resolved in their favor. *Montana v. Blackfeet*, 471 U.S. at 766; *South Carolina v. Catawba*, 476 U.S. at 506. Indian tribes, like states, are entitled to comity. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 496. Furthermore, both the legislative and executive branches have declared that federal Indian policy favors tribal self-government. At this point the Supreme Court has spoken clearly and emphatically: "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government . . . . This policy reflects the fact that Indian tribes possess attributes of sovereignty over both their members and their territory, to which that sovereignty has not been withdrawn by federal statute or treaty." *Iowa v. LaPlante*, 480 U.S. 9, 14 (1987) (internal quotation and citation omitted). See also generally, President's Message to Congress, *The American Indians*, 137 Cong.Rec. 23131 (July 8, 1970) (declaring previous termination policy a failure and announcing a new direction in Indian policy, favoring increased tribal autonomy). The Court has recognized that reservation tribes enjoy the right to "n

own laws and be ruled by them," as a benefit to be protected from state interference. *Williams*, 358 U.S. at 220. Preempting tribal laws divests tribes of their sovereign authority, running counter to this policy and not benefitting Indians. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 484 (1979) (stating the "general rule that ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians," in the absence of tribal sovereignty). In the absence of clear evidence of congressional intent, therefore, federal law will not be read as stripping tribes of their retained authority to pass right-to-work laws and be governed by them.

We turn now to the arguments made by the Board and the Union that Congress has divested the Pueblo of its sovereign authority to enact the right-to-work ordinance and enter into the lease. All parties agree that neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes. We must decide what is the proper inference to draw from this silence. The NLRB cited *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980): "Where Congress

(7) This address by President Nixon has been identified as having "clearly stated the current direction of federal policy." William Canby, *American Indian Law* 3 (1998) (citing Cong.Rec. 23258).

explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary intent." The Board argues that this rule, akin to the well-known principle of *expressio unius est exclusio alterius*, is a "settled principle of statutory construction applicable in this case. Supp. Brief of the NLRB at 16. While this "settled principle" may find application in other types of cases, in matters of Indian law, "expressio unius . . ." must often be set aside. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 487 (1999).

The Board argues that, while "legal ambiguities" can sometimes be resolved

to the benefit of the Indians,' *DeCoteau v. District County Court*, 420 U.S. (1975), courts cannot ignore a statute's plain language . . . ." Supp. Bri disagree, however, with the implied contention that silence establishes thi plain intent to preempt tribal authority. Silence as to tribes can constit or intrinsic ambiguity that only becomes apparent when other facts are cons *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 493\_94. In t context of Indian law, appeals to "plain language" or "plain meaning" must to canons of statutory construction peculiar to Indian law. *Id.* at 493 (fi the "plain meaning" canon was parried by the canon "that not only treaties (other) statutes as well are to be construed so far as is reasonable to do Indians."). We note further that it is congressional intent, and not mere words of a statute, that controls. *South Carolina v. Catawba*, 476 U.S. at Silence is not sufficient to establish congressional intent to strip Indian retained inherent authority to govern their own territory. See *Kerr\_McGee Farley*, 915 F. Supp. 273, 277 (D.N.M.1995), *aff'd* 115 F.3d 1498 (10th Cir. cert. denied, 522 U.S. 1090 (1998) (observing that congressional silence is interpreted in favor of Indians).

The correct presumption is that silence does not work a divestiture of power. *Merrion*, 450 U.S. at 148 n.14 ("[T]he proper inference from silence that the sovereign power to tax remains intact."); *El Paso Natural Gas*, 52 at 487 (concluding that tribes should be treated like states because the Pr Anderson Act's silence as to tribes was probably attributable to congressic inadvertence). But see *Chickasaw Nation v. United States*, No. 00\_507, 2001 1488017 (U.S.) (Nov. 27, 2001) (affirming this circuit's denial of a tax ex for tribes on their gaming operations, and reaching this conclusion on the special canon disfavoring implied tax exemptions, evidence of congressional and strong statutory language); *Confederated Tribes of the Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982) (concluding that express exemptions for states, their political subdivisions, and the District of Co not provide the clear statutory guidance required to find a tax exemption f

cert. denied, 460 U.S. 1040 (1983). In neither of these latter cases, however, was the tribe's sovereign authority to enact and enforce laws at stake, as is the case here.

The NLRB points out that, "at the time that [§ 14 (b)] was enacted, Congress was aware that there existed some twelve States with laws prohibiting union security . . . ." (8) Supp. Brief (NLRB) at 12. The Board goes on to argue that "the legislative history indicates that it was these State laws which Congress intended to preempt and that "[t]he legislative history repeatedly refers to State laws and only those laws prohibiting union security . . . ." Id. However, we are not convinced that Congress did not merely intend to preserve the existing state laws, since in including § 14 (b) it recognized the authority of all states \_ and territories as well \_ to enact their own right\_to\_work laws if they wished, not just the twelve states that had already done so. The NLRA embraces the possibility that many of the states might be governed by their own right\_to\_work laws enacted by sovereign governments. Furthermore, the Act expressly embraces diversity of legal regimes respecting union security agreements at the level of "major policy\_making units." *New Mexico Fed'n of Labor*, 735 F. Supp. at 1000.

*Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949), is instructive. *Algoma* arose before the enactment of § 14 (b). The Court there held that "§ 8 (3) merely disclaims a national policy hostile to the right to work in a shop or other forms of union\_security agreement." Id. at 307. Relying on

(8) On September 25, 2001, Oklahoma voters approved a state right\_to\_work referendum question, bringing the total to 22 such states.

In its legislative history, the Court quoted from, among others, Senator Wagner, who stated that "[t]he provision will not change the status quo." Id. at 310 (citations and quotations omitted). The Court concluded that the Wagner Act had not swept away the state authority to regulate union security measures, but was enacted, as to matters of union security, simply to express Congress' judgment that closed shops were not in the public interest where authorized, and not to declare national policy that they were desirable. The Court found this view of § 8 (3) supported by the subsequent enactment of § 14 (b).

in the Taft\_Hartley Act. Id. at 313\_14.

Thus the tribe is not preempted by § 8 (a) (3) from enacting a right\_to law for business conducted in its reservation. What Congress has not taken § 8 (a) (3) it need not give back (by § 14 (b)) in order for the tribe to c have authority to pass a right\_to\_work law. Although the Supreme Court has characterized § 8 (a) (3) as "articulat[ing] a national policy that certain security agreements are valid as a matter of federal law," *Oil, Chemical & Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976), the Court also made it clear that § 8 (a) (3) was not intended by Congress to be preempted. See id. at 417 (noting § 14 (b) of the NLRA "was designed to make clear that § 8 (a) (3) left the States free to pursue their own more restrictive policies in the area of union\_security agreements") (internal quotations omitted); *Retail Clerks Int'l Union Local 1625 v. Schermerhorn*, 375 U.S. 96, 101 (1963) (noting § 14 (b) of the NLRA was enacted to "mak[e] clear and unambiguous the purpose of Congress not to preempt the field"); see also *Algoma Plywood*, 336 U.S. at 307 (describing the predecessor to § 8 (a) (3) as "merely disclaim[ing] a national policy hostile to closed shop or other forms of union\_security agreement").

The Court has explained that, in enacting § 14 (b), "Congress left the States free to legislate in that field . . . [and thus] intended to leave unaffected the authority of the States to enforce those laws." *Schermerhorn*, 375 U.S. at 102 (emphasis added). When Congress enacted § 14 (b), it did not grant new authority to states and territories; it merely recognized and affirmed their existing authority. Congress' silence regarding the authority of tribes can therefore hardly be taken as an affirmative divestment of their "general authority, as sovereign[s], to control economic activity" on their own territories and their jurisdictions. See *Merrion*, 455 U.S. at 137.

### III

#### The effect of the Tuscarora case

The NLRB and the Union further urge us to find preemption on the basis of the holding in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

a tribe owned property that the Court held was subject to condemnation under the Federal Power Act in order to create a reservoir. The tribe had been using the property as a reservation,<sup>(9)</sup> but the *Tuscarora* opinion held that Congress designated it as such, either by statute or treaty. *Id.* at 121 n. 18.

The Court noted that Congress appeared to have intended that Act to be generally applicable to "lands owned or occupied by any person or persons, including Indians." *Id.* at 118. The *Tuscarora* Indian Nation had relied on a rule set forth in *Wilkins*, 112 U.S. 94 (1844) that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Tuscarora*, 362 U.S. at 116. The Court explained that, although at one time individual Indians had been considered exempt from laws that did not specifically include them, the rule had since been modified. The Court cited *Superintendent v. Five Civilized Tribes*, 295 U.S. 418 (1935), in which a restricted Indian's investment income was held to be subject to federal income tax under the broad terms of the 1928 Revenue Act, and *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), in which the State of Oklahoma was held to have the same status as the United States. *Tuscarora* at 116-17. The Court said "it is now well settled by the authority of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

However *Tuscarora* dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. Property ownership and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a sovereign, and a government may exercise sovereign authority over land it does not own. *Tuscarora* mentions no attempt by the tribe to govern the disputed land, nor does it take cognizance of any argument that taking the land would incidentally infringe on tribal sovereign authority to govern. It was the tribe's possessory interest in the land, rather than its authority to govern activity on the land, that was at stake in *Tuscarora*. 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.

In *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545 (10th Cir. 1986), we dealt with property rights and reached the conclusion that tribal ownership did not prevent a generally applicable federal statute from regulating activity to ensure the safety of ground water under tribally\_ownership. (9) The lands involved were owned in fee simple by the Tuscarora Indian and no "interest" in them was "owned by the United States" so that they were within a "reservation" as that term was defined in 3 (2) of the Federal Power Act.

(10) In keeping with the guardian\_ward relationship, the allotted property of certain Indians was subject to the supervision of the United States and could not be freely alienated. They were referred to as "restricted" Indians. See *Cohen v. Comm'r of Internal Revenue*, 38 F.2d 976, 977 (10th Cir. 1930) (plaintiff Blackbird "is a restricted full\_blood Osage. Her property is under the supervision and control of the United States."). See also *Cohen* at 650\_51 (discussing restrictions).

There, the Osage tribal government's property interest was regulated by the Safe Drinking Water Act of 1974 (SDWA), but its sovereign authority was not. For example, when attempting to exercise its sovereign authority to enact a competing regulation, the tribe supported the federal regulation and indicated its approval by tribal council. It was a third party (Phillips Petroleum) that challenged the application of the regulation. *Id.* at 556. Furthermore, the facts differ significantly between *Cohen* and the instant one. There, the statute gave delegated authority to the Environmental Protection Agency to promulgate regulations governing underground injection wells that threatened to pollute groundwater and endanger the nation's drinking water. *Id.* at 547\_48.

Other cases have applied the Tuscarora principle to Indian tribal government entities acting in proprietary capacities. See, e.g., *Florida Paralegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999); *Reid v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Smart v. State Farm Mutual*, 868 F.2d 929 (7th Cir. 1989); and *Donovan v. Coeur d'Alene Tribal Farm*, 692 F.2d 709 (10th Cir. 1982).

Thus *Tuscarora* is not persuasive here. We are convinced it does not apply where an Indian tribe has exercised its authority as a sovereign ? here, by enacting a labor regulation ? rather than in a proprietary capacity such as that of

landowner. In spite of the Board's attempts to bring to our attention multi-  
where the rule was applied to a tribe qua sovereign, no citations were four  
apposite.(11) Supp. Brief of the Board at 23 n. 22. Further, Tuscarora do  
where, as here, the law is not generally applicable as the exceptions of §  
The exception to § 8 (a) (3) recognized in § 14 (b) indicates that Congress  
intend "inclusion within its general ambit as the norm," Smart, 868 F.2d at  
view of Congress' intention with regard to this statute, and the federal po  
long recognized tribal sovereignty, we do not think that Tuscarora may be a  
to divest a tribe of its sovereign authority without clear indications of s  
congressional intent which are lacking here. We therefore are convinced th  
(3)'s proviso permitting union security agreements does not support divestr  
the Pueblo's sovereign authority to enact the right\_to\_work ordinance.

The exemption of § 8 (a) (3) contemplates that federal law, and partic  
the provisions of § 8 (a) (3), may conflict with that of other sovereigns,  
that federal law give way. Oil, Chemical & Atomic Workers, 426 U.S. at 417  
(recognizing "a conflict sanctioned by Congress with directions to give the  
way to state laws."). We recognize that § 14 (b) should not be read as gra  
and territories general power to supplant federal labor law; states and ter

(11) In Tuscarora, 362 U.S. 99, the rule was applied to the tribe as a  
owner and not as a sovereign authority. In Nero v. Cherokee Nation of Okla  
892 F.2d 1457, 1462\_63 (10th Cir. 1989), we found that a generally applicak  
rule did not apply to the tribe as sovereign.

not, for instance, enact laws that exempt their territory from other federal  
regulations. See id. at 413 n.7 (finding no suggestion in § 14 (b)'s langu  
legislative history that types of laws not mentioned in § 14 (b) might be p  
However neither the Board nor the Union contests the Pueblo's assessment of  
right\_to\_work law as being similar to state right\_to\_work laws. Brief for  
Pueblo of San Juan at 6. There is therefore no showing before us that the  
right\_to\_work ordinance is a kind of law that a state or territory might not

permitted to enact and enforce.

Like states and territories, the Pueblo has a strong interest as a sovereign in regulating economic activity involving its own members within its own territory; it therefore may enact laws governing such activity. *Merrion*, 455 U.S. at 137. *Merrion* illustrates the exercise of sovereign authority (there, to tax) and the exercise of sovereign authority exercised was recognized to be "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or the implication of their dependent status." *Id.* at 137 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980)). The legislative enactment of the Pueblo's `right_to_work` ordinance was also a clear exercise of sovereign authority over economic transactions on the reservation. This distinguishes the Pueblo's exercise of sovereign authority here from a congressional enactment like that in *Tuscarora* which did not affect tribal legislative power but instead impacted proprietary interests. This distinction demonstrates why the *Tuscarora* principle, that Indians' proprietary interests may be affected even if Indians are not specifically mentioned, does not apply here where the matter "is a fundamental attribute of sovereignty" and "a necessary instrument of government and territorial management . . . [which] derives from the tribe's authority, as sovereign, to control economic activity within its jurisdiction." *Merrion*, 455 U.S. at 137.

#### IV

In sum, we are convinced that Congress did not intend by its NLRA provision to preempt tribal sovereign authority to enact its `right_to_work` ordinance as part of the lease agreement. The Board and the Union had the burden to establish the intent of preemption, but they did not satisfy their burden. Since they failed to do so, we uphold the tribal `right_to_work` ordinance. Similarly we see no reason to invalidate the lease provisions entered into by the Tribe. Accordingly, the decision of the district court is

AFFIRMED.

No. 99\_2011, No. 99\_2030, NLRB v. Pueblo of San Juan

BRISCOE, Circuit Judge, concurring:

I concur. Applying the Tuscarora/Coeur d'Alene analytical framework outlined in Judge Murphy's dissent, which I believe to be controlling in the outcome, in my view, turns on the effect of § 8(a)(3) of the NLRA. Although the Supreme Court has characterized § 8(a)(3) as "articulat[ing] a national policy that certain union\_security agreements are valid as a matter of federal law," *Oil & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976), the Court has also made it clear that § 8(a)(3) was not intended by Congress to be preemptive. See *id.* at 417 (noting § 14(b) of the NLRA "was designed to make clear that § 8(a)(3) left the States free to pursue their own more restrictive policies regarding the matter of union\_security agreements") (internal quotations omitted); *Retail & Wholesale Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 101 (1963) (noting § 8(a)(3) of the NLRA was enacted to "mak[e] clear and unambiguous the purpose of Congress was not to preempt the field"); see also *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 307 (1949) (describing the predecessor to § 8(a)(3) as "merely disclaim[ing] a national policy hostile to the closed shop").

(1) I agree with Judge Murphy that the majority "offers no logical, policy, or authoritative support" for its attempt to draw a distinction between a tribal union\_security agreement and other forms of union\_security agreement". Based upon these statements, I agree with the majority that § 8(a)(3) does not preempt tribes from enacting their own work laws for business conducted on their reservations.

No. 99\_2011, No. 99\_2030, NLRB v. Pueblo of San Juan

LUCERO, Circuit Judge, concurring.

I join Judge Briscoe's concurrence. I write separately to note my rec of the potential analytical tension between Parts I, II, and IV of the major which I have also elected to join, and the approach set forth in Judge Briscoe's concurrence. Under either approach, the result reached today is mandated by United States Supreme Court cases, *Retail Clerks International Ass'n, Local 100 v. Schermerhorn*, 375 U.S. 96, 101 (1963), and *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307 (1949). These cases do not permit us to entertain the interpretation or result advocated by appellants in this case.

No. 99\_2011, No. 99\_2030, *NLRB v. Pueblo of San Juan*

MURPHY, Circuit Judge, dissenting:

A majority of this court concludes that Congress did not divest Native American Indian tribes of the power to enact right\_to\_work laws when it passed § 8(a)(3) and 14(b) of the National Labor Relations Act ("NLRA"). The majority supports this conclusion by invoking the general proposition that Congress implicitly abrogate Indian self\_governance by silence. It then goes on to conclude, first, that Congress, by its silence, implicitly granted Indian tribes the right to enact right\_to\_work laws when it passed § 14(b). Because I disagree with the majority's conclusion that § 8(a)(3) did not divest Indian tribes of their power to enact right\_to\_work laws with its subsequent conclusion that § 14(b) implicitly granted Indian tribes the power to enact right\_to\_work laws granted to states and territories, I respectfully dissent.

It is beyond debate that Indian tribes do not "possess[ ] . . . the full measure of sovereignty." *United States v. Kagama*, 118 U.S. 375, 381 (1886); see also *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541 (10th Cir. 1980), aff'd, 454 U.S. 130 (1982). Tribes, rather, are quasi\_sovereign governments, possessing "those powers of self\_government not voluntarily relinquished by treaty, not by Congress in the exercise of its plenary authority over them, or not incompatible with the superior interest of the United States as a sovereign nation." *Merrion*

F.2d at 541. The Union and the NLRB do not argue that the Pueblo of San Juan ("Pueblo") never possessed the power to enact a right\_to\_work law or that a power has either been relinquished by treaty or is inconsistent with the status of the United States. Rather, both simply argue that the Pueblo's power has been divested by the exercise of congressional plenary authority over Indian

The majority does not dispute that Congress retains plenary power over Indian tribes and may exercise that power to divest tribes of their sovereignty. at 8\_9. Further, the majority correctly points out that the burden is on the Union to demonstrate that the Pueblo's power to enact the ordinance at issue has been "modified, conditioned or divested by Congressional action." *Southern Ute Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 488 (10th Cir. 1983). The majority then concludes that Appellants have not met their burden of showing that Congress intended to divest the Pueblo of the power to enact the ordinance. The NLRB and the Union, however, have met their burden by demonstrating that the NLRA constitutes comprehensive federal regulation of labor relations. The Union then fails to offer any proof that Congress did not intend for § 8(a)(3) to apply to Indian tribes.

Congress' clear intention to apply a federal statute to Indian tribes is demonstrated in one of two ways. Congress, of course, may expressly limit Indian sovereignty by including specific language to that effect in the federal statute. Alternatively, congressional intent to abrogate Indian sovereignty can be inferred from legislative history or from the "existence of a comprehensive statutory scheme." *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989). The conclusion that Congress can abrogate Indian sovereignty by implication is firmly supported by statements made by the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). In *Tuscarora*, the Court declared that it is now well settled by many decisions of this Court that a general [federal] statute in terms applying to all persons includes Indians and their property interests. Though dicta, this language indicates the Court's position that the case law

a presumption that federal statutes of general applicability apply to India  
See *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his cou  
considers itself bound by Supreme Court dicta almost as firmly as by the Co  
outright holdings . . . .").

The Ninth Circuit has expounded on the Court's statement in *Tuscarora*,  
articulating three exceptions to the general presumption in favor of applic

A federal statute of general applicability that is silent on the issue  
applicability to Indian tribes will not apply to them if: (1) the law  
touches exclusive rights of self\_governance in purely intramural  
matters; (2) the application of the law to the tribe would abrogate ri  
guaranteed by Indian treaties; or (3) there is proof by legislative hi  
or some other means that Congress intended [the law] not to apply to  
Indians on their reservations . . . .

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

(quotations omitted). These exceptions provide Indian tribes with the oppo  
to rebut the presumption that they are included in federal statutes of gene  
application.

In *Donovan v. Navajo Forest Products*, this court opined that *Merrion v*  
*Jicarilla Apache Tribe*, 455 U.S. 152 (1982) "limits or, by implication, ove  
*Tuscarora*." 692 F.2d 709, 713 (10th Cir. 1992). If *Merrion* did limit the  
application of *Tuscarora*, those limits are entirely consistent with the exc  
articulated by the Ninth Circuit in *Coeur d'Alene*. Reading *Merrion* as cons  
with *Tuscarora* is supported by the opinions issued by this court after *Merr*  
*Navajo Forest Products* in which the court invokes the *Tuscarora* presumptio  
then considers the *Coeur d'Alene* exceptions. See *Nero v. Cherokee Nation*,  
1457, 1462\_63 (10th Cir. 1989); *EEOC v. Cherokee Nation*, 871 at 939; *Phillip*  
*Petroleum Co. v. EPA*, 803 F.2d 545, 555\_56 (10th Cir. 1986). Thus, this co  
together with several other circuits, has embraced the *Tuscarora/Coeur d'Al*  
approach.

In *EEOC v. Cherokee Nation*, a divided panel of this court concluded th  
Age Discrimination in Employment Act ("ADEA") did not apply to Indian tribe  
See 871 F.2d at 939. Both the majority and the dissenting judge, however,

acknowledged that clear congressional intent to abrogate tribal sovereignty manifested by the existence of a comprehensive statutory plan. See *id.*; *id.* n.1, 941\_42 (Tacha, J., dissenting) (examining legislative history and an federal statute to support the conclusion that the tribe's right to self\_government limited by the ADEA). It is unclear whether the majority based its holding on the view that the ADEA was not a comprehensive federal plan or its conclusion that the treaty between the Cherokee Nation and the United States overcame the Tuscarora presumption. See *id.* at 939, 938 n.3.

This court has also invoked the Tuscarora presumption to conclude that Congress intended to include Indian tribes within the reach of the Safe Water Drinking Act of 1974 ("SWDA") even though tribes were not expressly mentioned. See *Phillips Petroleum*, 803 F.2d at 556 ("The conclusion that the SWDA empowers the EPA to prescribe regulations for Indian lands is also consistent with the presumption that Congress intends a general statute applying to all persons, Indians and their property interests."); *id.* at 556 n.14. The court's holding is supported, in large part, by its conclusion that the SWDA "clearly establishes a national policy with respect to clean water." *Id.* at 555. The court determined that this national policy would be thwarted if Indian tribes were not covered by the SWDA. It then noted that there was no showing that the SWDA conflicted with a specific right granted to the tribe either by statute or treaty. See *id.* at 556. The majority believes *Phillips Petroleum* differs from this case because, unlike *Pueblo*, the Indian tribe in *Phillips Petroleum* did not oppose the application of the SWDA. Under the analysis employed by the *Phillips Petroleum* court, however, the outcome would be the same regardless of whether the issue of tribal sovereignty was raised by an Indian or by a non-Indian. Certainly the majority cannot be said to believe that the outcome in *Phillips Petroleum* would have been different had the tribal sovereignty been raised by the affected tribe rather than *Phillips Petroleum*. The importance of *Phillips Petroleum* is that it squarely supports the proposition that cases involving comprehensive federal statutes of general applicability should

analyzed by applying *Tuscarora/Coeur d'Alene*.

Other circuit courts of appeal have also concluded that tribes' sovereign powers can be divested by comprehensive federal regulatory schemes that are as to their application to Indians. See, e.g., *Fla. Paralegic Ass'n v. Mi Tribe of Indians*, 166 F.3d 1126, 1128\_30 (11th Cir. 1999) (concluding that applies to Indian tribes); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (holding that OSHA applied to an Indian tribe); *Smart v. Sta Ins. Co.*, 868 F.2d 929, 932\_36 (7th Cir. 1989) (applying ERISA to an employ benefits plan established and operated by an Indian tribe); *Coeur d'Alene 7 Farm*, 751 F.2d at 1116 (holding that OSHA applied to a tribe's commercial activities). These cases all discussed *Tuscarora* and the exceptions articu Ninth Circuit.

The majority distinguishes *Tuscarora* and its progeny by concluding the Pueblo's sovereign power to govern by enacting legislation, as opposed to i to protect any proprietary interests it holds, can never be divested by imp See slip op. at 10\_11 ("[I]mpplied preemption of such sovereign authority de suffice."). The majority's position, however, is purely visceral; the majc no logical, precedential, or authoritative support for the proposition that sovereign power to enact general legislation is afforded more protection th other aspect of its sovereignty. Further, the majority's position conflict *Merrion v. Jicarilla Apache Tribe*.

In *Merrion*, the Supreme Court addressed the question of whether Congre implicitly divested an Indian tribe of its power to impose a severance tax, of self\_governance. See 455 U.S. at 150\_52. Although the Court ultimately concluded that there was no indication the tribe's power had been abrogated Congress, it clearly engaged in the very analysis repudiated by the majorit case. The Court first examined two federal statutes to determine whether t contained any references to Indian tribes. See *id.* at 149\_50. It then exa whether any particular provision in the statutes "deprived the Tribe of its to impose the severance tax." *Id.* at 149. The Court concluded that the fi

contained express language indicating congressional intent that it not apply to Indian tribes. See *id.* at 150. As to the second statute, the Court noted that all authorized state taxation of royalties from mineral production on Indian lands did not mention tribal authority to tax. See *id.* at 151. In rejecting the claim that the statute transferred the Indian power to tax mineral production to the state, the Court stated as follows:

This claim not only lacks any supporting evidence in the legislative history, it also deviates from settled principles of taxation: different sovereigns can enjoy powers to tax the same transactions. Thus, the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax.

*Id.*

Although the Court concluded that Congress had not implicitly divested the tribe of its power to impose the severance tax at issue in that case, *Merrill* stands for the proposition that Congress can divest an Indian tribe of a "right of self-government" by implication. 455 U.S. at 152 ("We find no 'clear indication that Congress has implicitly deprived the Tribe of its power to impose the tax." (emphasis added)). The Court did not conclude that Congress could not divest a tribe of such powers by implication.

Like the Supreme Court, this court has also recognized that Congress could divest Indian tribes of sovereign powers of self-government by implication. *Nero*, 892 F.2d at 1462\_63. In *Nero*, this court concluded that a federal statute of general applicability did not divest a tribe of its sovereign power to determine tribal membership and thus exclude plaintiffs from participating in tribal election and Indian benefits programs. See *id.* at 1463. The court arrived at this conclusion by applying the *Tuscarora/Coeur d'Alene* analysis. It apparently assumed that the federal statute was one of general applicability but then concluded that the statute could not be invoked against the tribe because it would impinge on the tribe's right of self-governance over tribal membership, a purely intramural matter. See *id.* at 1462\_63.

The Supreme Court has consistently and unequivocally stated that Congress

has plenary authority to divest Indian tribes of any and all aspects of the sovereignty, whether those powers were retained by the tribes or established by treaty. "The sovereignty that the Indian tribes retain is of a unique and character. It exists only at the sufferance of Congress and is subject to defeasance." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added). "Congress has plenary authority to limit, modify or eliminate the powers of self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); see also *United States v. Dion*, 476 U.S. 734 (1986) (holding that rights granted to a tribe by treaty may be abrogated by Congress). Even powers over purely intramural tribal matters can be divested by treaty or statute. See *Wheeler*, 435 U.S. at 322 n.18.

The *Tuscarora*/*Coeur d'Alene* test accommodates notions of both tribal and federal sovereignty. Pursuant to the exceptions first articulated by *Coeur d'Alene*, Congress has the power to implicitly divest an Indian tribe of sovereign powers limited in only two circumstances: when the federal statute strips the tribe's power to regulate purely intramural matters or when the statute divests the powers guaranteed by treaty. Only in those two situations must congressional divestiture be express. Congress can divest Indian tribes of any and all aspects of their sovereignty by implication, including their power to regulate the affairs of non-members, unless the tribe can demonstrate that Congress did not intend the federal statute to apply to them.

The majority's attempt to distinguish the *Tuscarora*/*Coeur d'Alene* analysis on the basis that it only applies when a federal statute affects property interests does not apply when a tribe merely invokes its general legislative powers. If the majority is correct, an Indian tribe, in almost every instance, could avoid the application of a comprehensive, generally applicable federal statute simply by exercising its general legislative powers and enacting an ordinance that either declares the tribe to be exempt from the federal statute or which directly conflicts with the federal statute. By holding that Congress can never implicitly di-

of their power to enact laws that conflict with generally applicable federal law. The majority effectively bestows upon Indian tribes sovereign powers far greater than those possessed even by the states. As a result of the majority opinion, tribes now have unfettered power to enact ordinances that directly conflict with a federal statute of general application. For example, the Pueblo could enact an ordinance legalizing the closed shop, a form of compulsory unionization the majority acknowledges was "outlawed in 1947 by the Taft-Hartley Act's amendment of the NLRA." Slip op. at 6 n.3. The Pueblo could also enact legislation declaring tribal members to be exempt from all federal tax laws. Such an ordinance would effectively preempt the application of all federal tax laws until Congress changes the situation by expressly including Indian tribes within the reach of the laws. This certainly cannot be the rule.

Both the Seventh and the Second Circuits have rejected the majority's reasoning on this very basis. In *Smart*, a member of the Chippewa Tribe argued that ERISA did not apply to an employee benefit plan maintained by the tribe because it affected tribal sovereignty. See 868 F.2d at 935. The Seventh Circuit disagreed, stating:

A statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived. Any federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government.

*Id.* Similarly, the Second Circuit addressed a nearly identical argument, *id.*

When taken to its logical limits, it would preclude the application of any federal legislation, silent as to Indians, that in some way affects political integrity, economic security, or health and welfare of a tribe. Such a test greatly expands the niche the federal government has carved out for Indian tribes; that of a sovereign with limited powers, dependent

on, and subordinate to the federal government.

*Mashantucket Sand & Gravel*, 95 F.3d at 179 (quotation omitted).

*Merrion* and *Nero* stand for the proposition that the *Tuscarora/Coeur d'Alene* analysis should be applied to determine whether Congress has, by implication

divested an Indian tribe of any powers it retains. The approach adopted by Circuit in Coeur d'Alene is consistent with both Tuscarora and Merrion and courts with an appropriate and workable framework within which to analyze the impact of all generally applicable federal statutes on all aspects of Indian sovereignty. The exceptions articulated in Coeur d'Alene appropriately limit the Tuscarora presumption by preserving tribal sovereignty over purely intramural matters even in the face of comprehensive federal regulation. A limited national tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters. The majority's concerns about abrogating tribal powers of self-governance by implication are addressed by the Coeur d'Alene exceptions. The majority has offered no rationale for its position that tribes' powers to enact general legislation occupy the same heights as their more vital powers to regulate purely intramural matters such as membership and domestic affairs.

Congress divested the Pueblo of the power to enact the ordinance at issue here. The Pueblo does not dispute that the NLRA establishes a national labor policy. See *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981) ("The national policy favoring collective bargaining and industrial self-governance was first expressed in the National Labor Relations Act of 1935. It received its fullest expression and definition in the Labor Management Relations Act, 1947." (citation omitted)); *Phillips Petroleum*, 803 F.2d at 555 (using the NLRA as an example of a statute that established a national policy); *Navajo Tribe v. NLRB*, 288 F.2d 1000 (D.C. Cir. 1961) ("Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies."). Relying on *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, however, the majority concludes that § 8(a)(3) does not prohibit right-to-work laws like the one at issue here. See *Wisconsin Employment Relations Board v. Giss*, 375 U.S. 476, 483 (1964).

*Algoma* cannot be read for the proposition that § 8(a)(3) had no effect on the Indian tribe's power to enact a right-to-work ordinance. In *Algoma*, the Court

interpreted § 8(3) of the Wagner Act, which permitted the closed shop before it was amended by the Taft-Hartley Act of 1947.<sup>(1)</sup> See *id.* at 307\_09. Addressing the issue, the Court stated, "§ 8(3) merely disclaims a national policy hostile to the closed shop forms of union-security agreement." *Id.* at 307. The Court, in part, relied on the language from a Senate Report indicating that § 8(3) "deals with the question of the closed shop." *Id.* The Court then quoted a statement made by Senator Wagner in 1935: "§ 8(3) 'will not change the status quo. . . . [W]herever it is the law today, a closed-shop agreement can be made, it will continue to be the law. By this amendment we do not change that situation.'" *Id.* at 310. Thus, the language in *Algom* cited by the majority stands only for the proposition that § 8(3) of the Wagner Act does not prohibit states from outlawing closed shops. The "status quo" referred to by the Court was the states' powers to regulate closed shops.

Even assuming that § 8(3) of the Wagner Act had no effect on the right of the states to fully regulate union security agreements, the majority fails to acknowledge that § 8(3) was amended by the Taft-Hartley Act of 1947. See *id.* at (1). Section 8(3) of the Wagner Act read as follows:

8. It shall be an unfair labor practice for an employer

. . . .

(3) By discrimination in regard to hire or tenure of employment or any term or condition of membership in any labor organization: Provided, That nothing in this Act, or in the Nation Industrial Recovery Act . . . 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, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

ch. 372, § 8(3), 49 Stat. 449, 452 (1935).

§ 8(a)(3), 61 Stat. 136, 140\_41 (1947) (current version at 29 U.S.C. § 158(a)(3)).  
 amended, the statute regulates more than the closed shop. Section 8(a)(3)

add[ed] new conditions, which, as presently provided in § 8(a)(3), require that there be a 30-day waiting period before any employee is forced into a union, that the union in question is the appropriate representative of the employees, and that an employer not discriminate against an employee if he has reasonable grounds for believing that membership in the union was not available to the employee on a nondiscriminatory basis or that the employee's membership was denied or terminated for reasons other than failure to meet union-shop requirements as to dues and fees.

Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 100 (1964). Because Algoma did not resolve the question of whether § 8(a)(3) of the Taft\_Hartley Act, the statute at issue here, preempted state right\_to\_work laws, the Court left the question up in Schermerhorn. Acknowledging that § 8(a)(3) of the Taft\_Hartley Act imposed additional federal restrictions on union security agreements not found in § 8(3) of the Wagner Act, the Court, referring to § 8(a)(3), stated, "In other cases where Congress undertook pervasive regulation of union\_security agreements, raising the minds of many whether it thereby preempted the field . . . and put such agreements beyond state control." *Id.* at 100\_01 (emphases added and citation omitted). Although the Court ultimately concluded that the state law at issue in Schermerhorn was not preempted by § 8(a)(3), its holding was premised on § 14(b) of the Taft\_Hartley Act, which restored to the states and territories a power otherwise preempted by § 8(a)(3). See *id.* at 102. The exception carved out by § 14(b), however, is extremely narrow; it only permits states and territories to enact legislation prohibiting union security agreements otherwise allowed under § 8(a)(3). § 14(b) does not permit even states and territories to enact legislation allowed by § 8(a)(3) prohibits, e.g., the closed shop.

In 1976, the Court unambiguously reiterated its belief that § 8(a)(3) of the National Labor Relations Act preempted pervasive federal regulation of union security agreements, stating:

Section 8(a)(3) of the National Labor Relations Act permits employees to enter into agreements with unions to establish union or agency shops. Section 14(b) of the Act, however, allows individual States and Territories to exempt themselves from § 8(a)(3) and to enact so-called "right\_to\_work" laws prohibiting union security agreements.

*Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976) (citations and footnote omitted). The Court went on to state, "§ 8(a)(3) articulates a national policy that certain union\_security agreements are a matter of federal law." *Id.* at 416. This most recent pronouncement by the Court supports the proposition that Congress intended to regulate union security agreements when it enacted § 8(a)(3) of the Taft\_Hartley Act, restoring a portion of that regulatory power only to states and territories when it ena

Thus § 8(a)(3), the statute at issue here, did alter the status quo as it existed at the passage of the Taft-Hartley Act and does constitute pervasive federal regulation of union security agreements.

The ordinance in this case clearly conflicts with the NLRA. Section 8(a)(3) states that employers and unions are not precluded by the NLRA from entering into an agreement requiring employees to become union members within thirty days beginning employment. See 29 U.S.C. § 158(a)(3). The ordinance enacted by the Pueblo specifically prohibits what § 8(a)(3) otherwise allows, i.e., the right of "employers as a matter of federal law to enter into agreement with unions to establish union or agency shops." *Oil, Chem. & Atomic Workers, Int'l Union*, 426 U.S. 659, 670 (1975). Thus, the ordinance is clearly contrary to federal law. Congressional intent in granting the Pueblo of its power to enact the ordinance is thus presumed under *Tuscarora*.

None of the exceptions first articulated in *Coeur d'Alene* apply in this case to overcome the *Tuscarora* presumption. The Pueblo has not identified any treaty or statute of the United States that permits it to enact the ordinance. Additionally, § 8(a)(3) does not touch on the Pueblo's "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene*, 751 F.2d at 1116 (quotation omitted). Section 8(a)(3) regulates the relationship between employers and their employees. In no case has § 8(a)(3) impact purely intramural tribal matters which "generally consist of those matters the immediate ramifications of which are felt primarily within the reservation and among members of the tribe." *Mashantucket Sand & Gravel*, 95 F.3d at 181. Section 8(a)(3) does not regulate tribal membership, domestic relations, or tribal inheritance, those areas recognized by the Supreme Court as constituting tribal internal self-governance. See *Wheeler*, 435 U.S. at 322 n.18 (acknowledging that even the power to regulate tribal membership, domestic relations, or rules of inheritance can be divested by treaty or statute). In this case, § 8(a)(3) clearly curtails the Pueblo's power to regulate the relationship between a non-tribe employer and its employees, both Indian and non-Indian. Although § 8(a)(3)

implicate the Pueblo's power to regulate economic activity on its land, as above, this power, like almost all other powers retained by Indian tribes, divested by implication. See *Merrion*, 455 U.S. at 152 (examining whether a power to impose a tax had been divested by implication). Because § 8(a)(3) affect the Pueblo's power to regulate purely intramural matters, the second Alene exception does not apply.

Finally, the Pueblo has failed to show that "Congress intended [§ 8(a)] to apply to Indians on their reservations." *Coeur d'Alene*, 751 F.2d at 111 (quotation omitted). The majority believes that congressional intent is expressed in § 14(b), which specifically exempts only states and territories from the application of § 8(a)(3). To support this conclusion, the majority relies on the rule of construction that statutes are to be interpreted in favor of Indian sovereignty. This rule of statutory construction, however, can be invoked only when the statute at issue is ambiguous. See *Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000), *aff'd*, 122 S. Ct. 528 (2001). Section 14(b) is not ambiguous; it expressly provides that only states and territories may enact legislation prohibiting what § 8(a)(3) otherwise allows. Further, § 14(b)'s silence as to Indian tribes does not render it ambiguous. To conclude otherwise would eviscerate the *Tuscarora* presumption whenever a federal statute of general application contains a liability exception. Under the majority's reasoning, no federal statute containing even the most narrow exception would apply to Indian tribes; congressional failure to specifically include Indian tribes in the exception would, standing alone, constitute proof that Congress intended by that failure to include them. If this were true, the general *Tuscarora* presumption that federal statutes of general application apply to Indian tribes would be swallowed by the narrow and specific *Coeur d'Alene* exception in almost every case. For this reason, the majority's approach is flawed. The existence of a statutory exception, standing alone, is insufficient to establish that a federal statute is ambiguous or trigger the application of canons of construction in favor of Indian tribes.

The majority's conclusion is fatally undercut by a recent Supreme Court

decision. In *Chickasaw Nation v. United States*, two Indian tribes argued that they were exempted from paying federal taxes related to their gaming activities. 531 U.S. at 531\_32. The tribes asserted that they were entitled to the same exemption from taxation expressly granted to the states. See *id.* The Court disagreed with its conclusion on the plain, unambiguous language of the federal statute which does not expressly grant Indian tribes an exemption from the federal taxes granted to the states. See *id.* at 532\_33. In light of its conclusion that the statute was clear, the Court refused to apply the canon of statutory construction favoring Indian tribes, stating, "to accept as conclusive the canons on which the Tribes rely would be to give an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." *Id.* at 53.

The majority attempts to distinguish *Chickasaw Nation* on the basis that the issue does not involve a tribe's power to enact and enforce laws. The broad concepts of statutory interpretation articulated in *Chickasaw Nation*, however, are not limited to the narrow issue before the Court. *Chickasaw Nation* must be read for the proposition that courts may not engage in judicial lawmaking by invoking general rules of statutory construction to rewrite otherwise clear and unambiguous statutory language. Further, as already explained, a tribe's power to enact legislation that does not impact purely intramural matters is entitled to no more protection than any other tribal power. Accordingly, the Court's analysis in *Chickasaw Nation* applies with equal force to this case. The majority has circumvented congressional intent embodied in the clear and unambiguous language of § 14(b) by invoking a canonic rule of statutory construction. The majority's statement that "in the context of this case, the plain language of the statute appeals to 'plain language' or 'plain meaning' must give way to canons of statutory construction peculiar to Indian law," directly conflicts with the Court's holding in *Chickasaw Nation*. Slip op. at 19.

The majority also relies on *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 115 (1999), to support its conclusion that congressional silence implicitly grants Indian tribes the same exemptions and exceptions from federal law afforded states.

op. at 20. In *El Paso*, however, the Court concluded that Congress had implicitly divested Indian tribal courts of their power to adjudicate tort claims arising from nuclear accidents, an aspect of their self-governance. See *El Paso*, 526 U.S. 87. The Court's holding in *El Paso* is completely consistent with the *Tuscarora* presumption. Read together, *El Paso* and *Chickasaw Nation* clearly stand for the proposition that while Indian tribes can be divested of powers of self-governance, those powers cannot be restored by congressional silence. The majority reaches the opposite conclusion, thereby turning the law on its head.

There is no evidence in this record of congressional intent to include or exclude tribes from the exemption recognized in § 14(b). The majority nevertheless equates this lack of evidence with freedom to legislate by invocation of a construction favoring Indian tribes. The proper conclusion from this lack of evidence of legislative intent, however, is that application of the third exception is precluded. Because Indian tribes are not specifically named in § 14(b) and because the Pueblo has not offered any other proof that Congress intended § 14(b)(3) should not apply to Indian tribes, none of the exceptions articulated in *Alene* are present in this case. Thus, Congress implicitly divested the Pueblo of the power to enact the ordinance and I would, accordingly, reverse the order of the district court.