Gaming Sovereignty? A Plea for Protecting Worker’s Rights While Preserving Tribal Sovereignty

Jonathan Guss

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z388J85

This Comment is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Gaming Sovereignty? A Plea for Protecting Worker’s Rights While Preserving Tribal Sovereignty

Jonathan Guss*

Tribally owned gaming facilities have become an increasingly popular vehicle for economic development throughout Indian Country. As an incidental consequence of this industry’s growth, many non-tribal members now come into contact with tribal-gaming enterprises as either customers or employees. Consequently, tribal gaming establishments have become a vital nexus in battles over what tribal sovereignty should entail in a modern social and economic context. Indeed, the legal framework surrounding these entities highlights a central tension within our modern-day federal Indian law regime—one that often forces tribal governments to choose between maintaining absolute sovereign self-governance on the one hand, and providing modes of economic development, such as gaming, on the other. Both state and federal authorities play a role in the often complex regulatory structure around labor relations at tribal-gaming facilities. This means that non-tribal members may take labor and employment disputes outside of tribal laws and courts—a situation that tribes regard as an incursion upon tribal sovereignty. Nonetheless, labor advocates argue that the opposite

Copyright © 2014 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of publications.

* Associate, Mayer Brown LLP, Palo Alto, CA; J.D., University of California, Berkeley, School of Law, 2013; B.A., B.A. Pennsylvania State University (Schreyer Honors College), 2007. Foremost, I would like to thank Scott Williams and Curtis Berkey, who dispensed sage wisdom, advice, and encouragement throughout the writing process. They also dealt admirably with what might generously be called a flexible approach to deadlines on my part. Thanks are also due to David Rosenfeld, whose class on protecting low wage workers spawned the first iteration of this Comment. A special thanks to Matt VanWormer and everyone in the Shiprock office of DNA-People’s Legal Services, which is where I first became fascinated by the mystifying labyrinth that is modern tribal jurisdiction. I would also like to thank my family for their support. Viviana Santiago deserves special thanks for heroically putting up with me on a daily basis. Finally, I am thankful for the hard work and insights of the California Law Review staff. The opinions expressed in this Comment are my own and do not necessarily reflect those of Mayer Brown LLP.
situation would give tribal employers little incentive to give fair, adequate protections to their workers.

This Comment seeks to address the tension between tribal sovereignty and workers’ rights by proposing a positive approach. In concrete terms, this approach seeks to funnel labor and employment disputes through tribal courts by strengthening tribal labor and employment laws and alternative dispute resolution systems. The positive approach represents a third way to tribal sovereignty—where tribes, much like other nation-states facing the perils of globalization, can navigate global and local power networks from a position of strength rather than remain outside of them. The positive approach can also benefit workers by creating a strong internal tribal authority to protect labor and employment rights and by fostering opportunities for tribes to settle disputes through traditional or culturally based dispute resolution practices. This approach is in stark contrast to the decidedly anti-worker positions that some tribes have recently adopted by passing right-to-work laws and waging court battles against unfavorable shifts in the law. While the positive approach has the significant drawback of curbing some traditional elements of tribal sovereignty, its chief strength is its pragmatism, in that it works within, rather than against, recent shifts in federal Indian law jurisprudence. The approach can also provide a blueprint for economic development and tribal self-governance that can successfully coexist.

Introduction .................................................................................................... 1625
I. Increased State Regulation of Labor and Employment Conditions at Tribal Gaming Facilities ................................................................. 1627
II. Increased Federal Regulation of Labor And Employment Conditions at Tribal Gaming Facilities............................................... 1636
III. Potential Strategies for Retaining Tribal Sovereignty: Advocating a “Positive” Approach ................................................................. 1647
   A. “Negative” Assertions of Tribal Sovereignty ...................... 1648
      1. Tribal Right-to-Work Ordinances .................................. 1648
      2. Legislative Fixes .......................................................... 1651
      3. Injunctive Remedies ...................................................... 1652
      4. Tribal Exclusion Power .................................................... 1655
   B. “Positive” Assertions of Tribal Sovereignty and Their Advantages .......................................................................................... 1657
      1. Economic Development: Cultural Negotiation and Tribal Capitalism ................................................................. 1658
      2. Strong Labor and Employment Protections in Tribal Courts .......................................................................................... 1661
INTRODUCTION

Over the last few decades, gaming operations have offered an intriguing route for tribal economic development and self-sufficiency. Although not without controversy,1 gaming facilities have had a growing economic impact, both on tribes and surrounding communities. In 2009, tribal gaming generated an estimated 26.2 billion dollars of revenue and created 628,000 jobs for tribes.2 Significantly, the 2009 revenue figure was approximately 5 times greater than in 1995.3 Tribes in 28 states have signed tribal gaming compacts.4 These statistics illustrate the increasing popularity of gaming with a diverse assortment of tribal governments operating in various locales.

An incidental consequence of this recent growth is that many non-tribal members now interact with tribal gaming enterprises as either customers or employees. The particular interaction between a non-tribal member and a tribal government necessarily implicates a complex and often contradictory strain of federal Indian law. Together, the reaches and limitations of tribal law over nonmembers form the fundamental boundaries of tribal sovereignty. Consequently, tribal gaming establishments have become a vital nexus in battles over what tribal sovereignty should entail in today’s globalized social and economic context.

The rise of Indian gaming and its growing economic and social impacts has led to increased federal and state regulation of labor and employment conditions at tribal gaming facilities. There is ample scholarship debating the validity of these new regulatory schemes and elucidating their inconsistency with traditional principles of tribal sovereignty.5 Fewer scholars have examined

---

1. See, e.g., Audrey Bryant Braccio, How The Anti-Gaming Backlash Is Redefining Tribal Governmental Functions, 34 AM. INDIAN L. REV. 171, 191–95 (2010) (describing the growing public backlash against Indian gaming). Gaming is also often controversial within tribes, but that is outside my scope here. There is ample public debate on this topic, and any curious reader will not lack potential resources.
these shifts pragmatically or considered how a pro-labor perspective can be harmonized with the sovereignty interests of tribal governments. This Comment works within the relative gap in the scholarship by accepting increased regulation as a future likelihood rather than as a historical aberration, and seeks ways in which tribes can proactively work within this framework rather than simply opposing it and hoping to be left alone.

First, this Comment explores the dual state and federal strategies to regulate labor and employment relationships at tribally owned casinos. Part I examines how state jurisdiction infiltrated Indian Country in the context of gaming in order to regulate labor and employment conditions. The tribal-state regulatory compact created by the Indian Gaming Regulatory Act (the “Gaming Act”) and the resulting Tribal Labor Relations Ordinance (the “Ordinance”) were borne of these efforts. The Comment discusses state regulation from a historical perspective to illustrate that the Gaming Act represents the culmination of a general trend away from a geographically based concept of jurisdiction. Part II outlines the creep of federal jurisdiction through the implicit divestiture approach to tribal sovereignty, where courts and agencies apply “silent” labor and employment statutes to the commercial activities of tribal governments. The National Labor Relations Board’s (NLRB) adoption of this framework represents a shift towards greater regulation of tribal businesses, particularly casinos. Although this approach has not garnered acceptance in every circuit, its influence on NLRB actions against tribal businesses and acceptance in several circuits indicates that it will continue to play a significant role in the labor and employment relations of tribal governments.

Inevitably, tribal governments and businesses have reacted defensively. Part III describes how the tribes’ responses to state and federal regulation shape their employment policies. Part III-A explains the negative approach to sovereignty and examines the most prominent weapons in a tribe’s arsenal. The negative approach is characterized by the avoidance of federal and state assertions of jurisdiction and is largely designed to preserve the existing regulatory mechanisms of tribes by insulating those regulations from outside authorities. By envisioning sovereignty as the exclusion of outside regulatory authority, the negative approach by itself is an incomplete and futile response to current trends in federal Indian law and policy. It will also likely have a deleterious effect on the rights of workers, Indian and non-Indian alike.

By contrast, a positive approach to sovereignty, as outlined in Part III-B, emphasizes developing tribal institutions by expanding tribal court jurisdiction over employment disputes. Although it compels tribal governments to partly relinquish their freedom to make their own employment and labor laws, the

6. Professor David Kamper provides the most forceful argument for reconciling the protection of tribal sovereignty with Native American perspectives on work and workers’ rights. See DAVID KAMPER, THE WORK OF SOVEREIGNTY: TRIBAL LABOR RELATIONS AND SELF-DETERMINATION AT THE NAVAJO NATION (2010); see also Singel, supra note 5, at 725–28.
positive approach opens up a greater opportunity for tribes to preserve a remnant of sovereignty going forward. In other words, the positive approach is pragmatic in that it is compatible with the recent shifts in the law documented in Parts II and III. Unlike the negative approach, where sovereignty is an all-or-nothing proposition, the positive approach represents a “third way” to tribal sovereignty—where tribes, much like other nation-states dealing with uncertain and shifting conceptions of sovereignty, can navigate the forces of national political and social power from a position of strength. This approach can also benefit workers by creating a robust internal authority to protect labor and employment rights and create opportunities for tribes to settle conflicts through traditional or culturally based dispute resolution practices. Ideally, adopting appropriate aspects of the positive approach could provide a way forward for some tribes seeking to profit from gaming, or other forms of economic development, without sacrificing essential aspects of sovereignty.

I. INCREASED STATE REGULATION OF LABOR AND EMPLOYMENT CONDITIONS AT TRIBAL GAMING FACILITIES

Tribal gaming operations, which initially fell completely outside state regulation, are now a primary place where states can regulate tribal activity. This change is emblematic of a gradual historical shift towards greater state regulation of tribes. Whereas early Supreme Court cases conceived of tribal sovereignty as a tribe’s power to control a specific geographic territory, this conception has eroded over time to allow greater state regulation of activities occurring on tribal lands.

First, this Section describes early notions of tribal sovereignty vis-à-vis states and traces several important shifts in how Congress and the courts have treated this topic. Second, it reviews the *Cabazon* case, which established that states could not regulate tribal gaming. Third, it discusses the provisions of the Indian Gaming Regulatory Act (IGRA) that allow states to regulate gaming activities on tribal lands. Finally, it describes the historical developments that led up to California’s recently implemented regulatory framework, which provides a salient example of how states can now regulate employment and labor relationships at tribally owned casinos through the IGRA.

In the early-to-mid nineteenth century, U.S. Supreme Court cases framed an exclusive Indian-Federal relationship and conceived of tribal sovereignty primarily as a function of territoriality. Indian nations engaged with the United States as “a ward to his guardian” and were characterized as “domestic

---

For a discussion of the historical paradigm of land ownership and borders in definitions of tribal sovereignty and an explanation of how that approach has always proven problematic for the U.S. legal system, see Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 603–08 (2010).
dependent nations."\(^8\) This conception of sovereignty was problematic because it acknowledged tribal political and cultural independence with the significant caveat that those features were completely under the "dominion of the United States" and subject to congressional plenary power.\(^9\) For example, Indian nations possessed an absolute right to occupy territory but not to alienate it,\(^10\) in respect to which the United States had achieved "a title independent of their will."\(^11\)

In *Worcester v. Georgia*,\(^12\) the Supreme Court clarified that plenary power over tribal sovereignty was exclusive to the federal government and nullified any state assertion of jurisdiction over Indian territory.\(^13\) In that case, a Georgia law regulated the entry of outsiders to the Cherokee Nation by requiring them to obtain a license and swear an oath of loyalty to Georgia.\(^14\) The Court found that Georgia did not have the authority to enact these restrictions because Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive."\(^15\) Consequently, the Court relied on treaties between the United States and the Cherokee Nation to show that the Cherokee had not relinquished their "national character" and that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."\(^16\)

The *Worcester* Court conceptualized tribal sovereignty as territorial control, later referred to as the geographical approach. Territorial control was manifest in both the absence of state jurisdiction in Indian country and the tribal right to exclude state citizens.\(^17\) Although the Court acknowledged the exclusive federal role in regulating economic "intercourse" with tribes,\(^18\) it was not clear from the opinion whether Indian nations could exercise jurisdiction over nonmembers within their territory beyond merely excluding them. Although regulation of trade with the Cherokee Nation was vested in the federal government by treaties, the Court contemplated a regulatory relationship between the sovereigns beyond a trade relationship. Professor Florey has referred to this early paradigm of Indian sovereignty as

---

9. Id. at 17. Justice Thomas has colorfully pointed out this ostensibly untenable position: "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.' In short, the history points in both directions." United States v. Lara, 541 U.S. 193, 225 (2004) (Thomas, J., concurring) (citations omitted).
13. Id. at 561.
14. Id. at 516.
15. Id. at 557.
16. Id. at 519.
17. "[T]he laws of Georgia can have no force, and . . . the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . ." Id. at 520.
18. Id. at 592.
characterized by “tribal control over discrete geographical areas.” Enabled by the relative isolation of and insignificant movement across reservations, the geographical approach kept state regulation out of Indian country.

The late nineteenth century marked a shift toward more fluid notions of sovereignty and jurisdiction in federal Indian policies that also opened the door to state regulation in criminal matters. The Major Crimes Act, passed in 1885, provided federal jurisdiction over certain serious crimes committed by or against Indians on Indian land. *United States v. Kagama*, the Supreme Court case upholding the law’s constitutionality, conceptualized jurisdiction as dependent on the identity of individuals rather than control over territory. The Court redefined tribal sovereignty as “the power of regulating . . . internal and social relations,” while justifying the law as a means of assisting with the punishment of criminals on Indian land through the exercise of the federal government’s overriding territorial jurisdiction. This new paradigm also allowed the Court to justify the exercise of state criminal jurisdiction over state citizens for crimes committed on Indian reservations.

Other cases during that era illustrate the Supreme Court’s willingness to recognize greater state control over activities occurring on Indian lands. In *United States v. McBratney*, the Court held that Colorado had exclusive jurisdiction over an offense committed by a non-Indian against a non-Indian on the Ute Reservation. In *Utah & Northern Railway Co. v. Fisher*, the Court ruled that the Idaho territory was permitted to tax a railway company for portions of rail routes that ran through reservation lands. These cases also reflected an increasing interaction between Indians and non-Indians within reservation lands. Perhaps, concomitant with that recognition was a gradually growing acceptance that states could have a jurisdictional interest in matters involving their own citizens or businesses. The interaction between Indians and non-Indians only increased after the passage of the Dawes Allotment Act in 1887, which was both a literal and figurative intrusion on tribal sovereignty by outside communities. The Allotment Act allowed the distribution of land parcels to individual tribal members while distributing unclaimed parcels to local non-Indian settlers. This helped to create a series of checkerboard reservations, where these two groups were heavily mixed.

19. Florey, supra note 7, at 603.
22. Id. at 382.
23. Id. at 379.
24. Id. at 383 (recognizing that the exercise of such jurisdiction “does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there”).
25. 104 U.S. 621 (1881).
In the mid-twentieth century, the interaction between tribes and state citizens led to a rise in the state interest in regulating conduct on reservation land, culminating in the 1953 passage of Public Law 280 (PL 280). PL 280 marked a significant abrogation of the exclusive Federal-Indian relationship in favor of a stronger role for states bordering Indian-territory. The statute, which applied in California and several other states, permitted state criminal jurisdiction “over offenses committed by or against Indians in [specified areas] of Indian country.” The statute conferred states with jurisdiction over a similar set of “listed areas” with “jurisdiction over civil causes of action between Indians or to which Indians [were] parties which [arose] in [those] areas of Indian country.” Congress designed PL 280 to address the problem of “lawlessness” on reservations, to decrease federal expenditures on law enforcement in those areas, and to encourage assimilation with surrounding communities. These goals reflected a decreasing emphasis on geographical boundaries in concepts of tribal sovereignty and an emerging dynamic of dual state and tribal citizenship for tribal members.

While PL 280’s sweeping grant of criminal jurisdiction was apparent from the text of the statute and its legislative history, the extent to which states were permitted to tax and regulate under the law remained ambiguous. Subsequently, a series of cases sought to address this ambiguity. In Bryan v. Itasca County, the Supreme Court determined that Minnesota, a PL 280 state, could not levy taxes against a tribal member’s personal property (a mobile home) kept on tribal land. Bryan established that the civil jurisdiction provision in PL 280 only extended to adjudications and did not provide the state with any civil regulatory authority over the activities of tribal members on tribal land. The Court interpreted PL 280 as “a reaffirmation of the existing

28. Although it was unclear why Congress chose to grant this power to states, the legislative history notes that tribes “reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction.” See Emma Garrison, Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty, 8 J. GENDER RACE & JUST. 449, 455 (2004) (quoting the legislative history). As Garrison notes, the law came during a period when federal policy was emphatically “pro-assimilationist.” Id.
32. The House Report on the bill states that “there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.” Bryan v. Itasca County, 426 U.S. 373, 380 (1976) (quoting H.R. Rep. No. 83-848, at 5–6 (1953)).
33. Id. at 375.
34. The Court’s examination of the Act’s legislative history revealed “consistent and uncontradicted references . . . to ‘permitting’ ‘State courts to adjudicate civil controversies . . . and the absence of anything remotely resembling an intention to confer general state civil regulatory control.” Id. at 384.
reservation Indian-Federal Government relationship in all respects save the
conferral of state-court jurisdiction to adjudicate private civil causes of action
involving Indians.” 35 The distinction between adjudicatory and regulatory
power produced wide-ranging implications for the tribal gaming industry.

A little over a decade after Bryan, the Supreme Court’s decision in
California v. Cabazon Band of Mission Indians prevented California, also a PL
280 state, from regulating gaming on Indian land through its criminal code.36
Cabazon involved two federally recognized tribes in California, each of which
conducted bingo operations; one of the tribes also conducted poker and card
operations.37 The gaming facilities—a major source of employment for
tribal members—catered to customers from outside the reservation.38 The
California Criminal Code placed significant restrictions on bingo games and
meant to limit such games to low-stakes charity ventures.39 The state attempted
to enforce compliance with its criminal code, based on the broad grant of
criminal jurisdiction in PL 280.40 The Court stated that granting California civil
regulatory authority on reservations would bring about “the destruction of tribal
institutions and values,”41 and followed the distinction delineated in Bryan:

[I]f the intent of a state law is generally to prohibit certain conduct, it
falls within Pub.L. 280’s grant of criminal jurisdiction, but if the state
law generally permits the conduct at issue, subject to regulation, it
must be classified as civil/regulatory and Pub.L. 280 does not
authorize its enforcement on an Indian reservation. The shorthand test
is whether the conduct at issue violates the State’s public policy.42

California law only restricted, and did not prohibit, gambling, so the Court
determined that the law was regulatory in nature, rather than criminal.43
Additionally, California not only permitted but actually encouraged certain
forms of gaming, including the state-run lottery.44 The Court framed the tribe’s
gaming operation as a vehicle for enhancing tribal sovereignty and self-
determination through economic development, a sphere in which state
interference was undesirable.45 Consequently, PL 280 states that did not

35. Id. at 391. For an in-depth analysis of the Bryan case and its influence on Cabazon see
Kevin K. Washburn, The Legacy of Bryan v. Itasca County: How An Erroneous $147 County Tax
36. 480 U.S. 202 (1987). For a detailed discussion of the Cabazon case see RALPH A.
ROSSUM, THE SUPREME COURT AND TRIBAL GAMING: CALIFORNIA V. CABAZON BAND OF MISSION
INDIANS (2011).
37. Cabazon, 480 U.S. at 204–05.
38. See id. at 205.
39. See id.
40. Id. at 209.
41. Id. at 208.
42. Id. at 209.
43. Id. at 210.
44. Id. at 210–11.
45. Id. at 216–19. For an in-depth reflection on the ramifications of the Cabazon decision and
the “murky” future of tribal gaming as an economic development strategy, see Matthew L.M. Fletcher,
prohibit all gaming as a matter of public policy had no ability to prevent, restrict, or otherwise regulate Indian gaming operations. In other words, *Cabazon* confirmed that on-reservation gaming facilities fell entirely under the sovereign authority of tribes absent any contrary congressional action.

The *Cabazon* framework was short-lived, as Congress responded to *Cabazon* by creating the IGRA a year later. The IGRA was meant to balance the competing interests of tribal economic development with state and local concerns about the harmful effects of unregulated gaming activity. Although the statute reaffirmed the basic holding of *Cabazon*—a state cannot directly regulate gaming activities on tribal land unless it completely prohibits such activities—the IGRA allowed indirect regulation of high-stakes gaming through a compacting process between states and tribes. If an Indian nation sought to conduct Class III gaming, including card games against the house and lucrative, Las Vegas-style slot machines, the state must “permit[] such gaming” but the tribe can operate these games only “in conformance with a State-Tribal compact.” These compacts provided an avenue for state regulation of gaming activities, with a broad range of permissible bargaining topics that either party could enforce in federal court. The IGRA also requires states to negotiate with tribes in good faith.

---


47. Id. § 2702 (stating the purposes of the Act); see also Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 50 (2007) (“The Act was a compromise between the interests of Indian tribes that had been recognized and validated by the Supreme Court and the interests of the state and local governments.”).


49. This class of games is only defined as those not included within Class I or Class II gaming. Id. § 2703(8). Class III gaming activities involve high-stakes games and games played against the house, including “slot machines, banked card games such as baccarat, chemin de fer, blackjack, and pai gow poker, lotteries, pari-mutuel betting, jai alai . . . roulette, craps, and keno.” Kathryn R.L. Rand & Steven Andrew Light, *INDIAN GAMING LAW AND POLICY* 53 (2006).


51. Permissible topics of negotiation included:
   (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
   (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
   (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
   (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
   (iv) remedies for breach of contract;
   (v) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
   (vi) any other subjects that are directly related to the operation of gaming activities.
Id. § 2710(d)(3)(C)(i)–(vii).

52. For an analysis of the negotiating dynamic between states and tribes during the IGRA compacting process, see Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for*
One critic has claimed that the IGRA “reflects political strategizing more than pragmatic policy goals” in the sense that gaming, as an engine of economic development, will generally lead to inequities in revenue distribution depending on a tribe’s location. The notion that the IGRA is political rather than pragmatic could be drawn out even further to assert that the IGRA’s grant of compacting authority to states provides them with indirect regulatory authority in tribal gaming without a potentially more problematic grant of direct control. In other words, the IGRA forces tribes to enter the compacting process with states, a power dynamic which allows states to extract concessions in policy areas that would normally be exclusively tribal.

In California, for example, the IGRA has enabled the state to set broad parameters to guide labor and employment practices at tribally owned casinos through the Model Compact. In 1999, after a substantial fight over the scope of permissible gaming activities, negotiations between California and more than fifty gaming tribes resulted in the Model Compact. Section 10.7 of the Model Compact, also known as the Labor Relations Provision, requires:

---

53. 25 U.S.C. § 2510(d)(3)(A). Florida has previously refused to negotiate in good faith and safely claimed sovereign immunity under the Eleventh Amendment. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). However, sovereign immunity is also in the tribal arsenal and, absent a compact, states will have little recourse to set parameters for gaming activity, and tribes may be able to operate gaming facilities free from state interference. Indeed, noting the “continuing vitality of the venerable maxim that turnabout is fair play,” the Eleventh Circuit dismissed a subsequent suit by Florida to stop tribal gaming activities, citing the principle of tribal sovereign immunity. Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1239 (1999). Conversely, the Fifth Circuit has rejected a similar argument. See Texas v. United States, 497 F.3d 491, 506–11 (5th Cir. 2007). A footnote in a recent Supreme Court opinion seemingly endorses the Eleventh Circuit view: “[I]f a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law.” Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 n.6 (2014). Significantly, that case held that IGRA’s provision allowing states to sue to enjoin tribal gaming activities that violated a tribal-state compact conducted on Indian land did not abrogate a tribe’s immunity from a suit attempting to enjoin tribal gaming activities that were alleged to violate a tribal-state compact but conducted off Indian land. Id. at 2030–35.

55. The Ninth Circuit has held that California was only required to negotiate over those forms of gaming otherwise permitted in the state. See Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (1994). In 1998, California voters passed Proposition 5, which amended state law to require the state to enter into negotiations with tribes over any form of gaming. See In re Gaming Related Cases, 331 F.3d 1094, 1100–05 (9th Cir. 2003) (discussing the history of Proposition 5 and the fights over gaming compacts in California generally).

56. In re Gaming Related Cases, 331 F.3d at 1104. For some general detail on the lengthy, convoluted process of securing a tribal-state gaming compact in California, see Rossum, supra note 36, at 168–77. The political mechanisms employed by tribes during the struggle to secure a compact are detailed in Jeff Cummins, Lobbying Strategies and Campaign Contributions: The Impact on Indian Gaming in California, in The New Politics of Indian Gaming: The Rise of Reservation Interest Groups 38, 38–56 (Kenneth N. Hansen & Tracy A. Skopek eds., 2011).
an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe’s Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.57

In 2003, the Coyote Valley Band of Pomo Indians brought an action against California, claiming, among other things, that section 10.7 of the Model Compact was not within the bounds of the state’s negotiating authority under the IGRA.58 California countered that it had a sufficient interest in the working conditions of the thousands of non-Indian California citizens who would be employed at the gaming establishments.59 The Ninth Circuit held that the Labor Relations Provision was sufficiently limited to employees whose employment was “directly related to the operation of gaming activities,” and therefore fell within the ambit of the IGRA framework for negotiations.60 Thus, the Ninth Circuit held that California’s Model Compact represented an acceptable use of the IGRA’s limited grant of regulatory oversight to states in contracting with tribes over labor and employment conditions for on-reservation gaming facilities and derivative industries.

As allowed under the Labor Relations Provision in the tribal-state compact, California created the Tribal Labor Relations Ordinance (TLRO), which guarantees workers in gaming and related industries important representational and organizational rights similar to those guaranteed under the National Labor Relations Act (NLRA). Specifically, the TLRO defines employee rights and employer responsibilities. The TLRO applies to gaming and related facilities with 250 or more employees, but does not apply to supervisors, members of the Gaming Commission, casino security, “cage” employees, or dealers.61 Tribally owned casinos are required to follow the TLRO as a precondition to their exclusive gaming right under the IGRA, and a failure to adhere is a breach of California’s Model Compact.62

57. Gaming Related Cases, 331 F.3d at 1106.
58. Id. at 1094.
59. Id.
60. Id. at 1115–16; see also 25 U.S.C. § 2710(d)(2)(C)(vii) (West 2010), which permits negotiations covering “any other subjects that are directly related to the operation of gaming activities.”
62. Labor Ordinance, supra note 61, at Addendum B. Kamper notes examples of individual tribes making greater concessions than those required by the TLRO in exchange for a modified set of
The TLRO, which was created through a bargaining process between tribal and union representatives, provides unions with a broad set of rights in some areas while narrowing those rights in other areas that are thought to most greatly implicate tribal sovereignty. For example, the TLRO prevents tribal management from interfering with the employees’ right to organize, dominating or interfering with the union formation process, discriminating against employees for exercising rights under the TLRO, or refusing to bargain with the elected representatives of employees. However, it is not an unfair labor practice for management to promote or hire a tribal member over a known union supporter. Additionally, the TLRO restricts unions from coercing employees into exercising their rights, from engaging in a secondary boycott absent a stall in negotiations, and from refusing to bargain with tribal management. Further, the TLRO prohibits unions from picketing on “Indian lands.” The dispute resolution mechanism in the TLRO requires exhaustion of tribal remedies, with federal court as a last resort.

One commentator has labeled the compacting process as “a dual assault on tribal sovereignty” because it leaves individual tribes with little say and encourages the formation of unions, which have the potential to push back against tribal governments. However, the TLRO has served to protect the interests of employees and workers in California. The TLRO has protected classes of workers that do not necessarily share the interests of tribal management, especially when it was widely believed the NLRA did not apply.

rights for organizers. See KAMPER, supra note 6, at 81. This indicates that the TLRO sets a floor for labor rights in the context of individual tribal-state negotiations.

63. Gaming Related Cases, 331 F.3d at 1106; see also KAMPER, supra note 6, at 80–84 (lauding these negotiations as an example of fruitful cooperation between tribal leaders and labor unions, while recognizing that the context of forced negotiations was not ideal from a tribal sovereignty perspective).

64. See Herman, supra note 61. For a further explanation of why certain rights implicate sovereignty more than others, see Labor Ordinance, supra note 61, at § 5.

65. Labor Ordinance, supra note 61, at § 5.

66. Herman, supra note 61; see also Labor Ordinance, supra note 61, at § 9. Tribal preferences in hiring have long been recognized as constitutionally sound, and the right of a tribally owned employer to give preference to tribal members has not been seriously called into doubt. See Morton v. Mancari, 417 U.S. 535 (1974).


68. Id. § 11. D. Michael McBride, III and H. Leonard Court give an argument for why such “no strike” provisions may be particularly attractive to tribal gaming operations:

Unlike federal, state and local governments that have broad tax bases from property, sales and income taxes to name a few, tribal governments have very limited sources of revenue. If gaming revenue stops abruptly, many tribes do not have large reserves to fall back on and could become incapacitated quickly. Congress probably did not intend for tribes to face crippling strikes when it enacted the IGRA to help build strong tribal governments.


69. See generally Labor Ordinance, supra note 61, at § 13.

70. Herman, supra note 61.
to tribal gaming businesses. Those working in the hospitality and service industries serving gaming operations represent a different set of interests and vulnerabilities than the traders and missionaries envisioned in early federal Indian law cases like *Worcester*. Far from the more “consensual,” perhaps even entrepreneurial, nature of such early encounters seen in *Worcester*, the economic engine of tribal gaming may be one of the few options available for workers in rural California. In that sense, the TLRO does not shift the fundamentally exclusive Federal-Indian relationship, but instead recognizes California’s interest in protecting low-wage workers in these industries by providing the state an indirect role in assuring adequate labor rights for those citizens.

While the mandated compacting process under the IGRA was definitively a curtailment of tribal sovereignty, tribal governments still maintained some voice in setting up and enforcing compact provisions. The IGRA compacting framework permits states, such as California, to condition tribal gaming rights on the enactment of certain labor and employment standards for workers. Nevertheless, local political processes are one avenue for tribal governments to contribute to the dialogue surrounding these compacts. Additionally, there is some question as to the continuing viability of these compacts as the primary loci of labor regulation at tribal gaming facilities. Subsequent interpretations of federal law have thrown into doubt whether, and to what extent, state-tribal compacts can exclusively govern labor relationships at facilities related to tribal gaming.

II. INCREASED FEDERAL REGULATION OF LABOR AND EMPLOYMENT CONDITIONS AT TRIBAL GAMING FACILITIES

Like state regulation, federal regulation of tribal gaming facilities has increased in scope. First, recent federal attempts to regulate labor and employment conditions at tribally owned casinos have focused on enforcing statutes of general applicability on “commercial” arms of tribal governments. These so-called “silent” statutes do not explicitly acknowledge the possibility of tribes acting as employers of nonmembers, and stand in contrast with other legislation that explicitly exempts or includes tribal employers. Second, the NLRB, overcame its initial reluctance and has increasingly applied the NLRA

---

71. Kamper, supra note 6, at 79; see also Herman, supra note 61 (assuming that the NLRA does not apply).

72. “The whole idea of tribal self-governance involves Native communities making local decisions and laws that best suit local needs, issues, and values.” Kamper, supra note 6, at 90.

73. Professor Kamper observes that “[d]espite the benefits and potential of the California gaming TLROs,” recent developments in federal law “cast doubt over their authority and their reason for existence in general. These decisions leave little wiggle room for anything other than NLRA jurisdiction. By the same token, they have not specifically outlawed TLROs.” Kamper, supra note 6, at 82.
to tribal businesses on reservations. Finally, by applying the NLRA to tribal businesses operating on tribal land, the 2004 San Manuel case represents the culmination of the trend toward greater governmental regulation and a shift in NLRB precedent.

San Manuel has already affected subsequent labor disputes and attempts to apply other generally applicable employment statutes to tribal casinos and related businesses will likely follow the decision. Although the full impact of this case is unknown, San Manuel is emblematic of a general shift toward providing workers with federal labor protections beyond those secured through the IGRA compacting process. Additionally, much like the IGRA itself, San Manuel represents a significant shift toward tighter outside regulation of tribal gaming entities.

Federal statutes regulating the conditions of employment and labor relations fall into two categories: first, those statutes that specifically exempt tribal governments as employers, and second, “silent” statutes, which make no mention of employers operating in Indian Country. In the first category, for example, Title VII of the Civil Rights Act of 1964 specifically exempts tribal governments from the definition of “employer” and federal courts have consistently upheld this exemption.74 In contrast, courts have not applied the Title VII exemption to non-tribally owned businesses operating on tribal land.75 The Americans with Disabilities Act also explicitly exempts tribal governments from the definition of employer,76 while commercial ventures of a tribal government are not exempt.77 Recent amendments to the Employee Retirement Income Security Act and Worker Adjustment Retraining and Notification Act have identified a distinction between tribal governmental functions and other businesses operating in Indian country that affect interstate commerce (including those owned by a tribal government).78
Other prominent federal employment and labor laws that are silent with respect to tribal governments and tribally owned business enterprises, including the Age Discrimination in Employment Act, the Fair Labor Standards Act (FLSA), the Family Medical Leave Act, the Occupational Safety and Health Act, and the NLRA, have created interpretive difficulties for courts. Statutory silence has led to uncertainty among courts with respect to whether these laws apply on tribal lands and, if so, the extent of their application. Some courts, such as the Tenth Circuit, begin with the premise that statutory ambiguity should be interpreted in favor of tribes, and subsequently have found that silent statutes should not divest tribes of sovereignty. Others, including the Ninth Circuit, begin with the assumption that businesses that are not sufficiently tied to tribal sovereignty fall under these silent statutes and then engage in a fact-intensive analysis to determine whether that specific case implicates tribal self-government.

The NLRB adopted the Ninth Circuit’s approach by focusing on the composition and control of the business’s management in deciding whether the government employer exemptions applied to tribal businesses under the silent NLRA statute. In *Fort Apache Timber Company*, the NLRB held that an on-reservation business run by a tribe’s governing council was not an “employer” within the meaning of the NLRA. Several factual elements buttressed this conclusion. First, the business, a lumber corporation, was one of several ventures owned by the tribal council. Second, although the company’s manager was not a tribal council member, he claimed to work “under its direction.” Third, the tribal council both disbursed the operating budgets for its various businesses, including the lumber corporation, and paid employees directly through its general fund. Finally, employees frequently transferred between the different enterprises run by the tribal government while

79. Cf. EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1079–80 (9th Cir. 2001) (holding that the Age Discrimination in Employment Act (ADEA) cannot be applied to a tribal housing authority because it touches a purely intramural matter of tribal governance); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993) (holding that the ADEA cannot be applied to a tribal commercial enterprise because its application would interfere with a traditional internal matter of self-governance); EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) (refusing to apply the ADEA where there is no clear legislative intent that the statute was meant to apply to tribes).


81. See Fletcher, supra note 74, at 449–64 (outlining this confusion and delineating different standards that courts have used).

82. See, e.g., id. at 449–54 (contrasting the approach of the 10th Circuit in analyzing the applicability of the ADEA—as exemplifying the first view—and the Ninth Circuit’s approach).

83. 29 U.S.C. § 152(2) (West 2010).


85. Id. at 504.

86. Id.

87. Id.
maintaining seniority and other benefits. 88 Moreover, the NLRB focused much of its analysis on the sovereign character of tribal governments and concluded, “beyond peradventure,” that the tribal council was a “government” under the NLRA. 89 While refusing to categorically characterize tribal governments as equivalent to state governments, the NLRB emphasized that the tribal government’s “self-directed enterprise” was “implicitly exempt.” 90 To qualify for the NLRA’s governmental employer exemption, a tribal government not only needed to own the corporation but also needed to exercise control over the business’s affairs, including labor policy. 91

In contrast to the Ninth Circuit approach, whether a business fell under the NLRA’s governmental employer exemption under the NLRB’s initial approach hinged not only on what entity controlled the business, but also on the business’s location. 92 For instance, in Sac and Fox Industries, Ltd., 93 the NLRB determined that a business owned and operated by a tribe outside of the tribe’s traditional reservation fell under the NLRA’s jurisdiction. Although the business headquarters was located on the reservation, its manufacturing plant was located on land recently purchased by the tribe and was several hours outside of traditional tribal boundaries. 94 In its decision, the NLRB distinguished Fort Apache Timber Co. as dealing with on-reservation businesses where “the assertion of jurisdiction would interfere with the tribes’ powers of internal sovereignty.” 95 The NLRB considered the business to be an “employer” within the meaning of the statute because its only link to the tribe was through ownership rather than geography. 96 Further, the NLRB noted that “the NLRA’s jurisdictional definitions of ‘employer,’ ‘employee’ and ‘commerce’ are of ‘broad and comprehensive scope.’” 97 However, the NLRB

88. Id.
89. Id. at 506.
90. Id.; see also id. at 506 n.22 (analogizing this case to NLRB v. Natural Gas Utility District, 402 U.S. 600, 604 (1971), which held that a business administered by individuals reporting to public officials fell under the NLRA’s governmental exemption).
91. See Devil’s Lake Sioux Mfg. Corp., 243 N.L.R.B. 163 (1979) (finding jurisdiction where a tribal government held a majority ownership stake but an outside minority owner appointed the majority of the company’s directors and was primarily responsible for the company’s labor policies); see also NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 999–1000 (9th Cir. 2003) (applying the NLRA to an on-reservation health care facility where the tribe had contracted out the managing duties).
92. David Kamper has characterized this initial approach as being driven by considerations of “territorial and personnel jurisdiction.” See KAMPER, supra note 6, at 29–30.
94. Id. at 241–42.
95. Id. at 242–43; cf. S. Indian Health Council, 290 N.L.R.B. 436 (1988) (determining that the NLRA did not apply to a business run by a consortium of tribes, but located on the reservation of only one of those tribes, where all of the directors were members of those tribes and they set the labor policies.)
97. Id. (quoting Navajo Tribe v. NLRB, 288 F.2d 162, 165 n.4 (D.C. Cir. 1961)). The NLRB also analogized to State Bank of India v. NLRB, 808 F.2d 526, 531 (7th Cir. 1986), where a business
refused to disturb the general principle that on-reservation operations controlled by tribal governments were outside the scope of the NLRA. Consequently, the geographical boundaries of the reservation were also ostensibly a barrier to the application of federal labor regulations.

The issue of geographical barriers has shifted under the doctrine of implicit divestiture of tribal sovereignty where a tribe’s sovereignty has been divested unless its activities fall into particular exceptions, and represents a departure from early cases in federal Indian law, such as Worcester. In addressing the applicability of the silent Occupational Health and Safety Act, the Ninth Circuit established the implicit divestiture paradigm in Coeur d’Alene, and held that any federal law should not apply to a tribally-owned farm if (1) the law “touches exclusive rights of self-governance in purely intramural matters,” (2) applying the law would abrogate treaty rights, or (3) there is affirmative proof that Congress did not intend the law to apply to Indian tribes. Notably, at tribally owned business must be explicitly mentioned by a federal act in order to fall under one of these three exceptions. This decision has created a discretionary framework under which silent federal employment and labor laws can be applied to reservation-based, tribally owned businesses whose labor force and customer base extend beyond reservation boundaries. Indeed, as courts interpret and apply the implicit divestiture doctrine, the presence of nonmember employees and customers operating as a foreign government’s instrumentality outside of that government’s territory did not fall within the governmental employer exemption.

98. Although the NLRB refused to disturb the holding in Apache Timber Co., it did so rather tepidly: “[I]nasmuch as we find that Fort Apache and Southern Indian Health Council are clearly distinguishable, we find it unnecessary in this case to address the Union’s alternative argument that those cases were incorrectly decided and should be overruled.” Sac & Fox Indus., Ltd., 307 N.L.R.B. at 243 n.14. In fact, while this case leaves the old geographical approach undisturbed, its mode of analysis presaged a shift towards the NLRB’s modern control approach in analyzing these questions.

99. The court in Donovan v. Coeur d’Alene Tribal Farm, explained:

The Secretary relies on FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960), for the principle, ‘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 Farm may be correct when it argues that this language from Tuscarora is dictum, but it is dictum that has guided many of our decisions. As Judge Choy, writing for himself in United States v. Farris, 624 F.2d 890 (9th Cir.1980), has said: ‘federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.’

751 F.2d 1113, 1115 (9th Cir. 1983) (citations omitted).

100. Briefly stated, the more traditional approach that courts have taken to sovereignty is that “[g]eneral acts of congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them.” Elk v. Wilkins, 112 U.S. 94, 100 (1884). Although this general shift has been quite complex, it appears to have loosely coincided with the growing economic footprint of Indian tribes outside of reservations.

101. Coeur d’Alene Tribal Farm, 751 F.2d at 1115–16; see also Singel, supra note 5, at 692 (describing that the implicit divestiture doctrine demands that courts examine “whether sovereignty is consistent with particularized circumstances” to determine whether federal sovereignty has impliedly overridden tribal sovereignty).

102. Coeur d’Alene Tribal Farm, 751 F.2d at 1116.
would exclude any tribal business from meeting any of the three self-governance exemptions mentioned above.\textsuperscript{103}

In addition to the Ninth Circuit, the NLRB also adopted the implicit divestiture approach in \textit{In re San Manuel Indian Bingo and Casino}\textsuperscript{104} and signaled a significant shift towards regulating labor at Indian casinos and related businesses through silent statutes.\textsuperscript{105} \textit{San Manuel} involved an unfair labor practice claim at a tribally owned casino in California.\textsuperscript{106} The NLRB defined the San Manuel Casino as a “tribal governmental . . . development project,” which operated entirely on-reservation with tribal members in many key positions in the operation.\textsuperscript{107} A number of the employees and the majority of customers at the casino were non-tribal members living outside the reservation.\textsuperscript{108} Additionally, the tribe operated under its own employment laws, including the TLRO.\textsuperscript{109}

The NLRB concluded that it should consider the “increasingly important role” of tribally owned businesses, which “have grown and prospered . . . [and] become significant employers of non-Indians and serious competitors with non-Indian owned businesses,” and reevaluate its former, geography-based analysis.\textsuperscript{110} Accordingly, the NLRB adopted the \textit{Coeur d’Alene} approach\textsuperscript{111} and found that the gaming operation in that case did not fall under any of the three \textit{Coeur d’Alene} exemptions, thus falling within the reach of the NLRA.\textsuperscript{112} Specifically, the NLRB determined that applying the NLRA to the casino in that case did not infringe on any tribal treaty right and that the NLRA did not specifically exempt any of the tribes involved.\textsuperscript{113} Furthermore, the NLRB concluded that “the operation of a casino—which employs significant numbers of non-Indians and that caters to a non-Indian clientele—can hardly be described as ‘vital’ to the tribes’ ability to govern themselves or as an ‘essential attribute’ of their sovereignty.”\textsuperscript{114} Finally, as a matter of policy, the NLRB also

\begin{thebibliography}{99}
\bibitem{103}Singel posits that large tribal businesses that employ many nonmembers, such as casinos, are subject to any silent federal law: “The Court’s development of implicit divestiture shows that the limits of tribal political authority are drawn where tribal relations with nonmembers are concerned.” Singel, supra note 5, at 711–12.
\bibitem{104}341 N.L.R.B. 1055 (2004).
\bibitem{105}While the NLRB did apply the \textit{Coeur d’Alene} test in the \textit{Sac and Fox Industries} case, it clearly distinguished that case from others because the business in question was located outside of tribal lands. \textit{Sac & Fox Indus., Ltd.}, 307 N.L.R.B. 241, 242–43 (1992). The NLRB explicitly declined to consider whether its prior approach to on-reservation businesses should be overruled entirely. \textit{Id.} at 243 n.14.
\bibitem{106}341 N.L.R.B. 1055 (2004).
\bibitem{107}Id.
\bibitem{108}Id. at 1056.
\bibitem{109}Id.
\bibitem{110}Id. at 1062, 1065.
\bibitem{111}Id. at 1059.
\bibitem{112}Id. at 1063.
\bibitem{113}Id.
\bibitem{114}Id.
\end{thebibliography}
found that the NLRA should apply because tribal business activities “[significantly] affect interstate commerce” and that “[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is.” The D.C. Circuit affirmed the NLRB’s judgment for substantially the same reasons.

The D.C. Circuit’s affirmation of San Manuel has already had a ripple effect on labor negotiations of other tribally owned casino operations, and has likely opened the door for the application of other silent employment statutes at these facilities. For example, in 2007, the NLRB once again asserted its jurisdiction over a labor dispute at Foxwoods Resort Casino, which is tribally owned and located on reservation land in Connecticut. Although the NLRB recognized that Foxwoods provides almost all of the funding for the tribe’s governmental and community programs, it characterized the casino as “an exclusively commercial venture generating enormous income . . . almost exclusively from the general public who are not tribal members . . . [which] overwhelmingly employs non-tribal members, and actively markets . . . to the general public.” Following the Foxwoods Resort Casino decision, a tribally owned casino in Michigan allowed the NLRB to oversee a union vote without protest.

The NLRB’s analysis in the Foxwoods Resort Casino illustrates that the first Coeur d’Alene exception focuses on whether the business activity is a function of self-governance, not whether it affects self-governance, and that having non-tribal customers and employees pulls a business out of the “intramural affairs” sphere. According to the Foxwoods Resort Casino logic, a tribally owned casino that almost exclusively hires tribal members, markets itself only within the reservation, and has a primarily tribal clientele might be exempt from NLRB jurisdiction under the Coeur d’Alene framework, but such small-scale operations would vastly limit the positive economic impacts gaming can have. Additionally, it is difficult to imagine why other generally applicable employment statutes that do not mention Indian nations, such as the

---

115.  Id. at 1062.
120.  Braccio, supra note 1, at 186.
FLSA and FMLA, will not similarly apply to gaming facilities under the Coeur d’Alene approach. Although tribal leaders are left to wonder how widely courts and administrative agencies will apply the NLRB’s Coeur d’Alene approach, the implicit divestiture doctrine at least looms as a possible federal regulatory hook that is likely to influence the decisions of tribal casino management groups.

Indeed, the recent NLRB shift to the Coeur d’Alene framework likely portends an increase in direct and indirect federal regulation of employment and labor conditions at tribal casinos. The Coeur d’Alene approach recognizes the significant effects of such businesses on interstate commerce and correspondingly demands a greater showing of tribal interests prior to extending the exemptions in the name of tribal sovereignty. Additionally, the adoption of the Coeur d’Alene framework signals an expansion of the direct application of other federal statutes to tribal businesses operating on tribal land. The increase in direct federal regulation through generally applicable statutes, along with the indirect regulation exercised by states through the IGRA, represents an increasing concern about providing commensurate working conditions and labor rights for both tribal members and nonmembers employed in the tribal gaming industry.

Moreover, circuits are split as to whether they will accept the NLRB’s adoption of the Coeur d’Alene approach in the San Manuel case and apply it to extend the Board’s jurisdiction, thereby further complicating matters for tribal employers. At least one recent circuit court decision has relied on the NLRB’s San Manuel holding to determine the extent of the NLRB’s jurisdiction over a tribal employer under the NLRA. In NLRB v. Fortune Bay Casino, the District of Minnesota held that the NLRB had jurisdiction under the NLRA to issue an enforceable subpoena to an on-reservation tribal casino accused of unfair labor practices. Among the stated objectives of the subpoena was to gather information that would “establish whether the NLRB will consider [the tribal casino] an ‘employer’ within the meaning of the NLRA.” The tribe alleged that NLRB’s jurisdictional test conflicted with the Eighth Circuit’s

121. For example, the Tenth and Eighth Circuits severely limit the implicit divestiture approach and take a more expansive view of tribal governmental functions. Smith Jr., supra note 5, at 533–37. For the proposition that the San Manuel ruling will be generally confusing to tribal employers because of the unclear distinction between governmental and commercial functions, see Vicki J. Limas, The Tuscarora Organization of the Tribal Workforce, 2008 Mich. St. L. Rev. 457, 476–79 (2008).

122. See Kamper, supra note 6, at 44 (“Every time a judicial body rules as the NLRB did, it justifies the Tuscarora-Coeur d’Alene test as sound jurisprudence for any court to use in a variety of contexts in relation to a variety of federal laws. Thus, San Manuel has a broad impact on Native communities and tribal sovereignty, far beyond regulating the relationship between tribal governments and their employers [sic].”).

123. 688 F. Supp. 2d 858 (D. Minn. 2010). The enforcement action in this case was based on Section 11(2) of the NLRA, which allows federal district courts to enforce NLRB subpoenas. 29 U.S.C. § 161 (West 2010).

124. Fortune Bay Casino, 688 F. Supp. 2d at 862.
approach to silent statutes in Fond du Lac.125 Under Fond du Lac,126 the court must consider whether enforcement of a generally applicable statute against a tribe would interfere with “[s]pecific Indian rights,” which include “areas traditionally left to tribal self-government.”127 If enforcement would interfere with those rights, then there must be “clear and plain” congressional intent that tribes should be subjected to the statute.128 The tribe in Fortune Bay claimed that enforcement of the NLRA affected its traditional right to self-government because the tribally owned casino directly financed a number of essential tribal governmental programs.129 The Fortune Bay court rejected the tribe’s argument, stating that it was “unclear” that the casino’s essential role in funding the government would exempt it under either Fond du Lac or San Manuel.130 Although the court chose not to decide whether the NLRB’s jurisdictional analysis was ultimately compatible with Fond du Lac, a footnote in the opinion approvingly quoted a passage from San Manuel suggesting that the two cases could be reconciled.131

Similar to the Fortune Bay court, the Eastern District of Wisconsin relied on the analysis from San Manuel to determine whether a tribal casino’s health plan fell under the “governmental plan” exemption in the ERISA.132 Congress had recently amended the exemption to distinguish between tribal government employees who primarily performed “essential governmental functions” for the tribe and those who performed commercial functions.133 Noting the lack of case law in interpreting the ERISA exemption, the court cited San Manuel’s discussion of traditional and commercial governmental functions and approved of its reasoning that a tribal casino was clearly the latter.134 The plaintiff in the district court case was a former janitor at a casino operated by the Oneida Tribe.135 The plan at issue covered Oneida government employees and workers at the tribe’s various commercial endeavors, including the casino.136 In light of these facts, the court concluded that—absent proof that “substantially all of the services performed by the employees covered by the plan were of essential governmental functions, as opposed to commercial activities”—the plan did not fall under the exemption.137

125. Id. at 866–67.
127. Id. at 248.
128. Id.
129. Fortune Bay Casino, 688 F. Supp. 2d at 869.
130. Id. at 868–71.
131. See id. at 868 n.3.
135. Id. at 880.
136. Id.
137. Id. at 882.
Furthermore, the San Manuel decision has also been cited with approval by a district court in the Ninth Circuit in analyzing the FLSA. In Chao v. Spokane Tribe of Indians, the Eastern District of Washington denied the Spokane Tribe’s motion to quash the U.S. Department of Labor’s (the Department) application for enforcement of an administrative subpoena. In an investigation of the employment practices in the tribe’s casinos, the Department had issued the subpoena to obtain the relevant records in order to determine whether the casino was in compliance with the FLSA. The tribe, in turn, argued that the FLSA did not apply. The court analyzed the jurisdictional question under the Coeur d’Alene test. It determined that the casino functioned as an “arm” of the tribal government, but did not serve a traditional governmental role or function, quoting San Manuel for the proposition that the “operation of a casino is not a traditional attribute of self-government.” Additionally, the court justified its conclusion that the casino’s operation was not a “purely intramural matter” due to the presence of nonmember workers and customers. Given that the Coeur d’Alene framework originated in the Ninth Circuit, it was binding on the Chao court and could have been applied without reference to San Manuel. However, the district court adopted some of the language and reasoning from San Manuel to support its conclusions and cement the legitimacy of the Chao case in the Ninth Circuit. Indeed, tribes within the Ninth Circuit have felt the real world implications of San Manuel’s acceptance there. For example, the Fort McDowell Yavapai Nation in Arizona chose to settle with the NLRB rather than battle over jurisdiction.

139. Id. at *1.
140. Id.
141. See id. at *1–5.
142. Id. at *4. The court clarified that the casino’s function rather than its importance to the tribe’s government was relevant to its determination: “The fact that the Casino funds a significant portion of the Tribe’s governmental services is irrelevant; the question rather is whether the Casino serves a governmental role or function.” Id.
143. Id. at *5. The court further explained that: [T]he FLSA does not touch upon primarily intramural matters in this instance. The Casino employs, and is open to, both tribal members and nonmembers. . . . The Casino employee manual addresses terms of employment; yet, any conflict between the FLSA and the terms of the employee manual does not touch upon a primarily intramural matter given that the Casino—an interstate commercial enterprise—employs both tribal members and nonmembers. . . . The Casino is a for-profit commercial business participating in, and seeking through advertising, interstate business, largely of nonmembers. Id.
144. Indeed, the Ninth Circuit later held that the FLSA applied to an on-reservation tribally owned business without citing San Manuel. See Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009).
145. For a brief analysis of this case, a link to the settlement agreement, and a discussion of other similar cases, see Matthew L.M. Fletcher, Update on NLRB v. Tribal Casino Cases (from Kaighn Smith at DMW), TURTLE TALK (May 31, 2012), http://turtletalk.wordpress.com/2012/05/31/update-on-nlrb-v-tribal-casino-cases-from-kaighn-smith-at-dwm/. Significantly, the settlement
Nonetheless, not all circuits have embraced San Manuel this way with the strongest resistance coming from the Tenth Circuit. The Tenth Circuit has confined the Supreme Court’s *FPC v. Tuscarora Indian Nation* decision, which held that general statutes apply to all persons, to situations in which a tribe is acting in a “proprietary” capacity, rather than as a “sovereign.” When a tribe acts as a “sovereign,” the Tenth Circuit will not interpret generally applicable statutes as applying to the tribe absent express congressional intent. In other words, if application of the statute would abrogate the sovereignty of the tribe, the silence of the statute will be interpreted in the tribe’s favor. The Tenth Circuit approach is buttressed by the notion that a tribe’s general sovereign authority includes the ability to regulate economic activity occurring on tribal land.

Additionally, at least one district court within the Tenth Circuit has expressly stated that *San Manuel* is inconsistent with the Circuit’s approach and probably cannot serve as precedent. Professor Vicki J. Limas has also pointed to the potential incongruity of the Tenth Circuit’s position that tribes exist as sovereign “policy-making units” under the NLRA framework in *Pueblo of San Juan* and the D.C. Circuit’s conclusion that tribes are akin to employers rather than state governments under the NLRA.

The significance of a few district court cases should not be overstated because it is still unclear how the majority of circuits will receive the NLRB’s new jurisdictional analysis under *San Manuel*. Still, tribal employers may be troubled that only courts in the Tenth Circuit have offered an alternative approach. So far, district courts in other circuits have adopted the San Manuel approach and applied the NLRA and other federal employment statutes to agreement required the tribe’s Fort McDowell Casino to post a notice informing employees of their rights under federal law, thus effectively conceding that federal law did apply.

146. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1199 (10th Cir. 2002) (en banc). Interestingly, the *Pueblo of San Juan* case states that a tribe acts in a “proprietary” capacity when it is merely an employer or landowner and in a sovereign capacity when it enacts laws to regulate labor and employment. *Id.* It is unclear what the implication of this statement is when a tribe acts as an employer pursuant to its own labor regulations.

147. See, e.g., EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) (construing the ADEA).


150. Limas, *supra* note 121, at 481 (“If Indian nations are covered by the NLRA, as *San Manuel* holds, they cannot at the same time be exempt from it, as *San Juan* implies.”). But cf. Solis v. Matheson, 563 F.3d 425, 433–34 (9th Cir. 2009) (assuming that the approach in *Pueblo of San Juan* can be distinguished from the implicit divestiture approach from *Coeur d’Alene* because the question of whether one particular tribal labor ordinance, such as a right-to-work law, is preempted by the NLRA differs from the question whether the NLRA applies more generally).
tribally owned casinos. The apparent circuit split surrounding these issues is likely to generate uncertainty about the reach of federal employment statutes for the foreseeable future. Tribal employers will undoubtedly concoct strategies to protect tribal sovereignty in the wake of San Manuel. The shape and direction of those strategies, and how they affect tribal employees, will emanate from the vision of sovereignty that tribes choose to protect.

III. POTENTIAL STRATEGIES FOR RETAINING TRIBAL SOVEREIGNTY: ADVOCATING A “POSITIVE” APPROACH

Gaming tribes will inevitably adjust their practices to protect their sovereignty, which has been threatened by the recent rise in state and federal regulation of tribal gaming facilities. Increased federal and state regulation undermines tribes’ ability to set and enforce their own labor and employment laws within tribal territory. Tribes must choose how to respond to these increased regulations.

On the one hand, gaming tribes could react in a negative manner by crafting policies designed to exclude their workers from the protections of state and federal laws. The negative approach better fits purer conceptions of sovereignty. A pure conception of sovereignty is one in which a sovereign acts with complete freedom from outside influence or authority.

On the other hand, gaming tribes could adopt a positive response to these developments by providing a robust selection of rights and remedies within tribal forums. Tribes can assert sovereignty by augmenting tribal mechanisms and situating tribal forums as seats of power. This approach has the advantage of building tribal institutions and protecting workers. However, the positive approach requires the proper mix of resources and ingenuity within each tribe. Community leaders who envision sovereignty as complete freedom from outside influence may not accept the positive approach as a legitimate assertion of sovereignty, because it is somewhat outwardly focused. To adopt the positive approach, community leaders must overcome this absolutist conception of sovereignty.

Even though the positive approach does not try to maximize or achieve absolute sovereignty by avoiding regulation like the negative approach, the positive approach provides a better balance between tribal economic development and self-governance. The negative approach encompasses practices that are designed purely to avoid federal and state jurisdiction. This includes tribal right-to-work laws, legislative fixes exempting tribes from regulation, injunctive remedies, and liberal use of the tribal exclusion power. Conversely, the positive approach focuses on building tribal institutions and dispute resolution systems as a way to keep tribal businesses out of federal and state courts. Additionally, the positive approach builds on pragmatic theories about tribal economic development and sovereignty and depends upon strong
employment and labor protections in tribal courts. An additional advantage of the positive approach is that it opens up an excellent opportunity for tribes to use indigenous dispute resolution systems, where appropriate. As the in-depth analysis of both the negative and positive approaches will show, the positive approach confers the preferred strategy for tribes.

A. “Negative” Assertions of Tribal Sovereignty

As federal and state regulations have repeatedly encroached on tribal sovereignty, tribes have increasingly responded with negative constructions of sovereignty. These negative responses are partly a function of recent trends in federal Indian law jurisprudence that have limited tribes’ options. For example, early conceptions of sovereignty in cases such as *Worcester* defined sovereignty as a function of geography—that is, sovereignty as control over a particular territory. In contrast, the modern construction of sovereignty, stemming from the IGRA and the NLRB’s *Coeur d’Alene* approach, is narrower. These modern constructions of sovereignty limit tribal authority to the sphere of internal tribal affairs and identify sovereignty as an interest in individuals with tribal affiliations. The shift in NLRB policy to the *Coeur d’Alene* approach exemplifies the modern paradigm in the sense that the affiliations of clientele and employees are more important than the physical location of a business in determining whether tribal sovereignty applies.

Under the negative approach, sovereignty has been increasingly defined as an escape from outside impositions of authority. Professor Katherine Florey has explained the shift to an increasingly negative construction of sovereignty as follows: “The shift from territoriality to immunity has resulted in a construction of tribal sovereignty that is almost entirely negative—conferring the ability to avoid the effects of otherwise-applicable state and federal law, while at the same time denying affirmative powers to regulate events within tribal territory.”\(^\text{151}\) Unfortunately, the negative approach may dictate the framework through which gaming tribes shape their reactions to additional regulations. These strategies are likely to discourage or prevent workers from seeking legal protections. The most prominent negative responses to increased state and federal regulation of tribal activities include tribal right-to-work ordinances, legislative fixes, injunctive remedies, and strategic use of tribal exclusion powers.

1. Tribal Right-to-Work Ordinances

One negative assertion of sovereignty is the tribal enactment of right-to-work statutes. These statutes, which weaken unions, represent at least one aspect of tribal labor relations that courts have left open to tribal regulation without federal or state interference. This strategy is a negative assertion of

\(^{151}\) Florey, *supra* note 7, at 599.
sovereignty because it is designed to keep tribes out of federal or state courts by weakening labor protections. While right-to-work laws may be tempting to a tribal leadership seeking to abate the influence of outside labor unions and keep the tribe out of litigation, they ultimately represent an insufficient and flawed guarantor of sovereignty in the long term.

Section 14(b) of the NLRA impliedly permits states and territories to enact right-to-work ordinances. These laws prohibit agreements requiring union membership as a condition of employment. Right-to-work ordinances aim to weaken unions and discourage them from organizing by allowing employees to “free ride” on the benefits of union contracts without paying union dues. Congress added the right-to-work provision to the NLRA in 1947 as part of a larger effort to limit union security agreements, whereby a union could require all new employees to join or at least pay dues under a collective-bargaining agreement with an employer. The purpose of § 14(b) was to allow a state to choose whether to forbid union security agreements as a matter of policy and to prevent federal interference in this area. As of 2007, twenty-five states had enacted right-to-work provisions.

In Pueblo of San Juan, the Tenth Circuit upheld tribal right-to-work ordinance as a protected exercise of sovereignty under § 14(b). In Pueblo of San Juan, a tribal government sought to enforce its right-to-work ordinance to prevent a security agreement between a union and a non-tribal timber company operating on tribal land. The Tenth Circuit held that the Pueblo of San Juan tribal government could pass a right-to-work ordinance under § 14(b), much like any state government could. The court determined that the NLRA does not preempt the enactment of such laws by tribal authorities, even though tribes are not explicitly mentioned in the right-to-work provisions of the NLRA.

Further, the court held that the tribal right-to-work ordinance in Pueblo of San

152. 29 U.S.C. § 164(b) (West 2010) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.").

153. See Singel, supra note 5, at 726 ("Perhaps as a result of this free rider phenomenon, right-to-work laws have been shown to decrease the likelihood that new organizing activity will take place in the workplace.").


155. See Retail Clerks Int’l Ass’n, Local 1625, ALF-CIO v. Schermerhorn, 375 U.S. 96, 99–102 (1963) (describing the legislative history of Section 14(b)). The Retail Clerks decision also asserted, through its analysis of 14(b)’s legislative history, that such state laws were never meant to be preempted by the union security provision in the NLRA and, indeed, that twelve states already had such laws prior to the enactment of 14(b). Id. at 100.


157. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1189 (10th Cir. 2002).

158. NLRB v. Pueblo of San Juan, 280 F.3d 1278, 1281 (10th Cir. 2000), aff’d on reh’g en banc, 276 F.3d 1186 (10th Cir. 2002).

159. Id. at 1286.
Juan was permissible as “an exercise of sovereign authority over economic transactions on the reservation.” Indeed, the later NLRB’s San Manuel decision acknowledged that its holding did not impact the viability of tribal right-to-work ordinances.

In the wake of San Manuel, scholars have argued that right-to-work ordinances represent a desirable strategy for tribes seeking to discourage union and NLRB interference with tribal labor relations. Two prominent gaming law practitioners have recently argued that tribal right-to-work ordinances are essential to preserving tribal sovereignty because the laws discourage would-be union organizers. They note that, from a tribal perspective, the application of federal rather than tribal laws equates to “losing control over the work place, giving up confidentiality of government records, and jeopardizing essential governmental revenue.” Professor David Kamper has also acknowledged that the current climate around tribal disputes with unions has forced tribes to consider right-to-work ordinances: “The turn toward right-to-work ordinances is a Native backlash against the aggressive tactics of labor unions and the policy making of the NLRB, a deployment of the only apparent legal alternative left.” Notably, in the gaming context, tribal right-to-work ordinances are not framed as promoting optimal tribal economic health, but rather as a strategy to keep union organizers and the NLRB at bay.

However, there are significant limitations to this approach. Right-to-work ordinances have been characterized as “essentially defensive” and a “reactive and insufficient approach.” There are two reasons supporting such critiques. First, right-to-work ordinances delay, but do not wholly prevent, the formation

160. Pueblo of San Juan, 276 F.3d at 1200.


162. See, e.g., KAMPER, supra note 6, at 90 (noting a general increase in efforts to pass right-to-work ordinances among gaming tribes after San Manuel); McBride, III & Court, supra note 68, at 1293–94; Singel, supra note 5, at 725 (providing specific examples of tribes that passed right-to-work ordinances in the wake of the Pueblo of San Juan decision).

163. See McBride, III & Court, supra note 68, at 1293–94 (“If a union is choosing between a potential employer who is protected by right to work and one with employees who could be forced to pay dues through a union security clause, the natural choice is the latter.”). However, notably, right-to-work ordinances also encourage tribal employers to avoid practices that would trigger a violation of the NLRA as a strategy to prevent outside interference in labor relations. See id. at 1300–01.

164. Id. at 1286.

165. KAMPER, supra note 6, at 94. While Kamper generally supports a more labor-friendly approach, he highlights that many tribes and unions have been guilty of framing tribal sovereignty and organizational rights as a zero-sum game rather than finding common ground.

166. Singel, supra note 5, at 728.
of unions and the assertion of NLRB jurisdiction.167 Indeed, such ordinances could exacerbate existing tensions between tribal employers and national labor unions.168 Second, a blanket anti-union approach may not always be in the best interest of tribal communities.169 While the tribal leadership may be directing the employment practices of a tribally-run entity, many of the affected employees will also be tribal members who may desire the protections a strong union. Finally, right-to-work ordinances do not always advance tribal sovereignty because they do not necessarily reflect a community freely choosing how to govern itself—in some respects, the very essence of sovereignty—if that choice has only been motivated by the threat of outside union interference.170 Given these substantial limitations, tribes should not rely on right-to-work statutes to advance their sovereignty in the face of increasing federal and state regulation.171

2. Legislative Fixes

In addition to right-to-work ordinances designed to decrease union activity, tribes may use legislative measures to exclude the labor relations of their business operations from federal regulation. By lobbying for explicit exclusion from federal laws, the legislative strategy represents a negative approach to increased regulation.

Several laws seeking to exclude tribally owned businesses from federal and state regulation have been introduced, but have not yet been adopted. H.R. 2335, introduced in 2011, was designed to “clarify” tribal obligations under the NLRA by amending the statute to explicitly exclude tribally owned businesses operating on tribal land.172 The Tribal Labor Sovereignty Act of 2009 and several prior bills attempted a similar fix.173 Likewise, the Indian Sovereignty

167. “Indeed, it is when outsider forces perceive tribes to be ‘hiding behind sovereignty’ that these forces are most likely to aggressively push for legal intervention.” KAMPER, supra note 6, at 77.
168. See id. at 95.
169. See Singel, supra note 5, at 727–28 (noting several detriments that a blanket anti-union approach poses to the tribe); see also KAMPER, supra note 6, at 95 (“right-to-work ordinances could have the most adverse effect of dividing the community when both management and employees are tribal members”).
170. “The whole idea of tribal self-governance involves Native communities making local decisions and laws that best suit local needs, issues, and values.” KAMPER, supra note 6, at 90.
171. An additional factor complicating the use of right-to-work ordinances is how it would interact with tribal-state gaming compacts that already dictate permissible labor policies at gaming facilities. The California TLRO explicitly excludes any clause equivalent to Section 8(a)(3) of the NLRA, which protects union security agreements. See Herman, supra note 61. McBride, III and Court note that discrepancies between federal and tribal labor laws could put tribal governments in the difficult position having to follow one while violating the other. McBride, III & Court, supra note 68, at 1285.
Protection Act of 2000 attempted to remove labor as a permissible bargaining topic in tribal-state IGRA negotiations.\(^{174}\)

Despite these efforts, legislative reform will not adequately protect tribal interests. While the newfound political influence of tribal gaming interests makes legislative fixes a tempting long-term strategy, it has yielded few actual results on the federal level thus far. Certainly tribal lobbying has had some impact at the state level and can be a powerful tool.\(^{175}\) However, even if a legislative fix was enacted at the federal level by excluding tribes from specific statutes, its scope would be limited and would likely prove inadequate in ameliorating the overall trend toward increasing regulation of tribal activity. Thus, legislative reform does not offer a promising or viable strategy for tribes.

3. Injunctive Remedies

Some tribes have attempted to preserve their sovereignty by seeking federal court injunctions that would limit the NLRB from asserting jurisdiction over tribal activities under the NLRA. Recently, two Michigan tribes were unsuccessful in seeking such injunctive relief.\(^{176}\) Both lawsuits urged federal courts to effectively reject the NLRB’s San Manuel approach in order to prevent or delay NLRB claims.\(^{177}\) In these cases, the courts rejected the tribe’s strategy by dismissing the requests for injunctive relief for lack of subject matter jurisdiction under the theory that tribes must to exhaust their administrative remedies under the NLRA before initiating litigation.\(^{178}\) A lengthy, costly, and still uncertain litigation process continues for both tribes. Meanwhile, in the Tenth Circuit, the injunctive strategy has garnered limited success. However, given the unreliability in outcome, and the expense of long, tiring litigation, seeking injunctive relief does not afford a consistently beneficial strategy for tribes.

In *Saginaw Chippewa Indian Tribe of Michigan v. NLRB*, the Saginaw Chippewa Tribe requested a temporary restraining order and preliminary injunction against the NLRB to prevent enforcement of the NLRA at a tribally owned casino.\(^{179}\) The Eastern District of Michigan denied both requests, holding that the tribe needed to exhaust all administrative remedies through the

---


\(^{175}\) For some in-depth case studies on the rise of tribal lobbying power and its effects, see Jeff Cummins, *supra* note 56 (detailing the rise of tribal gaming interests in California politics and the enactment of a state-tribal compact); see also W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* 70–175 (2000) (describing the political role of tribes in debates over tribal gaming in New Mexico).


\(^{177}\) *Saginaw Chippewa Indian Tribe*, 838 F. Supp. 2d at 601; *Little River Band of Ottawa Indians*, 747 F. Supp. 2d at 881.

\(^{178}\) *Saginaw Chippewa Indian Tribe*, 838 F. Supp. 2d at 600; *Little River Band of Ottawa Indians*, 747 F. Supp. 2d at 888–89.

\(^{179}\) 838 F. Supp. 2d at 600–01.
The tribe contested the NLRB’s jurisdiction under the NLRA and moved to enjoin the administrative body. Specifically, the tribe argued that the NLRB had no jurisdiction because the NLRA itself did not apply and, therefore, the tribe would not need to exhaust its administrative remedies under the NLRA. In April 2012, an administrative law judge held that the tribal casino operation was an “employer” under the jurisdictional framework set forth in San Manuel and found that the tribe’s conduct toward the discharged employee violated several provisions of the NLRA. Predictably, the NLRB affirmed the administrative judge’s ruling, a decision that is now on appeal in the Sixth Circuit. Likewise, the Little River Band of Ottawa Indians filed a similar claim for injunctive relief that was denied by the Western District of Michigan under the administrative exhaustion doctrine. That case is unique in that the unfair labor practice alleged against the tribe constitutes a discrepancy between tribal labor laws and the NLRA. The NLRB ruling in that case is also currently on appeal before the Sixth Circuit.

The injunction strategy has garnered some limited success in the Tenth Circuit in Chickasaw Nation v. NLRB. In 2010, the NLRB brought an unfair labor practices claim against the WinStar World Casino run by the Chickasaw Nation of Oklahoma (the Nation). The Nation filed for injunctive and declaratory relief in the Western District of Oklahoma, claiming that the imposition of NLRB jurisdiction would interfere with its treaty rights and

---

180. Id. at 600.
181. Id. at 601.
182. Id. at 606.
184. For the Board’s decision, dated April 16, 2013, see the NLRB’s official webpage for the case at http://www.nlrb.gov/case/07-CA-053586. The case is now on appeal in the Sixth Circuit. For updates on the case, see Matthew L.M. Fletcher, NLRB Asserts Jurisdiction over Soaring Eagle Casino (Saginaw Chippewa Indian Tribe), TURTLE TALK (Apr. 17, 2013), http://turtletalk.wordpress.com/2013/04/17/nlrb-asserts-jurisdiction-over-soaring-eagle-casino-saginaw-chippewa-indian-tribe/.
186. The Teamsters Union challenged a tribal labor ordinance preventing strikes by employees of organizations subordinate to the tribal government, which included the tribally owned casino. See id. at 878.
sovereign power of self-government. Continuing the broad rejection of the Tuscarora-Coeur d’Alene framework in the Tenth Circuit, the court noted that the Nation drew support from “a deep body of Tenth Circuit law expressing extreme deference to tribal sovereignty.” The court recited the Tenth Circuit canon requiring an express congressional statement in order for a generally applicable statute to apply to activities implicating tribal governmental sovereignty. Accordingly, the court rejected the applicability of the administrative exhaustion doctrine, stating that the doctrine could not apply where sovereign governmental interests are at stake.

In addition, the Western District of Oklahoma made other findings based on the Tenth Circuit’s strong and unique deference to tribal sovereignty, noting that the NLRB’s application of the San Manuel reasoning was untenable in Little River Band under Tenth Circuit authority. Citing that Circuit’s tradition of “great deference for tribal sovereignty,” the Nation prevailed in its claim that the NLRA did not apply to WinStar in the district court. Furthermore, the district court held that the Nation also had satisfied the other requirements for a preliminary injunction: submission to the NLRB’s jurisdiction would have caused irreparable harm to tribal sovereignty, the NLRB had recourse to challenge the basis of the injunction on appeal, and there was a strong public interest in preserving tribal sovereignty. Rather than fighting over the injunction on appeal, the parties have agreed to bring the narrow issue of whether the NLRA applied to WinStar for an expedited review before the NLRB. The parties have also requested that the case be consolidated with the two cases out of Michigan. After the expedited NLRB decision, the issue is now on appeal before the Tenth Circuit. Although district courts in the Tenth Circuit appear more receptive to the injunction

192. Chickasaw Nation, No. CIV-11-506-W, slip op. at 4. The court also could not resist preening about the Tenth Circuit’s perceived expertise in the area: “Because of the extraordinary number of tribes located within its jurisdiction, the Tenth Circuit is uniquely experienced in the application of the canons of Indian law.” Id.
193. Id. at 4–5.
194. Id. at 6 (“There would appear to be a considerable distinction between a private company’s claim that it will be inconvenienced by disruption to its manufacturing activities and a federally-recognized Indian tribe’s claim that its sovereignty will be irreparably compromised by a federal agency’s unlawful exercise of authority under a statute to which the tribe is not subject.”).
195. Id. at 7–8.
196. Id. at 10.
197. Id. at 10–12.
199. Id. at 3.
strategy thus far, the issuance of a preliminary injunction has not provided the tribe or its employees with any level of certainty about which laws apply in Chickasaw Nation.

Seeking injunctive relief is unlikely to provide tribal employers with a definitive victory. It does not appear that courts have issued such injunctions outside of the Tenth Circuit. Further, even within the friendly confines of the Tenth Circuit, this strategy has only held the NLRB at bay but still left the ultimate question of whether tribal employers are subject to the NLRA unresolved. Consequently, the injunctive-relief strategy has not created certainty for tribal employers in defining their obligations under the NLRA, or for tribal employees in clarifying their rights and available remedies.

4. Tribal Exclusion Power

The traditional tribal exclusion power presents another potential avenue for tribally owned casinos to fight against state and federal regulation of their labor and employment laws through a negative strategy. The tribal exclusion power allows tribes to exclude nonmembers or otherwise set conditions on their presence on tribal lands. The exclusion power is deeply rooted in federal Indian law and remains at the heart of tribal sovereignty. While tribes are undoubtedly able to exclude nonmembers as an attribute of their sovereignty, selective use of this power is unlikely to fully shield tribes from enforcement of federal laws even if it is implemented with the aim of excluding unions. Further, as a policy matter, the exclusion strategy relies on the potentially faulty notions that only non-tribal workers want to unionize and that tribal businesses can function without non-tribal workers.

The power of tribes to exclude nonmembers from tribal land lies at the foundation of tribal sovereignty. The Supreme Court discussed the boundaries of tribal exclusion in Merrion v. Jicarilla Apache Tribe:

Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.

201. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832) (“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described . . . and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”) (emphasis added); Duro v. Reina, 495 U.S. 676, 696 (1990) (stating that tribes possess “traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands”).

The Merrion court also clarified that a tribe does not give up the right to impose a condition on nonmembers who wish to continue their presence on tribal land by failing to initially impose that condition upon entry. Tribes’ exclusion powers have been recognized in a number of treaties between the United States and tribal governments. Although the exclusion power is an inherent attribute of tribal sovereignty, many tribes have also chosen to codify it in their constitutions or in separate civil or criminal statutes. The practice of banishment for particularly heinous conduct also purportedly aligns with traditional historical practices in certain tribes.

As a negative strategy to reduce state and federal regulation of tribal activity, Practitioner Kaighn Smith Jr. has advocated that tribes exercise their exclusion power to banish unions from tribal lands completely or condition their presence. Under this interpretation, a union’s presence on the reservation “directly implicates tribal control over the reservation community and, more specifically, the allocation of resources from economic activity therein.” Accordingly, the tribal exclusion power implicates tribal regulatory authority and would only be relevant to preserving sovereignty when a tribe is acting as an employer or when a nonmember owns an on-reservation business—situations where nonmembers voluntarily entered the reservation to have a consensual economic relationship with the tribe. Under the tribal exclusion approach, nonmember employees and their union representatives could be compelled to conform to certain conditions to remain on the reservation or, alternatively, could be excluded altogether. Smith states that, “[i]f the costs to the nonmember from such tribal authority outweigh the economic benefits of remaining on the reservation, the nonmember is, of course, free to leave.”

203. Id. at 145.
205. See Patrice H. Kunesh, Banishment as Cultural Justice in Contemporary Tribal Legal Systems, 37 N.M. L. REV. 85, 110–13 (2007) (describing the inclusion of a banishment provision in one tribal constitution and the explicit prohibition on any form of banishment included in another); id. at 113–18 (explaining a range of civil and criminal banishment laws and procedures).
206. See id. at 91–100 (detailing the historical practice of banishment as a sanction in three different tribes).
207. Smith Jr., supra note 5, at 527.
208. Id.
209. See id. at 527–28; see also Montana v. U.S., 450 U.S. 554, 565 (1981) (“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”); Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1139 (9th Cir. 2006) (“If the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians.”).
210. Smith Jr., supra note 5, at 530.
On the whole, the unfettered use of tribal exclusion laws would be an undesirable outcome for tribes. First, there is no indication that tribal exclusion rights would prevent the enforcement of federal law in federal courts following the San Manuel analysis, particularly where the individual seeking to enforce the law is a government agent carrying out official duties. Second, the argument for exclusion laws is premised on the idea that unions are outside influences, which ignores the possibility that a union at a local gaming facility would likely include, and possibly be represented by, members of the tribe. Third, Smith’s assertion that nonmembers are “free to leave” understates the complexity of the employment relationship between tribes and nonmembers. Tribes gain significant economic value from nonmember employees, particularly in situations where tribal enterprises could not run absent that sector of the workforce; nonmembers choosing to leave could be disastrous for the tribal employer and the governmental functions that it funds. Finally, the appearance of an indiscriminate use of tribal exclusion power could also negatively impact a tribal casino’s public image and discourage customers and potential business partners by creating an air of insularity or uncertainty around the enterprise. In sum, excessive reliance on the tribal exclusion power—like any of these negative approaches—would not further tribal sovereignty and could even have detrimental impacts.

B. “Positive” Assertions of Tribal Sovereignty and Their Advantages

Positive assertions of tribal sovereignty seek to strengthen tribal institutions and internal processes to resolve disputes. Unlike the negative approach, which erects a temporary shield against impositions of federal and state jurisdiction, the positive approach recognizes that modern sovereignty is inevitably interdependent but also carves out new avenues of tribal jurisdiction. The positive approach can generate better long-term results for tribes by strengthening Indian models and institutions of justice. And, in contrast to the negative approach, it can also expand the rights of workers and help to

211. Indeed, in Solis v. Matheson, 563 F.3d 425, 437 (9th Cir. 2009), the Ninth Circuit rejected a tribe’s argument that a treaty-based right of exclusion barred the limited entry required to investigate a claim under the FLSA. But see Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 713–14 (10th Cir. 1982) (holding that a treaty-based exclusion right prevented the application of OHSA at a tribal business).

212. See U.S. v. White Mountain Apache Tribe, 784 F.2d 917, 920 (9th Cir. 1986) (“The Tribe’s own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers. . . . The district court was accordingly correct in concluding that the Tribe was without authority to restrict federal officials in their conduct of official business on the Reservation.”) (citations omitted).

213. David Kamper argues that scholars and policy makers have traditionally overlooked indigenous workers and their experiences of work and, regretfully, have adopted a hierarchical approach focusing instead on tribal employers and legal systems. KAMPER, supra note 6, at 6. He provides an in-depth examination of such an indigenous labor rights movement in the Navajo Nation. See id. at 97–199.
efficiently resolve disputes. Although a positive approach may carry some additional upfront costs for tribes and tribal businesses, it represents a realistic way forward in the wake of increasing state and federal interests in on-reservation employment regulations. The positive approach provides tribes several possible options to address jurisdictional tension in the regulation of employment and labor conditions, depending on the right cultural fit. Although neither approach is ideal, the positive approach allows tribes to assert their sovereignty through traditional conceptions of justice and local tribal institutions. Finally, these approaches are by no means mutually exclusive; however, given limited resources, the positive approach will provide a better long-term return for tribes seeking to preserve important elements of sovereignty.

1. Economic Development: Cultural Negotiation and Tribal Capitalism

If a tribal government decides to exercise its gaming right under the IGRA, its decision should be accompanied by the awareness that an expansion in economic opportunities will necessitate further interactions with other communities. A purely negative approach to the protection of tribal sovereignty fails to capitalize on opportunities to interact with other communities on favorable and self-directed terms. Admittedly, any cultural capitulation to the demands of outside communities—such as labor unions—could be conceived of as the death of sovereignty, at least under an uncompromising conception of that term. However, the San Manuel decision and its limitation of sovereignty to internal tribal matters represents the hand that tribes have been dealt for the foreseeable future, for better or worse. Some recent scholarship acknowledges that this situation, while far from ideal, provides an opportunity for tribes to assert a dynamic form of sovereignty—a veritable “third way”—through the mechanisms of economic development. The term third way is employed here as a rejection of the false dichotomy that sovereignty must either be preserved through isolationist attitudes or exposed and destroyed through assimilation.

The theories of “culture as negotiation,” “interdependent sovereignty, and “tribal capitalism,” discussed below, share the premise that tribal economic

214. See Christine Zuni Cruz, Shadow War Scholarship, Indigenous Legal Tradition, and Modern Law in Indian Country, 47 WASHBURN L.J. 631, 632–33 (2008) (“Speaking of mental sovereignty in the face of pressing and unrelenting outside influences is important to Indigenous endeavors. Sovereignty involves the idea of absolute authority within separate spheres and autonomy or freedom from outside control. Mind or mental sovereignty is a powerful concept; it takes the concept of sovereignty inward where it operates internally and is personal. Mental sovereignty speaks to me of the ability to be able to think in a different manner; it is more than thinking independently, though that is a part of it. It represents the idea of being able to maintain an autonomous way of ‘knowing,’ without having that way eradicated or compromised, even in the face of constant bombardment or immersion in another way of thinking, while maintaining the ability to operate accordingly . . . . It is the cure for the colonial mentality, in which the native is eclipsed by thinking the colonizer’s way is more worthy or superior.”).
development projects, like gaming, necessitate some level of interaction with outside communities, which present an opportunity for tribes to emphasize and protect essential cultural values. Under these theories, culture need not be stagnant and can develop and thrive through interactions with outside communities. In order to thrive, tribes should embrace cultural negotiation and adopt the perspective of “tribal capitalism.”

Naomy Mezey’s culture as negotiation approach supports the notion that tribes can use interactions with non-tribal members and communities to assert their cultural power. Mezey argues that the IGRA framework can be maximized, from a tribal perspective, by tribes adopting a culture as negotiation approach. She argues that viewing culture as “a process of negotiation” is a realistic approach to how cultural development works:

This paradigm looks at the history of any people as a series of cultural and political transactions, not all-or-nothing conversions or resistances. . . . The negotiation paradigm recognizes that groups of people rarely confront each other as equals, and that relations of power charge most cultural interaction. Choices, therefore, are not idealistic so much as pragmatic and strategic. Culture is never pure; it is always a product of historical choices and compromises. She distinguishes the process of “acculturation,” accomplished through cultural adaptation, from “assimilation,” the complete absorption of one culture into another.

Second, Mezey’s perspective aligns with Jessica Cattelino’s criticism of the false dichotomy that often pits tribal traditions and cultural independence in opposition to modernity and economic development. As her study of the Seminole Tribe of Florida suggests, economic activities that target outside communities can play a crucial role in promoting cultural dialogue and development. Cattelino’s and Mezey’s accounts suggest that tribal communities are already influenced by, and interacting with, outside communities, which can shape and express culture. While the terms of these interactions are not always favorable for tribes, it may be necessary to sacrifice some traditional aspects of tribal autonomy in order to gain a more active role in an increasingly globalized society and economy. Importantly, the sum of these theories suggests that such compromises do not inevitably lead to total assimilation.

Finally, in recognizing rising levels of interaction between tribes and outside communities, Professor David Kamper argues that this new interactive

---

215. Mezey, supra note 54, at 731–32.
216. Id. at 731 (internal quotation marks omitted).
217. Id.
paradigm is defined by the notion of interdependent sovereignty, whereby tribal economic development projects rely upon and are essential to outside communities. He writes: “[I]nterdependent self-determination is particularly apparent in the current structure of tribal gaming. Tribes must negotiate with states to structure gaming regulations; rely on non-Indian patrons and workers; contribute huge amounts of money to non-Indian charities, civil infrastructures, and political campaigns; and sustain local and state economies.”

Notably, interdependent sovereignty recognizes that sovereignty in the modern world is much more like a networked relationship rather than the juxtaposition of separate powers. Like any sovereign state seeking to have a beneficial relationship with citizens of other states, tribal sovereigns seeking such relationships through tribal enterprises will also have to work within this network of interdependent sovereignty. Mezey’s, Cattelino’s, and Kamper’s perspectives demonstrate that tribal economic projects, like gaming, necessitate interaction with outside communities; tribes may use these interactions to emphasize and protect their essential cultural values.

Given that tribes must interact with outside communities in order to ensure continued economic growth, this Comment argues that “tribal capitalism” provides one potential vantage from which tribal governments can approach these inevitable cultural interactions. Tribal capitalism is the adaptation of culturally centered practices designed to engage with outside communities and facilitate the free movement of people and goods.

Professor Duane Champagne observes that Native communities, much like communities all over the world, are encroached upon by an expanding and increasingly inclusive world market and “[t]he cost of not being advantageously engaged in the market is continued economic marginalization.” Champagne’s perspective echoes the theories that espouse a networked form of sovereignty. The fundamental problem for Native communities pursuing such development is that their basic traditional cultural values may conflict with the core values of capitalism such as individualism, accumulation of wealth, and reinvestment of wealth to increase production. Champagne argues that this problem is not unique to Native communities and that these communities can draw inspiration from countries, such as Japan, that have adopted capitalist modes of production without sacrificing fundamental cultural attributes. Accordingly, tribes choosing to engage with other

219. KAMPER, supra note 6, at 76 (citing Cattelino, supra note 218).
221. Id. at 47.
222. Id. at 52. Champagne contrasts these values with those he views to be common among Native communities, namely, a community focus, sharing of wealth, and the reinvestment of profit into the welfare of the community.
223. Duane Champagne, Tribal Capitalism and Native Capitalists: Multiple Pathways of Native Economy, in NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC
communities must structure those interactions around fostering economic development without sacrificing core cultural principles and values or adopting an inapt model of social organization. 224

Kamper also views tribal capitalism as “an ideal model . . . [for tribal] economic development,” but cautions that the presence of Native workers must also factor into this calculus. 225 He further echoes Champagne’s concerns about cultural compatibility by cautioning that “tribal enterprises ought to be wary of implementing political, economic, and legal strategies that are used as neoliberal policies around the world,” such as culturally incompatible anti-union provisions. 226 Tribal capitalism is ultimately important because it recognizes the underlying cultural challenges of globalization and economic development while maintaining essential cultural values as its centerpiece. Therefore, tribal capitalism could be a valuable construct for tribes seeking to navigate a “third way,” where economic development is possible without sacrificing key cultural principles and the core of sovereign governance.

Ultimately, each Native community must establish an approach to economic development that advances, or at least does not conflict with, its cultural values. The theoretical constructions of culture as negotiation, interdependent sovereignty, and tribal capitalism provide a way forward in which economic development and integration into a larger economic framework go hand in hand with asserting tribal culture and sovereignty rather than acting only as a force for assimilation. These theories also recognize that former notions of sovereignty no longer fit within the modern economic and social paradigm. Such self-directed, culturally-centered approaches lie at the heart of the positive response to federal labor regulation on reservations. This response is characterized by widening the scope of tribal jurisdiction (rather than merely seeking to preserve and protect it) and building up tribal institutions in line with central cultural values.

2. Strong Labor and Employment Protections in Tribal Courts

Tribal courts can be a locus for positive assertions of tribal sovereignty. They are among the primary places where a tribe can perpetuate good governance practices that benefit members and foster legitimacy amongst nonmember employees and business partners. If compatible with its cultural values, a tribe can structure its laws and procedures to incentivize submission of labor and employment disputes to tribal adjudication. In order to avoid

---

224. See Champagne, supra note 220, at 49–51 (explaining that tribes cannot merely return to traditional forms of social organization and governance and that some useful “colonial institutions” must remain but should be infused with cultural values).
225. KAMPER, supra note 6, at 8–9.
226. Id. at 9.
NRLB interference, tribal legal structures and procedures can adopt federal laws as minimum standards and invoke the tribal court exhaustion doctrine as a powerful mechanism to keep employment and labor disputes within tribal adjudicatory bodies.

A fair, responsive, and effective judicial system can form the basis for a tribal community’s ability to resolve disputes according to its internal values. There are an estimated 250 to 300 tribal courts in the United States. Despite a number of challenges related to securing adequate resources and building legitimacy, an increase in state court deference to tribal judgments is a sign of progress. Professor Stephen Cornell identified a strong and independent judiciary as a central aspect to the “nation-building” concept of tribal economic development. The separation of political influence from the judicial process is one aspect that is particularly important to avoid the appearance (and practice) of impropriety. Tribal jurisdiction by itself is insufficient without a body that can fairly and legitimately dispense justice.

While a tribal court cannot solely be measured by the legitimacy it holds in external communities, its perceived legitimacy should not be ignored. Tribal courts can effectively funnel disputes away from non-tribal courts when tribal members and nonmembers perceive them as legitimate. However, this can place tribal courts in a difficult double bind whereby they may simultaneously appear too tied up in tribal traditions to be legitimate by outsiders and too assimilationist to be legitimate by tribal members. This presents a difficult, but not intractable, problem. In response, tribal communities must determine which cultural values are central to their judicial systems and which can be compromised for the sake of strengthening the credence that other jurisdictions give to these courts.

Gaming tribes can strengthen their sovereignty by providing protections for workers that are at least commensurate with those provided under federal law and funneling labor and employment disputes through tribal adjudication.

---

228. Id. at 71–74.
230. See S. Chole Thompson, Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know, 49 WASHBURN L.J. 661, 709 (2010). Thompson explains:
Tribes should also consider how to insulate their judicial systems from political influence. Allegations that tribal judges are subject to the control of the tribal council often plague tribal dispute resolution systems that lack such insulation, particularly when the Tribe is a party to litigation. While there may or may not be merit to such allegations, Tribes may find it advantageous to avoid even the appearance of political influence.
Id.
processes. For example, in California, tribes could enact this change through the next tribal-state compacting process under the IGRA by amending the current compact with a catch-all provision like California Labor Code Section 1148, or by passing tribal ordinances that complement the protections guaranteed by in the existing TLRO, which already mirrors the NLRA in many ways. Tribally owned businesses would also need to waive their sovereign immunity for this limited purpose. However, a limited waiver of sovereign immunity for employment disputes in tribal courts would not jeopardize any corresponding tribal immunity in federal courts and, therefore, is a viable option. By way of example, Kamper suggests a dispute appeals system which would end in tribal court that would require the tribal employer to waive sovereign immunity for this limited purpose in order to prevent outside adjudications. Additionally, tribal forums could offer claimants a more streamlined and less formalized process compared to the NLRB, which typically takes two years to adjudicate a case. The creation of a labor board or specialized court independent from the rest of the tribal government could be an option for larger tribes with a greater volume of disputes.

Alternatively, in the wake of the San Juan Pueblo decision allowing right-to-work statutes under NLRA Section 14(b), gaming tribes can attempt to assume jurisdiction over disputes under Sections 10(a) and 14(c) of the NLRA. Under Section 10(a), the NLRB can cede jurisdiction over a particular industry to a state or territory, while Section 14(c) allows the NLRB to decline to assert jurisdiction and empowers states or territories to subsequently assert jurisdiction over those areas. A tribal labor code with protections equal to, or stronger than, NLRA protections enforced by a court or other body could also be helpful in convincing the NLRB to voluntarily decline jurisdiction and allow tribal forums to step in.

Adopting protective labor and employment laws would hurt sovereignty in the sense that tribes would be unable to set the minimum standards in these areas, but they would be able to exercise greater autonomy over how such

---

232. See Thompson, supra note 230, at 679–80 (arguing that a tribe adopting standards that fall below federal laws risks imposition of external authority and suggesting that tribes should consider federal laws as models when they align with tribal values).


234. See Herman, supra note 61.

235. See Catherine T. Struve, Tribal Immunity and Tribal Courts, 36 ARIZ. ST. L.J. 137, 167 (2004) (noting that a tribal immunity waiver can be limited to tribal forums and discussing the use of that principle to funnel disputes to tribal courts).

236. KAMPER, supra note 6, at 82.

237. Singel, supra note 5, at 729.

238. See, e.g., Labor Ordinance, supra note 61, at § 13 (establishing a grievance procedure and an appeals process in front of an independent Tribal Labor Relations Panel).

239. For just such a proposal, see Singel, supra note 5, at 728.


disputes are settled. Further, as it stands, federal standards already provide a *de facto* minimum if federal agencies choose to enforce them in forums adopting the *San Manuel* approach. Considering the limited set of options tribes face, it is surely preferable to bring these outside standards into tribal courts rather than fighting them (and potentially losing) in federal courts or administrative agencies.

The tribal court exhaustion doctrine will allow any disputes that are funneled through tribal court to be resolved in that forum first. Tribal court exhaustion is a judicially created doctrine based on the policies of tribal self-government and self-determination.242 Tribal court exhaustion permits tribal courts to first exercise concurrent jurisdiction to evaluate the basis of jurisdictional challenges and “allow[] a full record to be developed in the Tribal Court.”243 In *Iowa Mutual Insurance Co. v. LaPlante*,244 the Supreme Court held that a “full” development of the record entailed review by both lower and appellate courts within the tribal judicial system.245 There are exceptions where exhaustion is not required, including “where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.”246 Merely alleging the incompetence of a tribal court is not enough.247 This provides an important protection for tribal courts against undue challenges from litigants. Although there is some disagreement on whether an action needs to be pending in tribal court for the doctrine to apply, some federal courts have dismissed actions under tribal court exhaustion without a pending tribal suit on the matter.248 Significantly, some federal courts have required tribal court exhaustion in employment disputes.249 Although, nonmember employees may challenge the underlying jurisdiction of the tribal court, federal courts have held employee-employer relationships at on-reservation businesses sufficient to trigger a legitimate exercise of tribal

243. *Id.* at 856; see Alex Tallchief Skibine, *Deference Owed Tribal Courts’ Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. Rev. 191 (1994) (comparing the tribal court exhaustion doctrine with the exhaustion doctrine in administrative law).
244. 480 U.S. 9 (1987).
245. *Id.* at 16–17.
246. Nat’l Farmers Union, 471 U.S. at 856 n.21 (internal citations and quotation marks omitted).
247. *Iowa Mutual*, 480 U.S. at 19.
249. See, e.g., Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975) (holding that former tribal governmental employees had to bring wrongful termination suits in tribal court absent evidence that no such forum was available); Shannon v. Houltan Band of Maliseet Indians, 54 F. Supp. 2d 35 (D. Me. 1999) (requiring former tribal employee to bring ICRA claim after her termination in a tribal court).
jurisdiction over nonmembers under the Montana\textsuperscript{250} “consensual relationship” exception.\textsuperscript{251} The exhaustion doctrine will help to bolster the legitimacy of tribal labor and employment laws and to keep relevant disputes within the purview of tribal courts.

Stronger employment protections can be viewed as helping, rather than hurting, tribal self-sufficiency and economic development in the sense that they provide better benefits to tribal workers. A positive assertion of sovereignty would help to create strong tribal governments by incentivizing the maintenance of an independent judiciary to adjudicate labor disputes fairly—a potentially powerful step toward preserving tribal self-determination over the long run.\textsuperscript{252} Even assuming that the cost of additional labor and employment protections will cut into casino profits,\textsuperscript{253} additional employee benefits can be directly distributed to member employees or, at least, distributed throughout local communities. So even though some profits may be diverted from tribal programs, individual tribal members would directly receive at least a share of those benefits.

Tribal compliance with federal employment regulations has merited its share of critics. One commentator has argued that the congressional policy of encouraging tribal economic development and self-sufficiency will be “constrained by burdensome and onerous federal labor regulation” through the application of general employment statutes.\textsuperscript{254} Certainly, smaller, rurally located casinos may not have the same capacity to enact additional protections. Nonetheless, in California, tribes have already agreed to a set of standards through the TLRO, with which compliance is no more burdensome than federal


\textsuperscript{251} The “consensual relationship” exception allows for tribal jurisdiction over “activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Id. at 565 (citations omitted); see, e.g., MacArthur v. San Juan Cnty., 497 F.3d 1057, 1071–72 (10th Cir. 2007) (analyzing the “consensual relationship” exception to the Montana doctrine and concluding that tribes exercise regulatory jurisdiction over non-member employers that employ tribal employees “within the physical confines of the reservation”); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1315 (9th Cir. 1990); Paddy v. Mulkey, 656 F. Supp. 2d 1241, 1244 (D. Nev. 2009) (concluding that a non-member employee’s claim was subject to the exhaustion doctrine and that his employment at a tribal business “falls comfortably” within the “consensual relationship” exception to Montana). For an informative discussion of the current interpretation of the Montana doctrine, see Sarah Krakoff, Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges, 81 U. COLO. L. REV. 1187 (2010).

\textsuperscript{252} See Joseph P. Kalt, Professor at the John F. Kennedy School of Government at Harvard University, Statement Before the U.S. Senate Committee on Indian Affairs 8–9 (Sept. 17, 1996), available at http://access.minnesota.publicradio.org/civic_j/native_american/SenateTestimony.pdf (identifying an “independent judiciary or a capable bureaucracy” as important features of tribal self-determination).

\textsuperscript{253} Even this may be an unwarranted assumption when tribes are spending ample time and legal fees to fight against NLRB jurisdiction.

law. Other critics have noted that in order for tribal gaming facilities to “operate competitively” the facilities must be protected from regulation because “[t]ribes are generally smaller employers and frequently lose potential employees because other entities are able to offer much better benefits.”

While increased employee benefits may hurt an enterprise’s bottom-line in the short-term, it may also—as this critique suggests—help tribal businesses operate more efficiently by improving employee retention. On the one hand, these critiques illustrate valid concerns for small-scale gaming operations under the more regulated positive approach. On the other hand, arguments against a more regulated positive approach are shortsighted because they ignore the possibility that additional protections for workers can be an asset to tribal economic development efforts and encourage young workers to remain on the reservation or to aid the success of tribal businesses. In other words, bolstering internal tribal regulation of these businesses is not an ideal solution, but it is also not as economically harmful as critics may claim.

3. Traditional Dispute Resolution Models—The Navajo System

Tribal governments can incorporate a dispute resolution model based on traditional values as an alternative to adversarial adjudication. These models may provide a more comfortable space and efficient process for tribal management and workers to resolve disputes. In some instances, alternative dispute resolution provides a more culturally appropriate model for workers who are tribal members. This section briefly examines Navajo ideas of traditional justice and the incorporation of those ideas into the peacemaking system. The Navajo system provides a salient example that could lay the foundation for other tribes.

Tribes could supplement the adversarial proceedings of their court systems with traditional dispute resolution models, like the Navajo Peacemaking Courts, to resolve employment disputes. The peacemaking process does not involve any formal procedures, but instead focuses on healing and repairing the relationship between the parties by determining a fair form of restitution. A respected member of the community leads the process instead of a judge, but the final decisions can be enforced in a Navajo court. Indeed, some tribes already provide a similar option for employment disputes.

---

255. Braccio, supra note 1, at 190 (internal quotation marks omitted).

256. But see Matthew L.M. Fletcher, Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum, 38 U. Mich. J.L. Reform 273, 338–39 (2005) (suggesting that the peacemaking model requires both parties to come of their own consent, and that the unique pressures present in an employment hearing might not always translate well into that forum).

257. See The Peacemaking Program of the Navajo Nation, The Navajo Nation Peacemaking Program, http://www.navajocourts.org/indexpeacemaking.htm (last visited Aug. 6, 2014); see also William C. Bradford, Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute
These alternative models can be tailored to fit an individual tribe’s conception of justice. For example, Former Navajo Supreme Court Justice Robert Yazzie has noted the discrepancy between traditional Navajo concepts of justice and the Anglo-European tradition. He first defines the attributes of the Anglo-European tradition of “vertical” justice:

A ‘vertical’ system of justice is one which relies upon hierarchies and power. That is, judges sit above the parties, lawyers, jurors and other participants in court proceedings. The Anglo-European justice system uses rank, and the coercive power which goes with rank, to address conflicts. Power is the active element in the process... Adversarial law offers only a win-lose solution; it is a zero-sum game.259

He contrasts this with the traditional Navajo approach to justice, which is “horizontal”:

Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion. In it, humans are not in ranks or status classifications from top to bottom. Instead, all humans are equals and make decisions as a group. The process—which we call ‘peacemaking’ in English—is a system of relationships where there is no need for force, coercion or control. There are no plaintiffs or defendants; no ‘good guy’ or ‘bad guy.’260

Given the potential discrepancies between cultural conceptions of justice, illustrated by Yazzie’s description of Navajo justice, it is unsurprising that tribal employers or employees might sometimes feel uncomfortable resolving disputes through traditional Anglo-European adversarial system. Of course, the nature, and even the existence, of such discrepancies will necessarily vary by tribe.

There are other compelling reasons for adopting an alternative dispute resolution system. Professor Fletcher notes how the Anglo-American model of adversarial employment separation hearings can be unnecessarily long and emotionally draining for tribal members, particularly in rural communities.261 Individual tribal members may also be uniquely uncomfortable in an

---

258. Fletcher, supra note 256, at 339 (describing the Hoopa Valley Tribe’s express policy of initially attempting to come to informal resolutions to employment disputes).


260. Id. at 181.

261. Fletcher, supra note 256, at 302–03 (examining the problems that occur within the context of employment disputes in tribal courts and proposing alternatives).
adversarial setting because many Indian communities possess “a unique overlapping of economic, political, kinship, community, and ceremonial rituals” that can infuse employment relationships with meanings atypical to the Western capitalist conception. Culturally based resolution systems can play an important role in directing the exercise of tribal sovereignty through tribal justice systems. Through these alternative mechanisms, tribal justice systems can more adequately represent notions of “justice” in their constituent communities.

If strong labor and employment law protections were available in efficient and accessible forums, both tribal and nonmember workers would be incentivized to keep disputes within the tribal court system. Although such an alternative system would carry some upfront costs, it could also be specifically tailored to efficiently resolve employment disputes without formal adjudication. Such efficiency could ultimately be attractive to nonmember employees working at tribally run businesses. Ultimately, an individual tribe must determine what an alternative forum for dispute resolution should look like and how it can fit into a broader judicial system. Still, this model provides a concrete example of tribal capitalism, that is, the adaptation of culturally centered practices designed to engage with outside communities and facilitate the free movement of people and goods.

CONCLUSION: THE FUTURE OF TRIBAL SOVEREIGNTY AND THE BENEFITS OF A POSITIVE APPROACH

In a hopeful sign for the viability of the positive sovereignty approach, the United Auto Workers (UAW) and Mashantucket Pequot, who own Fox Resort Casino, recently completed the first union contract under tribal law. David Kamper notes that the Mashantucket Pequot’s labor laws are generally union friendly, presumably in an attempt to channel disputes through tribal courts. He also notes that the provisions in the agreement frame employee rights much like a contract between a union and a state government would. The union

262. See id. at 285. Fletcher explains:
Most Tribal Members employed by a Tribe are ingrained in the community. Many were born and raised in the community. They typically have several generations of relatives living in the area. The adult employees of a Tribe likely grew up with the members of the Tribal Council and may themselves be former or future Tribal Council Members. They know each other intimately: their strengths and weaknesses, their relations, and their ‘ skeletons.’ In many ways, the situation is no different from a small town where the chief of city police is the wife of the vice-chairman of the city council and the first cousin of the town mayor.

Id.; see also Champagne, supra note 223, at 312.


264. Kamper, supra note 6, at 204. He also admits that the tribal court’s jurisdiction in these matters is concurrent at best, since the union can still direct disputes to federal courts if it chooses. Id. at 205.

265. Id. at 204.
gave up its right to strike in return for binding arbitration, a result one union official praised as being more progressive than federal labor laws.266 Elizabeth Bunn, the secretary treasurer for the UAW, gave her reaction to the contract: “It really did feel very much like a win-win [with] respect and acknowledgment of tribal sovereignty, and at the same time having a legal framework that did protect employee rights.”267

The recent shift to greater state and federal regulation is not a momentary aberration, as advocates of a negative approach might hope, but rather a sign of increasing state and federal interest in economic relationships throughout Indian Country. While gaming may present an attractive opportunity for economic growth for tribes, the resultant influx of outside labor and capital will likely go hand-in-hand with outside encroachments on tribal sovereignty.

Rather than approaching sovereignty as an all-or-nothing proposition, tribal governments should respond pragmatically with the goal of retaining both essential elements of sovereignty and reaping the benefits of economic development. Of course, there is a significant limitation on the so-called positive approach as tribes effectively cannot set their own minimum standards for employment laws. The positive approach is certainly a significant abrogation of traditional authority in that context. Conversely, the primary benefit of the positive approach is to bolster the power of tribal governments and judicial systems to resolve employment disputes on their own terms. The latter consequence is both more desirable from the perspective of building tribal institutions and a more realistic reaction to emerging trends in federal Indian law. Ideally, if tribes can respond by promoting workers’ rights through their internal processes, then they can build a developmental model where tribal sovereignty can improve, rather than hinder, the employment opportunities that gaming provides to tribal members and surrounding communities.

266. Jones, supra note 263.
267. Id.