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Lifting the Shield of Tribal Sovereign Immunity: Age Discrimination Claims Against Tribes as Employers and Other Issues for Congress to Consider

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I. Introduction

Federal Indian Law is not a widely understood field of law, but it is one that is complicated and ever changing. The United States has a difficult history of its treatment towards the Native American population. The government, from the federal level to the local level, has taken substantial efforts to reconcile their mistakes.[1] These remedies include the creation of agencies like the Bureau of Indian Affairs, tribal governments, and government benefit programs.[2] Today, we see that Native American tribes are increasingly becoming more self-sufficient, economically independent, and financially stable.[3]

However, courts continue to grapple with specific as well as novel issues that pertain to Native American tribes and their role as employers,[4] specifically, their ability to be held liable for claims of age, disability, or other workplace discrimination due to their sovereign immunity.[5] This is because even though courts agree that Acts like the Americans with Disabilities Act (ADA)[6] generally exclude tribal employers,[7] there is silence within Title III of the ADA regarding its coverage

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[1] *See* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 54 (2008) (discussing how remedial acts like the Indian Child Welfare Act could benefit future generations of Indians).
[2] *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.01 (Nell Jessup Newton ed., 2019).
[3] *See generally* Geoffrey D. Strommer, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1 (2014) (describing the growth of tribes' economy throughout history as congress passed remedial acts for tribes).
[4] *See* Maynard v. Narragansett Indian Tribe, 984 F.2d 14, 16 (1st Cir. 1993); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
[5] *See* Wardle v. Ute Indian Tribe, 623 F.2d 670, 677 (10th Cir. 1980).
[6] 42 U.S.C. §§ 12101-12213 (1994).
[7] *See* Curtis v. Sandia Casino, 67 F. App'x 576, 581 (10th Cir. 2003); Pena v. Miccosukee Serv. Plaza, CASE NO: 00-6663-CIV-MIDDLEBROOKS, 2000 U.S. Dist. LEXIS 17199, 17205 (S.D. Fla. Oct. 4, 2000).

of tribal employers.[8] Additionally, there is a split of authority[9] regarding coverage of tribal employers under the Age Discrimination in Employment Act of 1967[10] because there is no explicit language outright mandating or exempting its coverage to tribal employers.[11] Neither the ADEA nor Title III of the ADA make any mention of tribes.[12] This is in sharp comparison to Title VII of the Civil Rights Act of 1964,[13] which makes explicit the coverage and scope of the provisions as they apply to tribal employers, which is that tribal employers are exempt.[14]

A lack of any language within the text of congressional acts in the ADEA, and the lack of language in Title III of the ADA, demonstrate a lack of clarity as to a Native American tribe's role as an employer,[15] to Native Americans and non-Native Americans, and their ability to be held liable for various claims of discrimination by employees.[16] The ADEA and Title III of the ADA make no mention of its applicability to tribal employers. Because of this, legal scholars have acknowledged how difficult decision-making can be for judges considering the nuance in Federal Indian Law.[17] Congress should address this by amending the ADEA and the ADA,

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[8] *See* 28 U.S.C. § 36.101-36.607 (1990).
[9] *See generally* E.E.O.C. v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2000); Cano v. Cocopah Casino, No. CV-06-2120-PHX-JAT, 2007 U.S. Dist. LEXIS 54377, 54380 (D. Ariz. July 24, 2007).
[10] 29 U.S.C. §§ 621-634 (1967).
[11] *See id.*
[12] *See id.*; 28 U.S.C. § 36.101-36.607.
[13] 42 U.S.C. §§ 2000e-17 (1994).
[14] *See* 42 U.S.C. § 2000e(b).
[15] *See* G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267, 275-77 (1996).
[16] *See id.*
[17] *See* David H. Getches & Charles F. Wilkinson, CASES AND MATERIALS ON FEDERAL INDIAN LAW, 315, 317-324 (1986) (recommending that 'only the brave' should explore the study of Federal Indian Law due to the nuances in tribal sovereign immunity issues).

or the "Acts," to include more specific and explicit language that defines tribes as covered employers.

This paper argues that Congress should amend the ADEA and the ADA to explicitly include tribal employers under the definition of covered employers for liability purposes for employment discrimination claims. Allowing these claims to move forward would lift the shield of tribal sovereign immunity that has previously been long utilized by tribal employers, like casinos or gambling arcades, to bar them from being liable for these claims, and ensure fairness and justice for non-Native and Native employees in the event they experience workplace discrimination while working for a tribal employer. Amending the Acts would not hinder tribes in carrying out the government functions vested to them through tribal sovereignty, but aid in their ability to function as an amendment would lead to clarity and uniformity of enforcement.[18]

The paper will proceed as follows. Part II will introduce the social and political history of Native American tribes, as well as the legislative history of anti-employment discrimination acts. Part III will examine how the law has been interpreted and changed to address employment discrimination claims against tribal employers and will offer counterpoints to arguments against lifting the shield of sovereign immunity. Part IV provides suggestions for congressional action to correct this problem, as well as novel and tribal-endorsed solutions, that are independent of Congress, to combating workplace discrimination. The focus of this

[18] *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at §§ 4.01-4.05.

paper will be on the ADEA and the ADA, and not Title VII, for the ADEA and ADA appear to contain the most vulnerability when it comes to their application against tribal employers.

II. **Background**

a. The history of Federal Indian Law dates to the founding of the United States, but the 21st century has provided a fertile landscape for economic prosperity and innovation.

The United States has a long and difficult history in its treatment of Native Americans: one that began years before the Constitution was even ratified. For decades, Native Americans experienced isolation, famine, and poverty because of discrimination, segregation, and prejudice, often by the hands of the federal, state, and local governments.

However, history has demonstrated that although grappling with these mistakes proved to be challenging. Leadership at the local, state, and federal levels have made, and are still making, active efforts to rectify prior discrimination towards American Indians.[19] Currently there are over five hundred and fifty-five federally recognized Native American tribes in the United States of America.[20]

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[19] *See* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 52 (2008).

[20] Federal Indian Law is the body of law: treaties, statutes, executive orders, administrative decisions, and court cases that regulation Indians relationship with the United States. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at § 1. The terms Native American and American Indian refer to an individual who (1) has some American Indian blood; and (2) is recognized as an Indian by members of his or her Tribe or community. The law defines an Indian tribe as any "tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians." 25 U.S.C. § 1903(8) (1978). An Indian reservation is land set aside for use and governed by Native Americans. A tribal government is the recognized governing body of a tribe. Indian country is defined as all land within the limits of any Indian reservation and is used interchangeably with tribal lands. 18 U.S.C. §

Many of these tribes enjoy economic independence and stability, as well as a degree of political autonomy as tribal sovereigns.[21] An American Indian or Alaska Native tribal entity that is recognized by the federal government is found to possess "a government-to-government relationship with the United States of America, with the responsibilities, powers, limitations, and obligations that are attached to that designation."[22]

Beginning in the early 1800s, courts recognized the sovereignty of these tribes, citing the tribes' history of being a distinct, political community independent from the union.[23] The first major case within the Federal Indian law framework acknowledged the sovereignty of tribes in their ventures of buying, selling or trading property.[24] The Supreme Court has recognized that Indian tribes "retain their original natural rights" which vested in them, as sovereign entities, long before the genesis of the United States.[25] The Court even goes on to explain that "our history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians,"[26] meaning now-Americans contemplated tribal sovereignty even before they had officially ceded from Britain. Justice Marshall also notes that tribes were not "foreign states," but were more

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1151 (1949). A Native American business is any business concerned controlled by at least 1 and is 51 percent or more Native American. 25 U.S.C.S. § 5802(6) (LexisNexis 2020).

[21] *See generally* Courtney Kirwin, *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFF. (Jan. 29, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-01606.pdf.

[22] Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2444 (2021).

[23] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[24] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 549 (1823).

[25] *Worcester*, 31 U.S. at 519.

[26] *Id.* at 520.

analogous to "domestic dependent nations" that had the capabilities of handling their own affairs.[27] The court further goes on to explain that even the Constitution provides a basis for tribal sovereign immunity, leaving state laws unenforceable as applied against sovereign tribes because the Constitution preempts state law.[28]

It is important to acknowledge the long and troubling history of mistreatment Native Americans received at the hands of the federal government, state governments, and its citizens even before the Constitution was ratified in 1788 and for two centuries thereafter. For example, for decades, the United States engaged in practices of forced removal of Indians from their native homelands, forced assimilation of Indian children by sending them to abusive boarding schools, and unfortunately, even the genocide of thousands of Cherokee Indians during the Trail of Tears, which was supported by former President Andrew Jackson.[29]

Now, however, Native American tribes have expanded their participation in intrastate and interstate commerce due to recent improvements in federal and state government treatment. This is evidenced by the substantial increase of tribal-run casinos and gaming enterprises due in part by the Indian Gaming Regulatory Act of 1988, which created guidance, procedures and rules for tribal employers to abide by and follow in operating their gaming business.[30] This Act covers casinos located on tribal lands, and also prescribes that in order to open these casinos to business,

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[27] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
[28] *See id.* at 15.
[29] *See generally* Addie C. Rolnik, *Assimilation, Removal, Discipline and Confinement: Native Girls and Government Intervention,* 11 COLUM. J. RACE & L. 811 (2021) (discussing the systemic abuse Indians experienced as the government attempted to assimilate them into an Anglo-Saxon society).
[30] *See* 29 U.S.C. § 2701 *et seq.*

tribes must enter into compacts with their home state.[31] The compacts frequently contain arbitration agreements, health and safety standards, licensing requirements, and more.[32] The implementation of IGRA served as a key turning point of improvement in economic growth for many tribal communities.[33]

Each Indian tribe, as sovereign entities, possesses the ability to implement their own treaties, regulations, etc. as a means of exercising self-governance.[34] Many tribes have created their own parallel versions of many United States federal statutes and regulations to combat common issues that tribal members share with the general U.S. public. However, we see that these provisions do not go far enough in providing safeguards and other protections for employees that may experience discrimination in a tribal workplace.

In 2018, Native Americans had the highest rate of disability among all American ethnicities and racial classifications; approximately 3 in 10 American/Alaskan Indians have a disability, while only 1 in 4 African Americans and just 1 in 5 White Americans are reported to have disabilities.[35] Many tribal entities have enacted their own similar versions of federal statutes like Title VII, the ADA, and the ADEA to combat against workplace discrimination.[36] There are

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[31] *See* 29 U.S.C. § 2710(d)(3) (1988).
[32] *See* BUREAU OF INDIAN AFF., 87 F.R. 74916, 74932-74937; *See*, *e.g.*, KALISPEL NATION CODE ANN. §§ 23–1.01 – 23–9.03 (2011).
[33] *See generally* Matthew M. Fletcher, BRINGING BALANCE TO INDIAN GAMING, 44 HARV. J. ON LEGIS. 390 (2007) (discussing how IGRA has allowed tribes to expand and diversify their gaming economy).
[34] *See* Kalt et al., *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (2004) (explaining tribal self-government has demonstrably shown progress in alleviating the long-standing problems of economic underdevelopment and social distress in Indian Country).
[35] CTRS. FOR DISEASE CONTROL & PREVENTION, *Adults with Disabilities: Ethnicity and Race* (2018), https://perma.cc/2768-G8EE.
[36] *See* Navajo Nation Occupational Safety and Health Act, 15 N. N. C. §§ 1401-1574 (2010).

discrepancies between the tribal versions and federal versions that deserve reconciliation. This can include varying definitions of words such as "disability" or "health" for both tribes and the federal government, which can have significant consequences in making determinations regarding potential employment discrimination claims.[37]

b. The late 20th century was marked by a boom of anti-discrimination legislature as a result of powerful protesting.

The United States government, in addition to their mistreatment of Native Americans as mentioned previously, unfortunately also enacted policies that were racist, sexist and ableist against other minority communities.[38] However, civil rights activists like Martin Luther King Jr., John Lewis, and others engaged in peaceful protesting across the country[39] that ultimately led to substantial and positive action by government authorities to remedy the decades of abuse people of color, women, and disabled individuals experienced at the hands of the government.[40] The Civil Rights Act of 1964 ushered in drastic, yet beneficial, change in the country that guaranteed protections for Americans[41] no matter what

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[37] *See generally* Kathy Dwyer et al., *Community Development by American Indian Tribes: Five Case Studies of Establishing Policy for Tribal Members with Disabilities*, 31 J. OF THE CMTY. DEV. SOC'Y 196, 200 (2000) (describing the evolving nature of tribes' treatment of its members with disabilities).
[38] *See generally* Sara Bullard, FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE (1993) (detailing the history of this discrimination, from slavery through the passage of the Civil Rights Act).
[39] *See* Kim Lacy Rogers, *Oral History and the History of the Civil Rights Movement*, 75 THE J. OF AM. HIST. 567, 567-76 (1988).
[40] *See id.*
[41] *See id.*

color their skin is. Additional expansions in protections for these at-risk communities would also come to include the ADEA and later the ADA.

Beginning with Title VII of the Civil Rights Act of 1964, congress has enacted legislation that protects employees from being discriminated against on bases such as sex, race, religion, age, and disability during each stage of employment, from hiring and training, to firing. Title VII of the Civil Rights Act of 1964 (Title VII) provides that:

> It shall be considered an unlawful employment practice for an employer to (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[42]

This provision is part of a larger framework of congressional action aimed at addressing decades of systemic racism in education, labor, politics, housing, banking, and more in the United States.[43] After years of protests during the Civil Rights Movement to end segregation and racial discrimination, President Lyndon B. Johnson signed the Civil Rights Acts into law as a clear and express ban on discriminatory voting practices, amongst others.[44] Title VII contains express language that provides a specific exemption for tribal employers to be covered under

[42] 42 U.S.C. § 2000e-2 (1964).
[43] *See generally* H.R. Misc. Doc. No. 88-124, at 3, 12 (1963) (noting that a purpose of the Acts is to address the issues brought to light by the Civil Rights movement).
[44] *See* 42 U.S.C. § 2000d *et seq.*

the Act.[45] Title VII also created the Equal Employment Opportunity Commission, a board that oversees and addresses violations of civil rights, to implement and enforce laws that promote the principles of justice that the Civil Rights Act was created to address.[46]

The enactment of the ADEA expanded anti-discrimination protections to include employees who were of older age. The ADEA was implemented to correct for the systemic disadvantages older individuals experienced compared to younger laborers while seeking out employment and retaining employment.[47] Congress recognized the fundamental unfairness of working for years, sometimes decades, only to lose severance benefits, health insurance, etc. simply due because of their age.[48] The ADEA also went so far as to call for the EEOC to conduct intensive studies and interviews to gain perspective on the institutionalized discrimination practices that older individuals experienced in pursuit of their employment endeavors, such as loss of pension and retirement funds, wrongful termination, emotional distress, and more.[49] The ADEA states that it shall be unlawful for an employer:

> To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . and covers employees over the age of 40.[50]

[45] *See* 42 U.S.C. § 2000e(b).
[46] *See* 42 U.S.C. § 2000e-2.
[47] *See* 29 U.S.C. § 621(a)-(b) (1994).
[48] *See* 29 U.S.C. § 621(a)(2).
[49] *See* 29 U.S.C § 624(a).
[50] 29 U.S.C. § 621 *et seq.* (1990)

The ADEA is silent as to its inclusion or exclusion of tribes, and this silence will serve as the main focus of this paper's discussion.[51]

The ADA was enacted to expand anti-discrimination protections for employees who live with a disability. The ADA was implemented to address decades of ableist rhetoric and discrimination that individuals with disabilities experienced while in the workplace.[52] Congress stated that the purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[53]

The ADA states that "no covered entity shall discriminate against a qualified individual on the basis of (1) disability in regard to job application procedures, the hiring, advancement . . . or (2) discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[54] The ADA was signed into law as part of an effort to help decrease the barriers to receiving reasonable workplace accommodations and opportunities that were systemically in place for disabled individuals and increase accessibility services in the workplace and public.[55]

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[51] See 29 U.S.C. §§ 621-634.
[52] *See Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, www.eeoc.gov/disability-discrimination (last visited May 12, 2023).
[53] 42 U.S.C. § 12101(b)(1), (4) (1990).
[54] 42 U.S.C. § §12112 (a) (1990).
[55] *See* 42 U.S.C. §§ 12101(a)(2)-(8).

The ADA explicitly excludes tribes as employers both in Title I and Title II; however, Title III is silent as to its inclusion or exclusion of tribes.[56] This silence will also be a focal point in this paper's discussion. Additionally, related to the ADA is the Rehabilitation Act of 1973, which prohibits disability discrimination in programs run by federal agencies, like federal employment, and Section 121 allows for tribal grants for vocational rehabilitation services.[57]

III. The lack of clarity within these antidiscrimination statutes has resulted in inconsistent rulings among judges hearing employment discrimination claims.

a. General approaches to determining whether federal statutes apply to Indian tribes.

State and federal courts have spent decades resolving ambiguities in congressional acts in relation to discrimination claims made against Indian employers.[58] The Supreme Court has held that terms within a statute of general applicability apply to all persons, includes Indians and their property interests,[59] and that an otherwise applicable law does not exclude tribes.[60] Although the Supreme Court has emphasized examining legislative history to determine

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[56] 42 U.S.C. § 12101(b)(1), (4).
[57] 29 U.S.C. § 701 *et seq*. (1990).
[58] *See* NLRB v. Chapa de Indian Health Program, 316 F.3d 995, 961 (9th Cir. 2003) (noting that Indian tribes are also not expressly exempted from the scope of the NLRA's definition of "employer"); *see also* Smith v. Salish Kootenai Coll., 434 F.3d 1127 (9th Cir. 2006) (explaining that the NLRB could still have jurisdiction over NLRA claims). The NLRA is not a part of this discussion, but these cases demonstrate how Acts not mentioned in this paper are affected by similar inconsistencies.
[59] *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 104 (1960).
[60] *See Tuscarora Indian Nation*, 362 U.S. at 103; *see also* Confederated Tribes of Warm Springs Rsrv. of Oregon v. Kurtz, 691 F.2d 878 (9th Cir. 1982), *cert. denied* (holding that absent a "definitely expressed exemption," tribes and their members are subject to federal excise taxes).

legislative intent of an Act's applicability,[61] the task of making a determination regarding Congress' intentions when issuing legislation dealing with regulation of tribes can be complicated. Because the focus of this discussion is employment discrimination law to tribal employers, the fact that there are over 300 "reservations or joint-use areas—areas where multiple American Indian reservation governments share legal and political jurisdictions in the lower 48 states, with wide geographic, regional, and economic variations,"[62] makes performing such an analysis and making these determinations quite challenging.[63]

Federal courts have developed some background rules of construction and interpretation when determining whether federal laws apply to Indian tribes. Federal laws do not apply to Indian tribes when applying the law would: interfere with internal matters of tribal self-governance (where matters are purely intramural,[64] such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes,)[65] run afoul of rights a treaty guarantees the tribe,[66] or when legislative history or other indicators show Congress did not intend for the law to apply to tribes operating within the territorial boundaries.[67] The burden of demonstrating to the court that these factors do, or do not exist, is upon the party

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[61] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir. 1985).
[62] *See generally* Randall Akee, Article: *Sovereignty, and improved economic outcomes for American Indians: Building on the gains made since 1990* (Jan. 2021). The author's use of the term 'American Indian reservation government' is interchangeable with the definition of Indian tribe given in Note 7.
[63] *Id.*
[64] *See Chapa de Indian Health Program*, 316 F.3d at 960.
[65] *See* United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980).
[66] *See id.* at 891.
[67] *See* Drake v. Salt River Pima-Maricopa Indian Cmty., 411 F. Supp. 3d 513, 517 (D. Ariz. 2019).

claiming immunity, i.e., tribal employers.[68] In making these determinations it is also essential that courts distinguish tribal-run enterprises from tribal entities engaging in self-government.[69] Ambiguities of congressional intent are generally resolved in favor of tribes.[70]

Although tribes can enjoy a general level of independence through tribal sovereignty, there are situations when Congress can supersede, or 'abrogate' tribal sovereign immunity via statute.[71] Additionally, the Court emphasized that they have never taken the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them.[72] Scholar Phil Frickey acknowledges the difficulty of using these Acts to make factual and legal determinations, explaining a main issue with "federal Indian law decisions, especially those dealing with developments since the mid-nineteenth century, turn on the text of seemingly more mundane instruments of law, such as statutes,"[73] that are already ambiguous to begin with.

1. Title VII Claims.

Although Title VII of the Civil Rights Act contains an express provision that exempts tribal employers from being covered as 'employer' for purposes of Title VII claims and permits tribal employers to engage in preferential hiring practices,[74] it

[68] *See Coeur d'Alene Tribal Farm*, 751 F.2d at 1117.
[69] *See* Casino Pauma v. NLRB, 888 F.3d 1066, 1071 (9th Cir. 2018).
[70] *See id.* at 1072.
[71] Osage Tribal Council v. U.S. Dep't of Lab., 187 F.3d 1174, 1179 (10th Cir. 1999).
[72] *Coeur d'Alene Tribal Farm*, 751 F.2d at 1120.
[73] *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 HARV. L. REV. 381, 421-22 (1993).
[74] Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002).

may become permissible for employees to bring Title VII claims against Indian employers.[75] The Supreme Court has determined for now, however, that typical Title VII claims cannot be brought against tribal employers.[76]

Because Title VII contains an express exemption for tribal employers, this discussion does not advocate for an amendment to Title VII. Because Title VII encompasses so many aspects of life including national origin, sex, ability, etc., the potential changes an amendment could bring to determinations of racial and political classifications of Native Americans and tribes are beyond the contemplation of this paper.

2. ADEA Claims.

There are no express provisions of the ADEA that outright exclude tribes from their definition of employers that can be held liable for discrimination.[77] There appears to be a circuit split as to the ADEA's applicability to tribal employers because the ADEA is silent as to its inclusion or exclusion of tribal employers.[78] This leads to discrepancies in court rulings regarding the applicability of ADEA claims against Indian employers.[79]

Because the ADEA does not contain an explicit provision regarding its applicability to Indian tribes, courts have held only that an 'employer' does not include ... the United States, or a corporation wholly owned by the government of

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[75] Legal scholars have yet to comment on Title VII and its relation to *Haaland v. Brackeen*, and the effects a ruling in either direction could cause.
[76] *See* E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 249 (8th Cir. 1993).
[77] *See* 29 U.S.C. §§ 621-634.
[78] *See* Mastro v. Seminole Tribe, 578 Fed. Appx. 801, 809 (11th Cir. 2014).
[79] *Compare Poarch Band of Creek Indians*, 839 F.3d at 1313, *with* Myrick v. Devils Lake Sioux Mfg. Corp. 718 F. Supp. 753, 757 (D.N.D. 1989).

the United States."[80] The Tenth Circuit also pointed out similarities shared between Title VII and the ADEA, namely addressing if the parallel definitions of 'employer' implicate tribes' liability under the ADEA in addition to Title VII.[81] However, some courts have interpreted Congress' silence as to the ADEA's applicability to Indian businesses as "at least ambiguous instead of expressing the clarion call of clarity required for abrogation."[82]

Further, the Ninth Circuit found that when the actual operations and employment of workers at a tribal business do not appear to include any "exclusive rights of self-governance in purely intramural matters." and operates "simply [as] a business entity that happens to be run by a tribe or its members . . . the ADEA might apply."[83] This view is supported by the dissent in *Fond du Lac*, querying as to whether the ADEA poses no more of a threat to the sovereign prerogatives of tribal governments, or to the control of that government over its internal affairs, than it posed to the separate, independent existence and sovereignty of state governments.[84]

3. ADA Claims.

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[80] Cano v. Cocopah Casino, No. CV-06-2120-PHX-JAT, 2007 U.S. Dist. LEXIS 54377 (D. Ariz. July 24, 2007); *Kurtz*, 691 F.2d at 881.
[81] EEOC v. Cherokee Nation, 871 F.2d 937, 942 (10th Cir. 1989) (Tacha, J. dissenting) (explaining that language of Title VII compared with that of the ADEA clearly shows that Congress intended the ADEA to apply to Indian tribes, which serves as "the clear congressional reliance on Title VII's provisions ... [that] evidences congressional intent on the face of the statute to include Indian tribes in the definition of employer for the purposes of the ADEA."
[82] *Id.* at 1316; Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1131 (11th Cir. 1999).
[83] *Karuk Tribal Hous. Auth.*, 260 F.3d at 1100 (9th Cir. 2000).
[84] *See* EEOC. v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 251 (8th Cir. 1993).

Title I and II of the ADA contains express provisions excluding Indian employers from coverage. However, Title III of the ADA, which prohibits discrimination against any individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation," does not explicitly include or exclude Indian businesses from its definition of liable employers.[85] Title I of the ADA does not exclude private employers located within Indian Country, and requires these types of claims to be processed through the Equal Employment Opportunity Commission.[86] Title I also contains an express provision exempting 'Indian tribes" from being defined as covered employers.[87] Title II prohibits disability discrimination in public services, and although tribal governments are not specifically mentioned, legal scholars concur that it does not apply to tribal employees.[88]

Within Title III is a clause creating a private cause of action that allows an aggrieved party to file a lawsuit against a defendant who has committed, or the plaintiff reasonably believes is about to commit, a practice prohibited by the Act.[89] However, the Eleventh Circuit was able to address the question of Title III applicability to tribal employers, where it held that that the ADA did apply to the

[85] 42 U.S.C. § 12182(a).
[86] *See* 42 U.S.C. § 12111(5)(b)(i).
[87] *See* 42 U.S.C. § 12101(b)(1), (4).
[88] *See* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 559 (2021) (____).
[89] *See* 42 U.S.C. § 12188(a)(1).

tribe, because it was a general statute.[90] The court, however, then held that under the rules governing tribal sovereign immunity, the defendant was not 'amenable' to a lawsuit against the tribe for violations of the ADA. The court held that suits against tribes were barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.[91]

Although courts in the past have held that Congress did not intend to abrogate tribal sovereign immunity through this Act,[92] the language of it is worthy of reconsideration in light of the recent COVID-19 pandemic. Through society's increased collective awareness of disability issues, especially after a global health pandemic, Congress should reconsider the application of ADA to tribal employers in a light that affords more deference to the disability community.[93] Some other scholars have queried if a strict reading of the ADA must be followed,[94] but courts have agreed that a broad construction of the ADA is required to serve the remedial purpose of the statute.[95] Although Title III lists multiple examples of public accommodations, the list is not exhaustive or finite.[96] The language of the Act seems to imply that because the barriers to accessibility are pervasive in all aspects of life,

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[90] *See Miccosukee Tribe of Indians of Fla.,* 166 F.3d at 129.
[91] *See id.*
[92] *See id.* at 1130; Block v. Tule River Tribal Council, 2022 U.S. Dist. LEXIS 119737 (E.D. Cal. July 6, 2022).
[93] *See* Mullin et al., *Disability and the Diversity Framework in the Post-Pandemic Workplace*, *Research in Social Science and Disability,* 13 RSCH. IN SOC. SCI. & DISABILITY 211, 211-30 (2023).
[94] *See* 9 LARSON ON EMPLOYMENT DISCRIMINATION § 154.08 (2023).
[95] Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002); Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993).
[96] Weyer v. Twentieth Century Fox Film Corp, 198 F.3d 1104, 1114 (9th Cir. 2000).

Congress could not produce a total list of protected parties but made a good faith effort to include as many as possible.

Additionally, the Third Circuit has held that businesses that receive federal funds waive immunity against claims under the Eleventh Amendment and are subject to suit under §504 of the Rehabilitation Act.[97] Therefore, it is possible that if an ADA claim fails, a claim could be made for violation of the Rehabilitation Act if the business takes federal funds to assist in operations, and a claimant could potentially recover.[98]

b. Upcoming Supreme Court opinions may drastically change how courts analyze claims for employment discrimination against tribal employers.

However, in light of upcoming Supreme Court cases, the covered employers and employees under Title VII claims could also change.[99] The Supreme Court has explained that Indian tribes have a unique status under federal law as quasi-sovereign entities and that laws enacted on their behalf reflect political rather than racial classifications.[100]

Courts have also held preferences in hiring practices are acceptable so long as they are reasonable. Currently, it is permissible for tribal employers to give some preference to Native American applicants during the hiring process thanks in part

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[97] *See* Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 545 (3d Cir. 2007).
[98] *See* 9 U.S.C. §794; *see also* O'Neil v. Tex. Dep't of Crim. Just., 804 F. Supp. 2d 532 (N.D. Tex. 2011) (noting that the rights and remedies plaintiffs are afforded under Title II of the ADA are almost entirely duplicative of those provided under § 504 of the Rehabilitation Act.)
[99] Legal scholars have not yet evaluated the potential effects of forthcoming cases on future Title VII claims.
[100] *See* Morton v. Mancari, 417 U.S. 535, 540 (1974).

to the creation of the Equal Employment Opportunity Commission.[101] But, it is also possible that upcoming Supreme Court cases could alter the foundation for the preference hiring of Native Americans for tribal employers,[102] as tribal employers would then be basing their preferences for hiring on race as opposed to political classifications, which previous courts have held is a permissible classification to correct for prior historical discrimination and bias.[103]

A case now before the Supreme Court, *Haaland v. Brackeen*,[104] could have profound effects on currently existing Federal Indian Law and tribal classifications. Although this case deals with an adoption issue within family law and does not address employment discrimination, the Supreme Court might hold that tribal classifications are in fact racial classifications as opposed to the traditional view that they are classified based on politics.

The case involves a challenge to the Indian Child Welfare Act, or "ICWA," claiming its definition of an "Indian child" is based upon an impermissible racial classification that is in violation of the Equal Protection clause of the Constitution.[105] If the Court finds that ICWA should be evaluated under strict scrutiny and does not pass Constitutional muster, it could open the door for the Court to additionally hold that classifications of tribes are not based on politics, but

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[101] *See* Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1091 (E.D. Cal. 2002).
[102] *See* Maverick Gaming LLC v. United States, No. 3:22-cv-05325-DGE, 2023 U.S. Dist. LEXIS 28654, at * 28654 (W.D. Wash. Feb. 21, 2023) (arguing that tribal practices discriminate against non-Natives); *see also* Brackeen v. Haaland, 994 F.3d 249, 270 (5th Cir. 2021) (*cert. granted*).
[103] See Malabed v. N. Slope Borough, 70 P.3d 416, 420 (Alaska 2003).
[104] *Haaland*, 994 F.3d at 252.
[105] *Id.* at 254.

are instead actually based on race. This is a substantial change from the long-standing finding that classifications of Indian tribes are politically classified.[106] The Court is expected to release its opinion on this case in the Summer of 2023.

Considering the potential[107] for complex future issues to judges and litigators, the opportunity is open for Congress to amend the both the ADEA and the ADA to include plain provisions that explicitly define Indian businesses within its definitions of 'employer,' making them liable to claims of employment discrimination.

IV. Proposed Solutions

a. Congressional amendments are the most direct and effective way to address the inconsistencies of both the ADEA and the ADA.

In the present year 2023, the fact that Congress has yet to address the lack of language in the ADEA and Title III of the ADA is concerning. Because the entirety of the ADEA does not address tribes, a clarification by Congress would be beneficial to courts, and the American public alike. Even though the ADA does exempt tribes explicitly in other parts of the Act, the silence in Title III is worthy of resolving.[108] For all these reasons, Congress, as a body of representatives elected by the American public, should amend the ADA and the ADEA to explicitly include tribes under the definition of "employers" for purposes of liability for claims of

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[106] *See generally* Click et al., *Haaland v. Brackeen*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/supct/cert/21-376 (last visited May 12, 2023) (describing the procedural history of the case and analyzes the main issues the Supreme Court will address).

[107] Legal scholars have not fully analyzed the possible ramifications this case could have on tribes' privilege of utilizing preferential hiring practices.

[108] *See* 42 U.S.C. § 12111(5)(B) (explaining "Indian Tribes" are not included in the definition of employer).

employment discrimination. The elected nature of the body of Congress would lend more weight to the strength of an amendment to the ADEA and ADA as well.

Although tribes in the past have been shielded from discrimination claims via tribal sovereign immunity, and there remains threats to tribal welfare and sovereignty, the protections afforded by the ADEA and the ADA to not implicate them. It is evident that employment discrimination claims of ableism and ageism are handled inconsistently across tribal employers, which can be seen throughout the Supreme Court's decisions regarding tribal sovereignty.[109] This is likely a result of the ambiguities of certain definitions within these statutes, as well as the convolution of tribal, state, local, and federal laws. For these reasons, the policy concerns demonstrated by these acts outweigh concerns for tribal sovereignty.

The argument that because there is no explicit mention of tribes in the ADEA definition of 'employers', that it could not apply to tribes, is weak,[110] because silence does not necessarily equate to exclusion.[111] Congress also intended for this statute to reach across all genders, races, and other intersections of identities because the Act is remedial in nature.[112] The dispositive factor in ADEA claims is age, which applies to every person, including Indians. Congress also intended the definitions of 'disability' within the ADA to be broad in order to correct for how expansive

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[109] *See* Kalt, *supra* note 34, at (noting inconsistency in the Supreme Court's worrying about the protection of civil rights from transgressions by tribes and their courts).
[110] Williams v. Poarch Band of Creek Indians, 2016 WL 6081345, at *6081349 (11th Cir.) (Oct. 18, 2016).
[111] *Id.* at *6081349
[112] *See* Cong. Rec. 1089 (1967); Sec'y of Lab., THE OLDER WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 6 (1965).

disability discrimination was in the workplace,[113] and for how prevalent the multitude of accessibility barriers are to disabled individuals not only in the workplace, but also in public spaces.[114]

More explicit language that clearly outlines who is and is not covered as an employer under these Acts would lead to a more precise judicial inquiry into employment discrimination claims. A congressional amendment along these lines would provide courts with clarity as to who is a covered employer and would aid them in making a fairer and just ruling. An express clarification would encourage uniformity and consistency in decision making regarding claims of employment discrimination, ensuring justice is served in an equal manner. The courts' challenges, and inconsistencies, in addressing these issues calls for a fix that only Congress can make. The congressional amendment would further hold authority if, in the future, there is a desire by the public to end the tribal employers' abilities to be immune from claims of employment discrimination.

For this reason, making additions to modify the language of the Acts to include tribal employers as covered employers would serve as the most beneficial remedy to the issues discussed above. Congress should further amend these acts to specify how and when employees may bring forth claims of employment discrimination against their tribal employers.

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[113] *See* 42 U.S.C. § 12101(b)(1), (4).
[114] *See* 42 U.S.C. § 12101(a).

b. Cooperation from the top-down: intergovernmental initiatives between tribes and local/state governments

In lieu of a Congressional amendment to these acts, there are still multiple solutions that federal, tribal, local, and state governments can experiment with. This is to help ensure that enforcement of provisions within the ADEA, ADA and other acts, or their tribal parallel, is uniform. Increasing tribal cooperation with state and federal governments to implement more bias training, diversity education, and accountability programs for tribal employers is one of many ways to help eradicate workplace discrimination in tribal-employer settings.

First, tribes and state governments could expand the duties and oversight of Tribal Employment Rights Offices or TEROs, to provide enforcement of anti-discrimination policies and investigate claims of harassment or discrimination. A TERO is a "unit within the Tribal government structure that monitors and enforces Tribal employment rights ordinances and facilitates the employment of American Indians and Alaska Natives in businesses and industries operating within the geographical boundaries of the reservation."[115] This could include providing work training to employers and employees about harassment and discrimination, or coordinating on-site TERO representatives for some of the largest Native American employers to conduct direct oversight and advocacy, and to mediate when conflicts may arise.

[115] SENECA NATION OF INDIANS, TRIBAL EMPLOYMENT RIGHTS ORDINANCE (2012); *Frequently Asked Questions About Indian Tribes and Tribal Employment Rights Offices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-tribal-employment-rights-offices (last visited May 12, 2023).

Additionally, the Dep't of Lab.,[116] through the Off. of the Fed. Cont. Compliance Program in March 2013, implemented the Indian and Native American Employment Rights Program (INAERP) to narrowly focus on particular employment issues of Indian and Native American applicants seeking employment with federal contractors and subcontractors, as well as other employees of these companies.[117] Perhaps this program, or its principal initiatives, could go further to also include freelancers and independent artists that contract with the government: a small expansion of assistance that could help some of the most vulnerable laborers. The Dept. of Labor, or even the Bureau of Indian Aff., could also enact programs like this to help protect other trade workers, like casino card dealers or table hosts, as these jobs are more niche positions that may require more specific and direct advocacy, and may also pose its own set of unique problems and challenges.

Finally, tribes could voluntarily waive their immunity for claims of employment discrimination, especially if the public expresses their desire for the end of this practice to their elected officials.[118] This would likely garner favorable

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[116] Memorandum of Understanding Between Department of Labor Office of Federal Contract Compliance Programs and Council for Tribal Employment Rights (Dec. 7, 2017). https://www.dol.gov/sites/dolgov/files/ofccp/INAERP/files/MOUbetOFCCPandCTER_12072017ESQA508c.pdf.

[117] *Indian and Native American Employment Rights Program*, U.S. DEP'T OF LAB. OFFICE OF FED. CONT. COMPLIANCE PROGRAM, https://www.dol.gov/sites/dolgov/files/ofccp/INAERP/files/INAERP_ESQA508c.pdf (last visited May 12, 2023).

[118] *See* Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1349 (1993) (proposing that tribes could voluntarily waive their immunity in discrimination suits instead of getting the federal government involved in tribal affairs).

opinion from the public, as non-Indian outsiders would be more inclined to engage in business with tribal businesses knowing they will not have to be completely liable for employment discrimination claims if their tribal business partner is not shielded against employment discrimination claims because of the tribe's sovereign immunity.[119]

V. Conclusion

It is important that as a nation, we continue to work to rectify this nation's history of bias and discrimination against Native Americans through Diversity, Equity and Inclusion initiatives, comprehensive education, and other governmental programs. However, claims of employment discrimination are a serious matter, and it is evident that the current system in place for sorting out these matters, in relation to Federal Indian law, needs a revision.

Still, there remains ambiguity within the ADEA and ADA, and their judicial interpretation that, when coupled with the substantially complex field of Federal Indian Law, raises numerous questions that may serve to be too intricate for courts to resolve on their own, without explicit federal guidance from the legislative branch. Congress should issue amendments to and clarify the ADEA and ADA to include tribal employers as covered employers to preserve the integrity of these claims, and to ensure fairness and justice for employees and employers alike.

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[119] *See* Steve E. Dietrich, *Tribal Businesses, and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 117 (1992) (querying how tribal sovereign immunity affects Non-Native employees and potential business partners).