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RIGHTS WITHOUT REMEDIES

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INTRODUCTION

In *Michigan v. Bay Mills Indian Community*,[1] the Supreme Court issued a critically important decision on tribal sovereign immunity denying Michigan a forum to enforce its alleged rights under the Indian Gaming Regulatory Act and under state law. The decision is reminiscent of *Oklahoma Tax Commission v. Citizen Potawatomi Nation*,[2] in which the Court held that Oklahoma could tax tribal smoke shops, but could not sue the tribe to force remittance of the tax revenue. The *Bay Mills* decision is thus the second time in recent decades where the Court has provided a state with a right under federal Indian law while rendering that right unenforceable against an Indian tribe by

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[1] 134 S. Ct. 2024 (2014).

[2] 498 U.S. 505 (1991).

way of tribal sovereign immunity (*i.e.*, granting a right without a remedy).

Bay Mills directly focuses issues of tribal sovereign immunity on Congress by reaffirming something known as the "clear statement rule." The rule's reaffirmation could impact many areas of tribal governance beyond tribal sovereign immunity, including labor relations, treaty rights, tribal court jurisdiction, and of course Indian taxation. This article parses out how tribal interests (Indian tribes and tribal entities) can utilize the clear statement rule for maximum effect, and how reliance upon the rule could generate signals to Congress.

In short, the clear statement rule requires Congress to make clear, plain, and express any intent to restrict tribal authority.[3] While the rule recognizes Congress's plenary authority to regulate tribal governance authority, it also maintains a general trust toward Indian nations and Indian people. The Supreme Court relies most heavily on the clear statement rule when Congress creates a legislative scheme to govern a particular area of tribal governance, such as the Indian Civil Rights Act[4] and the Indian Gaming Regulatory Act.[5] I address this area in Part I.

The clear statement rule as applied in *Bay Mills* appears to contravene Supreme Court dicta, namely, that federal statutes of general applicability which are silent as to Indian nations and Indian people still apply to them.[6] By definition, laws that are silent do not include a clear statement of intent by Congress to restrict tribal governance authority. This lack of clear congressional intent fuels

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[3] Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031–32 (2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).
[4] 25 U.S.C. §§ 1301–1303 (2012).
[5] 25 U.S.C. §§ 2701–2721 (2012).
[6] *See, e.g.*, Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) ("[I]t 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.").

disputes between Indian nations and federal agencies over federal employment laws that are silent as to their applicability to Indian nations. However, if the Court rejects the various common law artifices used by the lower courts in order to avoid the clear statement rule, there may be hope that the rule will ultimately prevail. I address these cases in Part II, focusing on labor relations matters currently pending.

The clear statement rule might also conflict with the Supreme Court's so-called "implicit divesture" practice. According to this practice, tribal governance authority may be restricted even where Congress has not created a statutory scheme, or has legislated in a piecemeal or incomplete fashion.[7] Tribal civil and criminal jurisdictional disputes are the key areas here. Because Congress has not established a clear legislative scheme to generally govern these areas, the Court is free to adopt common law rules implementing its own policy preferences. Absent favorable Congressional intervention, such as a statute exempting tribes from federal laws, tribal interests face an uphill battle to convince the Supreme Court to reverse course. *Bay Mills* may provide hope, however, that the Court has begun to step away from its role as national policymaker in Indian affairs. I discuss these areas in Part III.

In Part IV, I highlight the latest Indian taxation and tribal immunity matter to be heard by the Supreme Court. In *Lewis v. Clarke*,[8] the Court returned to the tribal immunity arena at the

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[7] See, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (relying upon "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians"); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) ("This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . .").

[8] 137 S. Ct. 1285 (2017).

invitation of personal injury victims who have alleged that immunity "will leave many persons who have been injured by tribal employees without any remedy at all."[9] The Court held that individual capacity suits against tribal employees do not implicate tribal sovereign immunity.[10]

In a future case, the Court might also address alleged state rights without remedies in cases involving in rem jurisdiction, as courts have recently held that tribes are immune from the state and local government suits to foreclose on tribally owned lands.[11] Assuming tribal interests prevail, the Supreme Court might again call on Congress to address tribal immunity.

In Part V, I conclude by identifying the logical outcome of reliance upon the clear statement rule: congressional reconsideration of tribal immunities. This could force Indian country's focus on litigation to give way to the legislative arena. There, tribal interests could be confronted with the rhetoric of rights without remedies.

I. THE CLEAR STATEMENT RULE

Simply put, the clear statement rule says that courts will not find a limitation of tribal governance authority absent a clear statement by Congress to that effect. The *Bay Mills* Court articulated the clear statement rule as follows:

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[9] Petition for a Writ of Certiorari at 3, Lewis v. Clarke, 137 S. Ct. 1285 (2017) (No. 15-1500).

[10] *Lewis*, 137 S. Ct. at 1289.

[11] *See, e.g.*, Cayuga Indian Nation v. Seneca County, 761 F.3d 218 (2d Cir.) (tax foreclosure), denying motion to file cert petition out of time, 135 S. Ct. 772 (2014); Hamaatsa, Inc. v. Pueblo of San Felipe, No. S-1-SC-34287, 2016 WL 3382082 (N.M., June 16, 2016) (quiet title claim); *see also* Oneida Indian Nation of N.Y. v. Madison Cty., 605 F.3d 149 (2d Cir. 2010), *vacated*, 562 U.S. 42 (2011).

> Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and "[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose." That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.[12]

The clear statement rule is one of the four or five foundational and canonical principles of federal Indian law originating in the Marshall Trilogy, but is most aptly announced in *Santa Clara Pueblo v. Martinez*.[13] There, the Supreme Court stated that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[14] The Indian Civil Rights Act (ICRA) imposes upon tribal governments the so-called "Indian Bill of Rights," which loosely track the federal constitution's individual rights protections.[15] But ICRA does nothing to abrogate tribal immunity from suits to enforce those rights in federal, state, or tribal courts; nor did Congress expressly provide a federal court cause of action to enforce the rights, except for habeas petitions.[16] In *Santa Clara Pueblo*, the Court applied the clear statement rule to hold exactly that: ICRA neither abrogated tribal immunity[17] nor allowed for federal civil suits to enforce the Indian Bill of Rights.[18]

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[12] 134 S. Ct. 2024, 2031-32 (alternation in original) (citations omitted).
[13] 436 U.S. 49 (1978).
[14] *Id.* at 60.
[15] 25 U.S.C. § 1302(a) (2012).
[16] 25 U.S.C. § 1303 (2012).
[17] 436 U.S. at 58-59.
[18] *Id.* at 59-70.

Similarly, in *Bay Mills*, the Supreme Court applied the rule to hold that Congress did not clearly intend the Indian Gaming Regulatory Act (IGRA) to abrogate tribal sovereign immunity. While IGRA does explicitly abrogate tribal immunity when states sue "to enjoin a class III gaming activity located *on Indian lands* and conducted in violation of any Tribal-State compact…", [19] that abrogation does not extend to suits—like Michigan's—designed to stop gaming facilities *not* on Indian lands.[20]

The *Bay Mills* decision rejected Michigan's ultimate argument that such a syllogism renders IGRA "senseless" and refused to rewrite IGRA to conform with Michigan's views. The Court strongly relied on the clear statement rule:

> But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment. Rejecting a similar argument that a statutory anomaly (between property and non-property taxes) made "not a whit of sense," we explained in one recent case that "Congress wrote the statute it wrote"—meaning, a statute going so far and no further.

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[19] 25 U.S.C. § 2710(d)(7)(A)(ii) (2012) (emphasis added); Bay Mills, 134 S. Ct. at 2032.

[20] Bay Mills, 134 S. Ct. at 2031–32 ("A key phrase in that abrogation is "on Indian lands"—three words reflecting IGRA's overall scope (and repeated some two dozen times in the statute). A State's suit to enjoin gaming activity on Indian lands. . .falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity off. [sic] Indian lands does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is outside Indian lands.") (emphasis in original).

> The same could be said of IGRA's abrogation of tribal immunity for gaming "on Indian lands." This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress "must have intended" something broader. And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) "Congress must 'unequivocally' express [its] purpose" to subject a tribe to litigation.[21]

Clear statements by Congress regarding tribal sovereignty abound. Most notably, in *United States v. Dion*,[22] the Supreme Court held that the Endangered Species Act and the Bald Eagle Protection Act abrogate Indian treaty rights to harvest bald eagles. The Court noted that the rule applies to treaty rights: "As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress."[23]

Ironically, *Lone Wolf v. Hitchcock* might be the origin of the congressional power to abrogate Indian treaty rights.[24] In *Lone Wolf*, the Court found clear congressional intent to abrogate Indian treaty rights and confirmed Congress's constitutional authority to do so. *Lone Wolf* is an embarrassment to American rule of law, to be sure. But the *Dion* Court did at least reestablish that congressional intent must be very clear before it would find abrogation:

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[21] *Id.* at 2033–34 (citations omitted).
[22] 476 U.S. 734 (1986).
[23] *Id.* at 738.
[24] 187 U.S. 553 (1903).

> Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."
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> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights...." We 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 is not to be lightly imputed to the Congress.'" . . .
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> [W]here the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.[25]

The Eagle Protection Act, at issue in *Dion*, criminalized the harvest of golden and bald eagles by any person,[26] but allowed the Interior Secretary to authorize via regulation American Indians to

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[25] *Dion*, 476 U.S. at 738–40 (citations omitted).
[26] 16 U.S.C. § 668(a) (2012).

take eagles.[27] The Court held that the provision allowing for a permitting process for American Indians constituted the requisite congressional statement of intent to abrogate treaty rights.[28] The Court also found evidence that Congress understood the Act to abrogate treaty rights in the legislative history of the amendment to the Act protecting golden eagles.[29]

The Supreme Court cases on ICRA, IGRA, and the Eagle Acts indicate that the clear statement rule is strongest in the context of broad congressional legislation in a particular area. All three statutes discussed here directly confronted Indian affairs questions. But what if broad Congressional legislation is silent as to Indian nations?

II. FEDERAL STATUTES OF GENERAL APPLICABILITY

The Supreme Court has not definitively addressed whether federal statutes of general applicability apply to Indian nations. In *Federal Power Commission v. Tuscarora Indian Nation*,[30] the Court held that the federal power of eminent domain allows the United States to take Indian lands,[31] without addressing tribal governance authority.

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[27] 16 U.S.C. § 668a (2012).

[28] *Dion*, 476 U.S. at 740 ("Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. The provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.").

[29] *Id.* at 740–45.

[30] 362 U.S. 99 (1960).

[31] *Id.* at 120–22. *See id.* at 122 ("In the light of these authorities we must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as

Twice, the Supreme Court has placed *Tuscarora*'s holding in jeopardy by reaching the opposite conclusion with respect to tribal governance authority: first in *Merrion v. Jicarilla Apache Tribe*,[32] and later in *Iowa Mutual Ins. Co. v. LaPlante*.[33] In *Merrion*, the Court declined to read into the tribe's constitution—which had been approved by the Interior Secretary—an implied limitation on the tribe's power to tax nonmembers.[34] In *Iowa Mutual*, the Court squarely applied the clear statement rule in the context of a statute of general applicability (there, the federal diversity jurisdiction statute[35]):

> Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence…is that the sovereign power…remains intact."[36]

Numerous federal courts have applied "silent" federal employment laws to tribal or Indian country employers, relying in large part on *Tuscarora*.[37] The leading case is *Donovan v. Coeur d'Alene Tribal Farm*,[38] in which the Ninth Circuit applied the Occupational Safety and Health Act to tribal employers. The National Labor

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those of all other citizens, when needed for a licensed project, upon the payment of just compensation . . . .").

[32] 455 U.S. 130 (1982).

[33] 480 U.S. 9 (1987).

[34] *Merrion*, 455 U.S. at 148 n.14.

[35] 28 U.S.C. § 1332 (2012).

[36] *Iowa Mut.*, 480 U.S. at 18 (quoting *Merrion*, 455 U.S. at 148 n. 14).

[37] *See, e.g.*, Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177–81 (2d Cir. 1996) (applying OSHA); Smart v. State Farm Ins. Co., 868 F.2d 929, 932–36 (7th Cir. 1989) (applying ERISA).

[38] 751 F.2d 1113 (9th Cir.1985).

Relations Act (NLRA),[39] also silent as to its applicability to Indian nations, was held applicable by the D.C. Circuit to Indian nations in the context of tribal gaming operations.[40] But the court in that case declined to employ *Tuscarora*'s statement and the related *Coeur d'Alene* framework, finding instead that the tribal gaming operations in question were not sufficiently "governmental" in character to avoid the NLRA.[41]

But in *NLRB v. Pueblo of San Juan*,[42] the Tenth Circuit (sitting en banc) held conclusively that the clear statement rule controls. The court drew from *Santa Clara Pueblo* rather than from *Tuscarora* as its starting point:

> Where tribal sovereignty is at stake, the Supreme Court has cautioned that "we tread lightly in the absence of clear indications of legislative intent." [*Santa Clara Pueblo*] The Court's teachings also require us to consider tribal 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 with the federal policy of encouraging tribal independence." Courts are consistently guided by the "purpose of making federal law bear as lightly on Indian

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[39] 29 U.S.C. §§ 151–169 (2012).
[40] San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007).
[41] *Id*. at 1315 ("[W]e need not choose between *Tuscarora*'s statement that laws of general applicability apply also to Indian tribes and *Santa Clara Pueblo*'s statement that courts may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent. Even applying the more restrictive rule of *Santa Clara Pueblo*, the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino.").
[42] 276 F.3d 1186 (10th Cir. 2002) (en banc).

> tribal prerogatives as the leeways of statutory interpretation allow." We therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so.[43]

Despite the D.C. Circuit's inclination in *San Manuel*—to not choose between *Tuscarora* and *Santa Clara Pueblo*—the Supreme Court likely will choose between the two. The D.C. Circuit's decision is not rigorously principled, relying heavily upon incorrect assumptions about the relationship between tribal governance and gaming operations.[44] Conversely, the Tenth Circuit's analysis in *Pueblo of San Juan* is rooted more in principles established by the Supreme Court, despite perhaps suffering from the defect, identified by the Second Circuit, as "almost invariably compel[ling] the conclusion that every federal statute that failed expressly to mention Indians would not apply to them."[45]

The Sixth Circuit recently decided two cases involving the NLRB's assertion of jurisdiction over two Michigan Indian tribes.[46] In the first, *NLRB v. Little River Band of Ottawa Indians Tribal Government*,[47] a split panel held that the NLRA could apply to the tribal casino operation. The court first concluded that federal statutes

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[43] *Id.* at 1195 (citations omitted).

[44] Justice Sotomayor's concurrence in *Bay Mills* should end any debate over the supposed separateness of tribal governance authority and tribal gaming operations. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. at 2040–45 (Sotomayor, J., concurring). *See also id*. at 2045 ("Both history and proper respect for tribal sovereignty—or comity—counsel against creating a special 'commercial activity' exception to tribal sovereign immunity.").

[45] Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178 (2d. Cir. 1996).

[46] 788 F.3d 537 (6th Cir. 2015), *cert. denied*, 136 S.Ct. 2508 (2016); Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S.Ct. 2509 (2016).

[47] 788 F.3d 537 (6th Cir. 2015), *cert. denied*, 136 S.Ct. 2508 (2016).

of general applicability should apply to Indian nations—as in the *Coeur d'Alene* framework—because tribal authority could be divested by the operation of a federal statute that does not mention Indian tribes.[48]

> Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that "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." Yet, such residual sovereignty is "unique and limited." As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is "subject to complete defeasance" by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.[49]

In dissent, Judge McKeague slammed the majority's reasoning, calling the *Couer d'Alene* framework (based on the Supreme Court's *Tuscarora* decision) a "house of cards":

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[48] *Id*. at 549. *See also id*. at 551 ("We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty.").

[49] *Id*. at 549 (citations omitted).

> So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress's silence. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, [*Tuscarora*]: "[I]t 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." The statement buttressed the Court's holding, but was not essential to it. While the *Tuscarora* statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the *Tuscarora* "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.[50]

A few weeks later, a different Sixth Circuit panel—also split 2-1—applied *Little River*'s holding and reached the same result in a matter involving the Saginaw Chippewa Indian Tribe.[51] The panel majority disagreed that the *Little River* court had applied the correct

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[50] *Id*. at 557–58 (McKeague, C.J., dissenting) (citations omitted).
[51] *See* Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015), *cert. denied*, 136 S.Ct. 2509 (2016).

law, but felt bound by the prior panel's outcome. The *Soaring Eagle* court later rejected en banc petitions, and the Supreme Court denied certiorari.

Reference to the *Bay Mills* decision here is appropriate. Judge McKeague's dissent in *Little River* relied heavily on that decision: "Indeed, the Supreme Court recently reaffirmed the 'enduring principle of Indian law' that tribal sovereignty is retained unless and until Congress clearly indicates intent to limit it."[52] The *Bay Mills* Court found good reason to apply a clear statement rule in Indian affairs in order to avoid "rewrit[ing] Congress's handiwork":[53] whether to restrict tribal immunity in that case, or tribal governance in an NLRA case, "is fundamentally Congress's job, not ours…."[54] If and when the Supreme Court reviews a federal statute of general applicability like the NLRA, one hopes the Court will not approach a "legislative vacuum"[55] as an opportunity to act as "super-legislature" and decide whether the NLRA applies to Indian nations without the benefit of the legislative process.[56]

III. IMPLICIT DIVESTITURE

Perhaps the hardest nut for tribal interests to crack is the Supreme Court's practice of finding that a tribal government has impliedly divested its authority, even in the absence of a congressional statutory scheme. Here, the Supreme Court seemingly acts on its own, devoid of congressional direction.

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[52] *Little River Band*, 788 F.3d at 557 (McKeague., C.J., dissenting) (quoting Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031–32 (2014)).
[53] 134 S. Ct. at 2039.
[54] *Id*. at 2037.
[55] *Id*. at 2038.
[56] *See* J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 1 (1968).

Oliphant v. Suquamish Indian Tribe is the prototype decision.[57] Based on a loose collection of federal legislative, executive, and judicial authorities, the Court in *Oliphant* held that the three branches of federal government "shared" a "presumption" that Indian nations lacked criminal prosecution authority over non-Indians.[58] Later, in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,[59] the Court applied a similar analysis in the context of tribal civil jurisdiction over nonmembers, concluding that tribal civil jurisdiction "is not automatically foreclosed." [60] In *Crow Tribe*, the Court revisited *Oliphant*, stating that tribal criminal jurisdiction had actually been stripped by a 1790 statute: "Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant* . . . ."[61] Interestingly, in more recent cases, the Court has turned away from drawing upon even the Indian affairs history, instead turning to Justice Kennedy's theories on the social contract in *Duro v. Reina*.[62]

Congress has tentatively legislated in response to these decisions, reaffirming inherent tribal criminal jurisdiction first over nonmember Indians, [63] and more recently authorizing tribal governments meeting certain criteria to prosecute non-Indian

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[57] 435 U.S. 191 (1978).
[58] *Id*. at 206.
[59] 471 U.S. 845 (1985).
[60] *Id*. at 853–57.
[61] *Id*. at 854.
[62] 495 U.S. 676, 694 (1990) ("This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.").
[63] *See* Indian Civil Rights Act, Pub. L. No. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (1990) (codified as amended at 25 U.S.C. § 1301(1), (4) (2012)).

domestic violence perpetrators.[64] Assuming Congress continues to legislate in this way, the analysis will shift toward the constitutionality of these federal enactments.[65]

IV. TRIBAL IMMUNITY, INDIVIDUAL LIABILITY, AND IN REM SUITS

Tribal sovereign immunity continues to be a focus of the Supreme Court's attention.[66] Two years after *Bay Mills*, a shorthanded Court has decided to hear a personal injury suit brought in state court against a tribal casino employee in his individual capacity.[67]

A suit against a government employee or official in his or her *individual* capacity ostensibly works around governmental immunity and official immunity. The tribal employer there, the Mohegan Tribe, enacted a tort claims ordinance that routes tort claims to the tribal court.[68] Whether the Supreme Court affirmed the lower court could have depended on the fairness and process available to personal injury claimants in Mohegan's tribal court; but looming again is *Bay Mills*. The gaming compact between the State of Connecticut and the Mohegan Tribe required the tribe to establish tort remedies for

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[64] *See* Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113-4, Title IX, § 904, 127 Stat. 120 (codified at 25 U.S.C. § 1304) (Lexis 2016)).
[65] *See, e.g.*, United States v. Lara, 541 U.S. 193 (2004) (affirming constitutionality of Congressional reaffirmation of tribal criminal jurisdiction over nonmember Indians).
[66] Matthew L.M. Fletcher, *Tribal Immunity: A Perfect Storm against Tribal Interests?*, LAW360 (Oct. 14, 2016, 1:32 PM), http://www.law360.com/articles/851682/tribal-immunity-a-perfect-storm-against-tribal-interests- ("That the Supreme Court is very interested in the contours of tribal immunity is confirmed by the consistency with which the court has granted certiorari in those cases.").
[67] Lewis v. Clarke 135 A.3d 677 (Conn. 2016), *rev'd*, 137 S. Ct. 1285 (2017).
[68] MOHEGAN TRIBE, CONN., CODE OF ORDINANCES §§ 3-241–3-252 (2016).

patrons,[69] which it has done. This is what the *Bay Mills* Court seemed to ask: whether gaming compacts are the means by which states (and ostensibly state citizens) can seek waivers of tribal immunity and ensure remedies for tribal misdeeds.

Instead, the Court avoided fairness issues relating to the scope of sovereign immunity by holding that an individual capacity suit against a tribal employee does not implicate tribal sovereignty at all.[70] That the tribal government had enacted a law indemnifying its employees from individual capacity suits for actions taken within the scope of tribal employment was irrelevant to the Court. The Court also found irrelevant that the tribe had waived immunity in tribal court for these types of claims, holding that at bottom, a tort claim arising on non-Indian lands is a state law claim.[71]

Still other tribal immunity matters on the horizon, however. Twice now the Second Circuit has held that Indian tribes are immune from suits by states and state subdivisions that would foreclose on tribally owned lands for failure to pay taxes to the state.[72] In *Madison County v. Oneida Indian Nation*,[73] the Supreme Court agreed to hear a similar case to resolve "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property

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[69] Tribal-State Compact between the Mohegan Tribe and the State of Connecticut, May 17, 1994, § 3(g).
[70] *Lewis*, 137 S. Ct. at 1289.
[71] *Id*. at 1292-93.
[72] Cayuga Indian Nation v. Seneca County, 761 F.3d 218 (2d Cir.), 135 S. Ct. 772 (2014); Madison County v. Oneida Indian Nation, 605 F.3d 149 (2d Cir. 2010), *vacated*, 562 U.S. 42 (2011).
[73] 562 U.S. 42 (2011).

taxes."[74] But the tribe in *Oneida* effectively avoided review of this question by waiving its immunity after the Court granted certiorari.[75]

In *Cayuga Indian Nation v. Seneca County*,[76] the Second Circuit held that a county may not foreclose on tribally owned properties for failure to pay property taxes.[77] According to the *Cayuga* panel, *Bay Mills* ended any real controversy over whether tribal immunity from suit extended to business activities, or whether courts could reason "a distinction between in rem and in personam proceedings."[78] This is another example of a state right without a remedy due to tribal sovereign immunity.[79] Notably, the *Cayuga* court (like the Supreme Court in *Bay Mills*) suggested that Congress enjoys its power to abrogate tribal sovereign immunity. Judicial adherence to the clear statement rule, therefore, leads inevitably to Congress.

V. THE LEGISLATIVE ARENA

Congress could very well be the next stage for major confrontations on tribal sovereignty. The correct application of the clear statement rule in *Bay Mills*, when combined with the Court's constant reminder that only Congress can abrogate tribal immunity absent a tribal waiver, signals that the next battleground over tribal sovereign immunity may be before Congress.

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[74] *Id* at 42.
[75] Letter from Seth P. Waxman to Hon. William K. Suter (Nov. 30, 2010), available at http://turtletalk.files.wordpress.com/2010/12/2010_11_30-letter-to-clerk-re-declaration-and-ordinance-2.pdf.
[76] Cayuga Indian Nation v. Seneca Cty., 761 F.3d 218 (2d Cir.).
[77] *Id.* at 220–21.
[78] *Id.* at 221 (citing The Siren, 74 U.S. 152 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property.")).
[79] The New Mexico Supreme Court similarly held that tribal immunity can block a quiet title claim where tribal land interests are at stake. *See* Hamaatsa, Inc. v. Pueblo of San Felipe, No. S-1-SC-34287, 2016 WL 3382082 (N.M., June 16, 2016).

This has happened before. In the aftermath of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[80] in which the Court "none too subtly" suggested that Congress revisit the tribal immunity doctrine, [81] Congress held multiple hearings and considered several bills throughout the late 1990s. But because the stakes were lower at the time, not much came of Congress's efforts.[82]

Bay Mills was a direct sovereign-on-sovereign clash. There, the tribe dared the state to stop a tribal gaming operation on fee lands far from the tribe's reservation, with further plans to open a lucrative facility in a larger gaming market downstate. Millions (and perhaps billions) were at stake.[83] Beyond *Bay Mills*, more evidence of state-tribe clashes exist. Tribal payday lenders, or tribal sovereign lenders, have been successful in avoiding state investigations of their operations.[84] State dram shop laws are found unenforceable against Indian tribes.[85] Tribes, it seems, are using their immunity in ways not

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[80] 523 U.S. 751 (1998).

[81] *Bay Mills*, 134 S. Ct. at 2039 (citing *Kiowa Tribe*, 523 U.S. at 758).

[82] The *Kiowa* Court and the *Bay Mills* Court both worried that nonmembers would have no remedy for torts committed by tribes, especially on tribal gaming facilities, but most tribes have waived immunity to address those issues. *Kiowa*, in my view, was an instance where a contract party was engaging in an efficient breach.

[83] However, at the time of this article, the Sault Ste. Marie Tribe of Chippewa Indians is making far more hay than the Bay Mills Indian Community with the door left open by *Bay Mills*. *See* Matthew L.M. Fletcher, *Sault Tribe Lansing Casino Trust Application Documents*, TURTLE TALK (June 11, 2014), http://turtletalk.wordpress.com/2014/06/11/sault-tribe-lansing-casino-trust-application-documents/; Matthew L.M. Fletcher, *Sault Tribe Huron Township, Wayne County Trust Application Documents*, TURTLE TALK (June 11, 2014), http://turtletalk.wordpress.com/2014/06/11/sault-tribe-huron-township-wayne-county-trust-application-documents/.

[84] *See, e.g.*, Cash Advance and Preferred Cash Loans v. State *ex rel*. Suthers, 242 P.3d 1099 (Colo. 2010).

[85] *See, e.g.*, Furry v. Miccosukee Tribe of Indians of Fla., 685 F.3d 1224 (11th Cir. 2012); Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843 (Tex. App. 1997).

dreamed of by the *Kiowa* Court. Congress may well pay more attention 20 years later.