TRIBAL SOVEREIGNTY AND GAMING: A PROPOSAL TO AMEND THE NATIONAL LABOR RELATIONS ACT

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TABLE OF CONTENTS

INTRODUCTION 378
I. LEGAL BACKGROUND 381
A. *History of Tribal Sovereignty in the United States* 381
1. Origins of Tribal Sovereignty 382
2. Tribal Sovereignty over Strictly "Commercial" Matters 386
B. *Federal Laws of General Applicability* 388
C. *Impact of the Gaming Industry on Tribes and the Non-Tribal Labor Force* 389
D. *The NLRB, the NLRA, and Unfair Labor Practices* 392
E. *Modern Labor Relations in the United States and Employment in the Tribal Gaming Industry* 393
II. THE CURRENT CIRCUIT SPLIT 394
A. *Introduction to the Circuit Approaches* 394
B. *The First Approach—the Michigan Cases* 394
C. *The Ninth Circuit* Coeur d'Alene *Approach* 400
D. *The Tenth Circuit Approach in* Pueblo of San Juan 402
E. *The D.C. Circuit Approach in* San Manuel Indian Bingo & Casino 403
III. TRIBAL SOVEREIGNTY LOOKING AHEAD 406
A. *Delicate Balancing of Interests—What Is Really at Stake Here?* 406
B. *Proposed Compromises and Legislation* 407
IV. A NEW PROPOSAL 408
A. *Proposal Specifics—Tribal Labor Sovereignty Act, Amended* 409

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B. *Why Federal Legislation Is a Workable Solution* 409
CONCLUSION.....411

INTRODUCTION

In June 2016 the Supreme Court denied petitions for writs of certiorari filed by the Little River Band of Ottawa Indians tribe and the Saginaw Chippewa Indian tribe.[1] Both tribes asked the Supreme Court to reverse 2015 Sixth Circuit Court of Appeals decisions that confirmed the National Labor Relations Board's (NLRB, or the Board) authority and jurisdiction over tribal gaming operations.[2] With this decision not to hear the cases, the Supreme Court left in place a major, three-way circuit split.[3] Thus, the critical issue of whether or not the NLRB has jurisdiction over tribal gaming operations still lacks clarity.[4] Had the Supreme Court decided to review these two cases, it could have provided much-needed insight and direction to an issue that has been litigated in federal courts—using various contradicting analytical frameworks—for over twenty years.[5]

In *NLRB v. Little River Band of Ottawa Indians Tribal Government*,[6] the first of the 2015 Sixth Circuit cases, the court analyzed whether the NLRB had the authority to apply the National Labor Relations Act (NLRA) to a casino owned and operated by the Little River Band of Ottawa Indians[7] (Little River Band).[8] The divided Sixth

1 Andrew Westney, *Supreme Court Won't Hear Mich. Tribes' NLRB Challenges*, LAW360 (June 27, 2016, 6:17 PM), http://www.law360.com/articles/811198/supreme-court-won-t-hear-mich-tribes-nlrb-challenges.

2 *Id.*; *see also* NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537 (6th Cir. 2015); Soaring Eagle Casino & Resort, 791 F.3d 648 (6th Cir. 2015).

3 The circuit split, which this Note will analyze, is three-way: the Eighth and Tenth Circuits follow one test; the Second, Sixth, Ninth, and Eleventh Circuits follow another test; and the D.C. Circuit developed its own test. For an even more in-depth analysis of the current split, see Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, 62 FED. LAW. 64 (2015).

4 Westney, *supra* note 1.

5 This topic is timely and has drawn much attention in legal journals. *See generally* Riley Plumer, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in* Soaring Eagle Casino and Resort v. National Labor Relations Board, 35 LAW & INEQ. 131 (2017) (arguing that applying the NLRA to Indian tribes is inconsistent with longstanding principles of tribal sovereignty and recommending an amendment to the NLRA); Briana Green, San Manual*'s Second Exception: Identifying Treaty Provisions That Support Tribal Labor Sovereignty*, 6 MICH. J. ENVTL. & ADMIN. L. 463 (2017) (arguing that tribes should make treaty-based arguments when faced with a threat of NLRB jurisdiction).

6 788 F.3d 537 (6th Cir. 2015).

7 This Note recognizes that terminology in this area is very complex and will follow the terminology used by Bryan H. Wildenthal, best and most concisely described below:

> I use "Native American" and "American Indian" (or "Indian" for short, since it should be understood that I am not referring to Indians from South Asia) fairly

Circuit panel held that the NLRA specifically applies to the Little River Band's operations of the casino, thus the NLRB has jurisdiction over the casino's operations.[9] One month later, a different but divided panel of judges on the same court issued its opinion in a case with almost identical facts, *Soaring Eagle Casino & Resort v. NLRB*.[10] There, the court similarly found itself called upon to analyze the scope of the NLRB's jurisdiction over a tribe's casino.[11] Like in *Little River Band*, the court found that the NLRB has jurisdiction over the casino's employment practices.[12]

These two cases from the Sixth Circuit clearly contradict the reasoning and conclusion of a 2002 Tenth Circuit case, *NLRB v. Pueblo of San Juan*.[13] In that case (which will be discussed in more detail in Part II of this Note), the court held that the NLRA did not preempt tribal government from enacting a right-to-work ordinance.[14] Furthermore, the D.C. Circuit held in 2007 in *San Manuel Indian Bingo & Casino v. NLRB*[15] (also discussed in greater detail in Part II of this Note) that the NLRB may apply the NLRA to employment at the casino in question, a holding which correlates with the Sixth Circuit's decisions but under substantially differing reasoning.[16] In each of these cases, a different analytical framework was adopted and utilized by the courts, leading to

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> interchangeably throughout the [work]. Both terms are, strictly speaking, somewhat inaccurate, imprecise, and problematical. Non-Indians often assume that Indians prefer "Native American," but in fact that is not usually true. "Indian" is far more commonly used by Indians themselves. Both terms are considered broadly acceptable and not offensive to most. Although "Native American" has a "progressive" or "politically correct" ring to many non-Indian ears, however, some Indians object to what they see as its assimilationist implications. I must stress that I use both terms simply as recognition of their wide current use, with no ideological implications intended.

BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL xii–xiii (2003). In that vein, this Note also uses "nation" and "tribe" or "tribal" interchangeably.

8 *Little River Band*, 788 F.3d at 539.

9 *Id.* at 539–40 ("We hold that because the NLRA applies to the Band's operation of the casino, the Board had jurisdiction to issue the cease and desist order. Accordingly, we grant the Board's application for enforcement of the order.").

10 791 F.3d 648 (6th Cir. 2015).

11 *Id.* at 651. "We thus determine only whether the 1855 and 1864 Treaties, or federal Indian law and policies, prevent application of the NLRA to a tribal-owned casino operated on trust land within a reservation, and, if not, whether the Board's interpretation of 'employer' in 29 U.S.C. § 152(2) to include the Casino is a 'reasonable one.'" *Id.* at 655–56 (citation omitted).

12 *Id.* at 675 ("Notwithstanding our preferred analytical framework, and in light of our prior panel decision in *Little River,* we are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and that the Board has jurisdiction over the present dispute.").

13 276 F.3d 1186 (10th Cir. 2002).

14 *Id.* at 1191. The NLRA allows state governments to enact "right-to-work" (RTW) laws, which allow them to prohibit or supersede the union security agreements in the NLRA. For more information on RTW laws, see BENJAMIN COLLINS, CONG. RESEARCH SERV., R42575, RIGHT TO WORK LAWS: LEGISLATIVE BACKGROUND AND EMPIRICAL RESEARCH (Jan. 6, 2014).

15 475 F.3d 1306 (D.C. Cir. 2007).

16 *Id.*

disparate and contradicting outcomes and the current circuit split.[17] This circuit split only adds further confusion into the area of interpretation of tribal sovereignty.

This Note proposes that tribes and other invested parties should look to Congress for resolution. Since the Supreme Court declined to address this issue, clarity and solutions must come from another source. Specifically, this Note proposes that Congress should pass legislation specifically geared toward the rights of non-tribal members employed in the gaming industry on tribal land: an amendment to the NLRA exempting tribes from being considered employers, but, crucially, with some added labor protections. Federal legislation that allows Indian tribes to preserve their inherent sovereignty over their gaming operations—a critical and still growing aspect of modern tribal life[18]—and allows non-member employees of these gaming operations important labor rights is necessary in an industry of this size. While it has been persuasively—and correctly—argued that increased federal labor regulation has been a driving source of infringement upon tribal sovereignty, as it has been traditionally understood,[19] this Note suggests that federal legislation could also be a source of protection for tribal sovereignty in the specific context of the gaming industry.[20]

Part I of this Note provides background information on the entities that have a stake in this issue. It first presents a general overview of Indian Law, the history of tribal sovereignty in the United States, and discusses the importance and prevalence of gaming to tribes. Then, it examines the history of the NLRB and NLRA and briefly describes labor law in the United States to provide context. Part II of this Note gives background on previous relevant litigation and describes and reviews the different analytical approaches taken in the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan*[21]; the Sixth Circuit's decisions in *NLRB v. Little River Band of Ottawa Indians Tribal Government*[22] and *Soaring Eagle Casino & Resort v. NLRB*[23]; and the D.C. Circuit's decision in *San Manuel Indian Bingo & Casino v. NLRB*.[24] Part III provides an overview of recent proposed "fixes" to this issue. Finally, Part IV proposes a solution in the form of an amendment to the NLRA that exempts tribes from the definition of "employer" but sets specific labor protections and standards for non-tribal employees of gaming operations or other tribal commercial enterprises.

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17 *See* Intermill, *supra* note 3.

18 *See infra* Section I.C.

19 *See, e.g.*, Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 123 (2016).

20 *See infra* Part III.

21 276 F.3d 1186 (10th Cir. 2002).

22 788 F.3d 537 (6th Cir. 2015).

23 791 F.3d 648 (6th Cir. 2015).

24 475 F.3d 1306 (D.C. Cir. 2007).

I. LEGAL BACKGROUND

This Part aims to contextualize the recent Sixth Circuit decisions and provide the legal background of this area of the law. It outlines the origins of tribal sovereignty in the United States and how tribes assert that sovereignty while engaging in commercial enterprises on reservations, including in tribal gaming. Then, it provides background on federal laws of general applicability and how various courts have applied these laws to Indian tribes across the country. Finally, this Part considers the history of the NLRB and labor laws in the United States.

A. *History of Tribal Sovereignty in the United States*

For approximately 200 years, the Supreme Court and the federal government have recognized Native American tribes as sovereign entities.[25] Tribes are considered to be distinct political entities with the power to make their own laws and enforce them in their own communities.[26] However, the federal government does not consider tribes to be full "sovereigns," as equals to the federal government.[27] This unique form of sovereignty was established through a combination of Supreme Court decisions, statutes, and most significantly, treaties between the federal government and various Indian tribes.[28] Although tribal sovereignty was once based completely in territoriality—sovereignty over geographic, or physical territory[29]—tribal sovereignty

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25 Cristen R. Hintze, Comment, *Going "All-In" Against the NLRB: How Tribal Self-Government Lost on the River in the Sixth Circuit [*Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015)]*, 55 WASHBURN L.J. 529, 553–54 (2016) ("For nearly two centuries, the Supreme Court has recognized Indian tribes as distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government."); *see also* WILDENTHAL, *supra* note 7, at 5 ("The tribes, thus, are clearly governments in some sense. They enjoy, to some degree, that quality of governments known to lawyers as 'sovereignty' (which basically means 'the power to govern').").

26 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. . . . [T]hey remain a 'separate people, with the power of regulating their internal and social relations.' They have power to make their own substantive law in internal matters and to enforce that law in their own forums." (citations omitted) (internal quotation marks omitted)).

27 *See* WILDENTHAL, *supra* note 7, at 6 ("[T]he American Indian nations still retain a part of the full sovereignty they once possessed."); *see also* United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute on other grounds*, 25 U.S.C. § 1301(2) (2012) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

28 *See generally* WILDENTHAL, *supra* note 7.

29 *See* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the*

today is more limited, and is now best understood as a combination of sovereignty both over territory and over membership.[30]

1. Origins of Tribal Sovereignty

The foundation of federal Indian policy dates back to the very first interactions between European explorers and the people already living on the land that would later become the United States.[31] In the 1823 case *Johnson v. M'Intosh*,[32] the Supreme Court determined that Native Americans did not have a right to "title" to the land they inhabited (and had inhabited since before the arrival of Europeans), but instead only a right to "occupancy."[33] The Court's decision was rooted in the discovery doctrine, which prescribed that whoever (or whichever nation) "discovered" a territory then gained full sovereignty over it.[34]

After the *M'Intosh* decision,[35] the Supreme Court, speaking through Justice Marshall, continued to define the federal government's relationship with Indian tribes in a series of landmark cases (the Cherokee Cases).[36] In one of the first of these cases to address the issue of tribal sovereignty directly, *Cherokee Nation v. Georgia*,[37] the Court

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Construction of Tribal Sovereignty, 51 B.C. L. REV. 595, 649–50 (2010).

30 *Wheeler*, 435 U.S. at 323 ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); *see also* Larry Betz & Donna Budnick, *Labor and Employment Law and American Indian Tribes: How State and Federal Laws Apply to Tribal Employment*, 83 MICH. B.J. 15, 16 (2004).

31 STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 3–5 (4th ed. 2012).

32 21 U.S. 543 (1823).

33 *Id.* at 591 ("[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.").

34 *Id.* at 592 ("This opinion conforms precisely to the principle which has been supposed to be recognised [sic] by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."); *see also* WILDENTHAL, *supra* note 7, at 24 ("This principle, derived from the early Spanish legal theories . . . was asserted by the European colonial powers as they competed to settle and develop the New World. Under this doctrine, whichever European nation first 'discovered' a given piece of American territory had sovereignty over it, to the exclusion of any other European power and trumping the preexisting sovereignty of whatever Indian nation or nations might actually govern the area.").

35 21 U.S. 543 (1823).

36 *See* WILDENTHAL, *supra* note 7, at 10 ("[These cases] laid the foundation for the legal framework that has governed . . . the triangular relationship of the states, the tribes, and the federal government and their respective rights, powers, and duties toward each other.").

37 30 U.S. 1 (1831). The Cherokee Nation brought the case seeking an injunction to restrain the state of Georgia from seizing tribal lands. *Id.* at 15. Before the Court considered the merits of the case, it had to determine whether the Cherokee Nation could sue in that court. In essence, it had to determine what kind of entity, or party, the Cherokee Nation was. *Id.* at 16 ("Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? . . . . Do the Cherokees constitute a foreign state in the sense of the constitution?").

determined that the relationship between tribes and the United States "resembles that of a ward to his guardian."[38] In its decision, the Court clearly distinguished "Indian tribes" as different from "foreign nations,"[39] citing the fact that the Commerce Clause of the Constitution specifically considered three separate classes of entities: the states, foreign nations, and Indian tribes.[40] Then, having determined that Indian tribes were "wards" of the United States, and neither foreign nations nor states, the Court determined that they could not bring suit in the Supreme Court.[41]

Cherokee Nation was also one of the first cases to establish the trust doctrine—a unique and complex relationship between the federal government and Indian tribes.[42] The Supreme Court confirmed this posture as recently as 2011,[43] and Congress has referenced the federal

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38 *Id.* at 17. The Court expounded on this ward-guardian relationship, explaining:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id.

39 *Id.* at 19 ("We perceive plainly that the constitution in this article [the Commerce Clause] does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States.").

40 *Id.* at 18 ("When forming this article, the convention considered them as entirely distinct."). For example, the Constitution references Indian tribes specifically in the Commerce Clause, which states that Congress shall have the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

41 *Cherokee Nation*, 30 U.S. at 20 ("The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.").

42 *See* PEVAR, *supra* note 31, at 31 ("Tribes had placed their faith in the United States to fulfill the guarantees made to them in exchange for their land. This principle—that the federal government has a duty to fulfill its promises—is known as *the doctrine of trust responsibility*. This doctrine 'has been a cornerstone of federal Indian law for nearly 200 years.'" (footnotes omitted)); *see also* WILDENTHAL, *supra* note 7, at 299 (defining the "Trust Relationship" as a "[l]egal doctrine related to the canons of construction, holding (in theory) that the U.S. government has fiduciary duties toward the Indian tribes in the same way that a trustee has to a ward"). However, this trust relationship is not so easily defined, and "the precise definition of the sovereignty tribes enjoy within the United States has long been an uneasy matter." Florey, *supra* note 29, at 596; *see also* Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4 (1999) ("What the Supreme Court said long ago remains true today: The relation of Indian tribes to the broader American system 'has always been an anomalous one and of a complex character.' The Constitution does not clearly delineate the relationship among tribes, the federal government, and the states." (footnotes omitted)).

43 United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011). The Supreme Court stated "[w]e do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'" *Id.* at 177 (citation omitted).

government's "trust responsibility" numerous times in passing legislation aimed at Native Americans and tribes.[44] Thus, as a result of statutes (and treaties), the U.S. government has created different types of trusts under which Indian tribes are the beneficiaries.[45] Importantly, in order to determine whether there is a trust relationship in a given situation, the relevant statute or treaty must be consulted.[46] And, the Supreme Court recently noted that the federal government must expressly accept trust responsibility for that relationship to exist.[47]

In the second landmark case, *Worcester v. Georgia*,[48] the Court expounded on the definition of the trust relationship that it had set out in *Cherokee Nation*.[49] The Court concluded that Indian territory was separate from that of the states and that only the federal government could negotiate and interact officially with the tribes.[50] The Court clarified further that Indian tribes were politically distinct and inherently sovereign entities,[51] and their treaty rights were enforceable similarly to the government's treaties with foreign nations.[52]

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44 PEVAR, *supra* note 31, at 29 ("Since 1975, Congress has created a number of programs for Indian tribes and their members, and each time it did so, it referenced the federal government's trust responsibility as a reason for the program's creation."); *see also* No Child Left Behind Act of 2001, 20 U.S.C. § 7401 (2012) (in its Statement of Policy, the Act states that its provisions were meant "to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children").

45 PEVAR, *supra* note 31, at 35.

46 *See id.*

47 *See id.*; *see also Jicarilla Apache Nation*, 564 U.S. at 177 ("When the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's control over Indian assets nor common-law trust principles matter. . . . The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." (footnotes omitted) (citations omitted) (internal quotation marks omitted)).

48 31 U.S. 515 (1832). The issue in this case was whether the state of Georgia could prosecute a non-tribal citizen for working and living upon Cherokee land without the required license. *Id.* at 537–40.

49 *Id.*

50 *Id.* at 557 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

51 *Id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

52 *Id.* at 559–60 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently

Tribes' treaty rights are derived from the treaties that tribes entered into in the years after "discovery," up until 1871.[53] The colonizing Europeans, and then the U.S. federal government—post-Independence—entered into these treaties primarily to acquire land.[54] During this period of time, treaties were the "accepted method" for the federal government to interact formally with Indian tribes.[55] In 1871, the U.S. Congress passed a law[56] prohibiting the federal government from entering into any additional treaties with Indian tribes; however, treaties entered into before 1871 were not affected.[57]

Another crucial element of Indian law is the use of canons of construction to interpret and construe matters of Indian Law. These canons are based, in part, on the Cherokee Cases[58] and in the trust

admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth."). The Court thus held that Georgia did not have the power to prosecute Worcester for living and working on Cherokee land without the requisite license (which the state did not have the power to require as well). *Id.* at 561–63. After these two cases, the Georgia Cherokee tribe was forcibly removed from their lands in 1838 and "resettled" in Oklahoma. *See A Brief History of the Trail of Tears*, CHEROKEE NATION, http://www.cherokee.org/AboutTheNation/History/TrailofTears/ABriefHistoryoftheTrailofTears.aspx (last visited Sept. 9, 2017). An estimated 4000 people died during this forced removal from hunger, disease, and exposure. *Id.*

53 Hintze, *supra* note 25, at 536 ("From 1778 to 1871, treaty-making was the predominate means of implementing federal Indian policy." (footnote omitted)).

54 PEVAR, *supra* note 31, at 45 ("Indian tribes were recognized as sovereign nations by the European countries that began settling in North America during the 1600s, and the Europeans entered into treaties with them to acquire land. Similarly, after the United States gained its independence from Great Britain, it relied on treaties to conduct its formal relations with Indian tribes."); *see also* Hintze, *supra* note 25, at 536 ("During these 'formative years,' the United States negotiated treaties with tribal nations for two primary reasons: to secure agreements of peace and friendship, and—most importantly—to acquire land." (footnotes omitted)).

55 *See* PEVAR, *supra* note 31, at 4 ("Nearly four hundred treaties have been signed between Indian tribes and the United States. Most tribes in the lower forty-eight states, other than those in California, have at least one treaty with the federal government. . . . Until 1871, treaties were the accepted method by which the United States conducted its formal relations with the Indians." (footnote omitted)).

56 *See* 25 U.S.C. § 71 (2012) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of Title 26 does not permit a like Federal tax to be imposed on such income."); PEVAR, *supra* note 31, at 49.

57 *See* 25 U.S.C. § 71; PEVAR, *supra* note 31, at 49–50.

58 *See* WILDENTHAL, *supra* note 7, at 10 ("The Cherokee Cases laid the basic foundation for Native American sovereignty and American Indian law generally. Chief Justice Marshall's opinion in *Worcester* was, in particular, the classic and prototypical model of Indian treaty interpretation by the Supreme Court. . . . This approach has (with notable omissions and

relationship and treaty rights that form the groundwork of the federal government's relationship with Indian tribes. Firstly, statutes, treaties, and executive orders must be liberally construed with ambiguities resolved in favor of tribes.[59] Secondly, tribal sovereignty and property rights must be upheld unless there is explicit congressional intent to the contrary.[60] It is established that "statutes are to be constructed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[61] However, in the past century, the Supreme Court has inconsistently applied the canons of construction in its decisions,[62] which contributed in part to the conflict at issue here and to the erosion of tribal sovereignty in general.

2. Tribal Sovereignty over Strictly "Commercial" Matters

In *Merrion v. Jicarilla Apache Tribe*,[63] the Supreme Court established that Indian tribes possess the sovereign authority to regulate commercial activity within their territory.[64] The Supreme Court

deviations) spilled over into the interpretation of most laws affecting Indians.").

59 Hintze, *supra* note 25, at 544–45.

60 *Id.* at 545.

61 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); *see also* Cty. of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 247–48 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. 'Absent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. . . . [T]he Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous,' and will not be 'lightly implied.'" (citations omitted) (quoting another source)); PEVAR, *supra* note 31, at 51 ("The Supreme Court has developed three rules that govern the interpretation of Indian treaties, called the *canons of treaty construction*. First, ambiguities in treaties must be resolved in favor of the Indians. Second, treaties must be interpreted as the Indians would have understood them at the time the treaty was signed. Finally, treaties must be construed liberally in favor of the Indians. . . . These canons of construction benefit the treaty tribe, as the Supreme Court intended they would, to help compensate for the fact that tribes were at a significant disadvantage in the treaty-making process." (footnotes omitted)); WILDENTHAL, *supra* note 7, at 10 (describing the canons of construction as "under which Native American treaty rights have (at least in theory) been generously construed in their favor and strictly against the erosion of tribal sovereignty").

62 *See* WILDENTHAL, *supra* note 7, at 11 ("The Supreme Court's interpretation of Native American treaty rights has taken a meandering and inconsistent course in the 170 years since the Cherokee Cases, especially toward the end of the twentieth century. Some decisions, even dating back a century or more, have construed treaty provisions with surprising breadth and firmness . . . . Other decisions, even in modern times, especially those dealing with . . . jurisdiction over nonmembers of tribes, have arguably failed to honor the canons of construction."); *see also* Hintze, *supra* note 25, at 545 ("If applied correctly, Indian law canons displace most ordinary canons of interpretation that might otherwise apply. However, these canons are often criticized as self-conflicting and susceptible to inconsistent interpretation, similar to newspaper horoscopes. As a result, courts—particularly the Supreme Court—have a strong history of misapplying these foundational tools." (footnotes omitted)).

63 455 U.S. 130 (1982).

64 *Id.* at 159. In that case, the Jicarilla Apache tribe had enacted an ordinance imposing a

determined that the tribe's authority—or power—to tax did not derive from the tribe's right to exclude, and that the tribe did have the authority to impose the severance tax on the lessees.[65]

In the tribal gaming context specifically, there are two "legal landmarks"[66] that control modern gaming law. The first case that directly addressed whether states could regulate gaming activity on tribal land through state's criminal code was *California v. Cabazon Band of Mission Indians*.[67] There, the Supreme Court held that states could not regulate gaming on tribal land through their criminal codes.[68] The Court determined that states do not have authority to regulate tribal conduct unless they are specifically authorized by Congress.[69]

Galvanized by the Court's decision in *Cabazon*[70] and bolstered by massive lobbying efforts by both states and tribes, Congress passed the Indian Gaming Regulatory Act[71] (IGRA) one year later, in 1988. The IGRA was meant to be a compromise between state and tribal governments, while codifying and confirming the *Cabazon* holding.[72] The statute does not in fact confer the right to conduct gaming operations to tribes; that right is treated as being inherently present.[73] The statute actually curtails tribal sovereignty by providing a limited framework for state and federal governments to regulate tribal gaming.[74] It sets forth an economic rationale for tribal gaming on reservations and

severance tax on oil and gas production on their reservation land, all of which was held in tribal trust. *Id.* at 133. Lessees of the land (under long-term leases approved by the Secretary of the Interior) brought actions in federal district court to enjoin enforcement of the tax. *Id.* at 136. The lessees, who were non-tribal members conducting business on tribal land, argued that a tribe's authority to tax non-members derived solely from the tribe's right to exclude, and because the tribe did not initially condition the lease on the tax, the tribe had no authority to impose the severance tax. *Id.* at 136–37.

65 *Id.* at 137 ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.").

66 KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 17 (2006).

67 480 U.S. 202 (1987).

68 *Id.* at 212.

69 *Id.* at 207.

70 480 U.S. 202 (1987).

71 25 U.S.C. § 2701 (2012).

72 *History*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/commission/history (last visited Sept. 9, 2017) ("Embodied in the Act was a compromise between state and tribal interests. The states were offered a voice in determining the scope and extent of tribal gaming by requiring tribal-state compacts for Class III gaming, but tribal regulatory authority over Class II gaming was preserved in full. The Act further provided for general regulatory oversight at the federal level and created the National Indian Gaming Commission as the primary responsible federal agency.").

73 PEVAR, *supra* note 31, at 276.

74 *See id.*

mandates that tribal gaming net revenues only be used in five areas: (1) "to fund tribal government operations or programs"; (2) "to provide for the general welfare of the . . . tribe and its members"; (3) "to promote tribal economic development"; (4) "to donate to charitable organizations"; or (5) "to help fund operations of local government agencies" providing services to tribes.[75]

B. *Federal Laws of General Applicability*

There are two types of federal statutes that regulate labor and employment relating to Indian tribes: statutes that explicitly exempt Indian tribes as employers and statutes that are completely "silent" as to whether Indian tribes are "employers" under the statute.[76] Some statutes, like Title VII of the Civil Rights Act of 1964[77] and Title I of the Americans with Disabilities Act of 1990[78] include various precise and straightforward exemptions for tribal governments from being considered as "employers."[79] However, other statutes, like the one at issue here (the NLRA) are silent with respect to tribal-owned businesses and tribal governments.[80]

The NLRA is not the only federal regulatory law of general applicability that could apply equally to tribes as to other employers.

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75 25 U.S.C. § 2710(b)(2)(B)(i)–(v).

76 Jonathan Guss, Comment, *Gaming Sovereignty? A Plea for Protecting Worker's Rights While Preserving Tribal Sovereignty*, 102 CAL. L. REV. 1623, 1637 (2014).

77 42 U.S.C. § 2000e(b) (2012).

78 42 U.S.C. § 12111(5)(B)(i) (2012).

79 Betz & Budnick, *supra* note 30, at 16. "Federal statutory and common law claims fall into several groups: those specifically exempting or including American Indian tribes and those covering or excluding American Indian tribes by implication." *Id.* However, it should also be noted that "Congress can make a statute applicable to tribes through the exercise of its plenary powers. Congress did so in the 1983 amendments to the Social Security Act. As a result, tribes are now subject to both Social Security and federal unemployment taxes." *Id.* For example, the Americans with Disabilities Act's definition of "employer" includes: "the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . ." 42 U.S.C. § 12111(5)(B)(i).

80 Guss, *supra* note 76, at 1637–38. Commentators have pointed out that one possible reason the NLRA was silent on Indian tribes was because the NLRA was passed in 1935, only one year after the Indian Reorganization Act was passed, and congressional policy reflected the notion that Native Americans should be assimilated as much as possible into the general population, and therefore Indian tribes were not formal governments. *See* D. Michael McBride III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake* of San Manuel Band of Indians v. National Labor Relations Board, 40 J. MARSHALL L. REV. 1259, 1278–79 (2007) ("When Congress passed the NLRA, it did not consider Indian tribes to be formal governments. Rather, the waning Congressional policy in that era was one of assimilation of Indian people into mainstream America, shuttling tribal children away from their family and into boarding schools, disestablishing Indian reservations, allotting reservation lands to individual Indians and making the trust lands alienable to non-Indians and significantly, dismantling tribal governments and institutions." (footnotes omitted)).

The Fair Labor Standards Act,[81] the Occupational Safety and Health Act (OSHA),[82] the Age Discrimination in Employment Act,[83] and even the Patient Protection and Affordable Care Act,[84] are all federal regulatory laws of general applicability that are completely silent regarding their applicability to Indian tribes, but nonetheless may be applicable to those tribes within reservations.[85]

These laws present a unique question in federal Indian law jurisprudence, because application of these laws within reservations affects the essence of what tribal sovereignty means today.[86] Historically, courts often applied the Indian law canons of construction to the interpretation of federal laws of general applicability.[87] As discussed later in this Note, the concept behind, definition of, and scope of tribal sovereignty has changed immensely over the years and even more so with every federal court decision addressing the applicability of federal statutes to tribal governments and business entities.

C. *Impact of the Gaming Industry on Tribes and the Non-Tribal Labor Force*

Tribal gaming[88] is rooted in a rich history of traditional gaming conducted by many North American tribes.[89] Unlike a common "western" view that gambling was immoral, many tribal communities viewed gambling, or wagering, in a more positive light.[90] Modern tribal

81 29 U.S.C. § 203 (2012).

82 29 U.S.C. § 652 (2012).

83 29 U.S.C. § 630 (2012).

84 42 U.S.C. § 300gg-91 (2012).

85 *See* Skibine, *supra* note 19, at 124.

86 *Id.* at 125 ("Because in many cases, application of such federal regulatory laws would interfere with tribal sovereignty, a decision to apply these laws to Indian nations inside reservations is a question that goes to the essence of how federal courts should view tribal sovereignty." (footnote omitted)).

87 *See* Hintze, *supra* note 25, at 545 ("Historically, the federal government strove to uphold a policy of promoting tribal self-determination and economic development. Consequently, the Supreme Court has long applied Indian law canons to generally applicable statutes." (footnotes omitted)). *See generally* Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007).

88 Tribal gaming, or Indian gaming, is "gaming conducted on tribal lands by federally recognized tribes. . . . Tribal gaming differs from commercial gambling in that it is conducted by tribal governments, making it more akin to state lotteries than commercial casinos or charitable gambling." RAND & LIGHT, *supra* note 66, at 7.

89 *Id.* at 17 ("Indian gaming has as its roots a tradition of social games and wagering common to many tribes. . . . Many tribal games have their roots in cultural creation stories and myths. . . . Traditional tribal games reflect a profound relationship between the game, the community, and spirituality." (footnotes omitted)).

90 *Id.* at 19 ("Although one common western view, at least at different times throughout history, is that gambling is evil or immoral, tribal communities generally did not share that perspective. For many tribes, wagering was viewed as an act of generosity that helped to regularly redistribute wealth within the community." (footnotes omitted)).

gaming thus emerged as a means of economic development and tribal self-determination.[91]

In order to fully understand why this issue is important—and why the balancing of interests between tribal sovereignty and labor rights is especially complex in this context—it is important to understand first the magnitude of the effect the gaming industry has had on Indian tribes in this country.[92] Over the past three decades, casinos and other gaming operations have played an increasingly significant and vital role in tribal economic development and self-governance.[93] According to the National Indian Gaming Commission, the independent federal regulatory agency created pursuant to the IGRA,[94] as of August 2015 there were 486 tribes and twenty-eight states with Indian gaming operations.[95] These gaming operations have had an enormous effect—both socially and economically—on tribes across the nation. According to the National Indian Gaming Association's (an inter-tribal association and lobbying group) August 2016 Report, Indian Country's gross gaming revenue for 2015 was the highest it has ever been: $29.9 billion.[96] Additionally, the industry has created hundreds of thousands of jobs and generated billions of dollars for both state and federal governments.[97]

One crucial effect of this rapid growth of the tribal gaming industry has been that there are now more interactions between tribal and non-tribal members (as casino customers or as casino employees) than ever before.[98] These interactions have ramifications for tribal sovereignty and

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91 *Id.* at 20–21.

92 *See* Alan P. Meister, Kathryn R.L. Rand, & Steven Andrew Light, *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 375–76 (2009) ("Economic development in Indian Country . . . is nearly synonymous with tribal gaming. No other modern industry has had such a substantial economic impact on tribal economies, and no other tribal industry has made such significant contributions outside of tribal economies.").

93 PEVAR, *supra* note 31, at 275 ("Indian Gaming has been the single most important catalyst for the economic advancement of Indian tribes, their reservations, and their surrounding communities."). The gaming industry also affects other aspects of tribal sovereignty, including immunity from lawsuits by non-members. *See* Florey, *supra* note 29, at 598 (explaining that "tribal gaming and other enterprises, which often share in the tribe's immunity, have expanded into multimillion-dollar operations with the usual legal problems of large businesses, making tribal immunity a more potent and widely useful tool than it has ever been" (footnote omitted)).

94 *About Us*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/commission/about-us (last visited Sept. 9, 2017).

95 NAT'L INDIAN GAMING COMM'N, FACTS AT A GLANCE, http://www.nigc.gov/images/uploads/Fact%20Sheet%20August%202015.pdf (last visited Sept. 7, 2017).

96 Ernest L. Stevens, Jr., *Indian Gaming Report: The Path to Continued Growth in Tribal Communities*, INDIAN GAMING 16 (Aug. 2016), http://www.indiangaming.com/istore/Aug16_Stevens.pdf.

97 The August 2016 Gaming Report states that "[I]ndian gaming has contributed 679,417 direct and indirect jobs. Furthermore, Indian gaming generated $10.33 billion dollars in revenues for the federal and state governments. . . . Indian gaming has resulted in substantial growth, both economical and socially." *Id.*

98 *See* Guss, *supra* note 76, at 1625.

federal Indian law.[99] The fact that this industry employs hundreds of thousands of people and has an annual gross revenue of almost $30 billion supports this Note's proposal that this unique labor situation should be regulated by federal legislation.

Furthermore, the gaming industry has a massive economic impact on the states in which the casinos are located.[100] In Arizona, between 2002 and 2012, tribes contributed over $350 million in gaming revenue to the state's Instructional Improvement Fund[101] and over $170 million to the state's Trauma and Emergency Services Fund.[102] In Washington State, activity on reservations generated over $260 million in indirect business taxes for the state treasury in 2010.[103]

Additionally, Indian gaming law is especially complex, because it touches on, and encompasses, laws and regulations at the tribal, state, and federal level.[104] There are tribal laws, state laws and regulations, federal regulations, and judicial decisions that all dictate the contours of tribal gaming law, thus creating an incredibly complex atmosphere to navigate in considering tribal gaming issues, including labor issues.[105] While the tribal gaming industry has been growing steadily for the past thirty years,[106] union membership and labor power in this country have been steadily declining.[107] Many employees of the gaming industry fall into the service industry, making tribal gaming a hugely attractive

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99 *See id.* ("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.").

100 *See, e.g.*, Jonathan B. Taylor, *The Economic Impact of Tribal Government Gaming in Arizona: Report*, ARIZ. INDIAN GAMING ASS'N (2012), http://www.azindiangaming.org/wp-content/uploads/2015/05/economic-impact.pdf.

101 *Id.* at 7 ("Since 2002, the gaming tribes of Arizona have contributed over $356.4 million to the state's Instructional Improvement Fund. All of this money goes directly to school districts on a per student basis, providing for reduced class sizes, teacher compensation, drop-out prevention and early reading programs. These funds are distributed to all state, public, and charter schools, so every community and every student benefits.").

102 *Id.* at 8.

103 Jonathan B. Taylor, *The Economic and Fiscal Impacts of Indian Tribes in Washington*, WASH. INDIAN GAMING ASS'N 4 (2012), http://www.washingtonindiangaming.org/images/content/wigaeconseptupt3.pdf ("$3.5 billion of the total gross state product can be attributed to the activity on American Indian reservations. That total impact generates an estimated $268 million in indirect business taxes for the state treasury.").

104 RAND & LIGHT, *supra* note 66, at 8.

105 *Id.* ("Indian gaming is subject to a unique and complex federal regulatory scheme, involving layers or federal, state, and tribal regulation. . . . Practitioners in the field must navigate federal laws and regulations, both civil and criminal . . . . Tribal laws and regulations . . . may cover many of the same topics . . . . State law, too, is relevant . . . .").

106 *See* Stevens, *supra* note 96, at 16.

107 Ana Swanson, *The Incredible Decline of American Unions, in One Animated Map*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/24/the-incredible-decline-of-american-unions-in-one-animated-map/?utm_term=.92fe2b8021ba.

potential source of membership.[108]

D. *The NLRB, the NLRA, and Unfair Labor Practices*

Understanding the basic parameters of the NLRA and federal labor regulations is also important in understanding the conflict between tribal sovereignty and the NLRB. The NLRA came into fruition as the United States recovered from the Great Depression.[109] The Act created an independent board—the NLRB—that would enforce employee rights and was intended to protect the rights of employers and employees as well as promote collective bargaining.[110]

The Board is headquartered in Washington, D.C. and has regional offices throughout the country.[111] It has two primary functions: preventing and remedying unfair labor practices (ULP)[112] by both employers and labor organizations and conducting elections relating to union representation and labor organizing.[113] The Board also investigates and remedies ULP—employer or union actions the Board would consider to interfere with an employee's labor rights.[114] If an

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[108] *See* McBride & Court, *supra* note 80, at 1281 ("As Indian gaming continues to expand and tribes prosper, unions will covet this growing industry. It is not surprising. As labor unions decline because of dying industrial and manufacturing industries and as they face insurmountable challenges from globalization and outsourcing, the remaining jobs are in the service sector." (footnote omitted)).

[109] *The 1935 Passage of the Wagner Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited Sept. 9, 2017).

[110] *National Labor Relations Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/resources/national-labor-relations-act (last visited Sept. 9, 2017).

> Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.

Id. According to the General Counsel,

> Over 5.7 million private-sector employers fall within the jurisdiction of the Agency, which has two primary functions: (1) to prevent and remedy statutorily defined unfair labor practices by employers and labor organizations and (2) to conduct secret-ballot elections among employees to determine whether they wish to be represented by a labor organization.

Eighty Years of Workplace Democracy, NAT'L LAB. REL. BOARD 7, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf (last visited Sept. 9, 2017).

[111] *Who We Are*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/who-we-are (last visited Sept. 9, 2017).

[112] An unfair labor practice occurs when a union or employer violates Section 8 of the NLRA. *See infra* note 114.

[113] *See National Labor Relations Act*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/resources/national-labor-relations-act (last visited Sept. 9, 2017).

[114] Unfair labor practices are defined in Section 8 of the NLRA. *See* 29 U.S.C. §§ 151–169 (2012). Under Section 8, unfair labor practices by an employer include:

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights

employee believes that one of their rights has been violated by either an employer or a labor organization, that employee can file a charge with a regional office of the NLRB, which will then investigate.[115] The cases examined in this Note all arose out of these types of charges. Specifically, Section 7 of the NLRA, which guarantees employees the right to join unions and organize for purposes of collective bargaining, is at issue in these circumstances.

E. *Modern Labor Relations in the United States and Employment in the Tribal Gaming Industry*

The issue of whether the NLRA applies to non–tribal member individuals employed at casinos on tribal land is hugely significant. It can have a massive economic impact on tribes, and is also significant for

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guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

29 U.S.C. § 158 (2012).

115 *Frequently Asked Questions - NLRB*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/resources/faq/nlrb#t38n3207 (last visited Sept. 9, 2017).

the casino employees. In 2014 in Oklahoma alone, casinos directly supported 23,000 jobs, of which sixty percent were held by non-tribal citizens.[116] Of the forty percent of positions held by tribal members, eleven percent worked for a tribe other than their own.[117] These statistics are similar across the country. In Washington, in 2012, tribes paid $1.3 billion in payroll to over 27,000 Washington residents; eighty-one percent of the gaming employees were non-Indians.[118] Because of the industry size—both in number of employees and amount of revenue—a legislative solution (which will be discussed in greater detail in Part IV) would be the most effective way to provide clarity on the rights and obligations of both tribes and employees.

II. THE CURRENT CIRCUIT SPLIT

A. *Introduction to the Circuit Approaches*

There are at least three overall different approaches used by circuit courts to interpret and decide the issue of whether federal regulatory laws that are silent as to their applicability to Indian tribes are actually applicable to those tribes within their reservations: the so-called *Coeur d'Alene* Approach set forth in the 1985 Ninth Circuit case *Donovan v. Coeur d'Alene Tribal Farm*[119]; the approach taken by the D.C. Circuit in the 2007 case *San Manuel Bingo & Casino v. NLRB*[120]; the approach taken by the Tenth Circuit in the 2002 case *NLRB v. Pueblo of San Juan*.[121] The approach taken by the Sixth Circuit in *Soaring Eagle Casino & Resort v. NLRB*,[122] an analysis based on the Supreme Court's decision in *Montana v. United States*,[123] builds upon the *Coeur d'Alene* approach, and further widens the multi-way circuit split.

B. *The First Approach—the Michigan Cases*

Two recent cases—both involving tribes in Michigan—brought this issue into sharp relief. The first case, *Little River Band*,[124] involved the

116 Lenzy Krehbiel-Burton, *Most Workers in Tribal Gaming Industry Are Non-Tribal Members, Study Shows*, TULSAWORLD (July 29, 2015), http://www.tulsaworld.com/news/local/most-workers-in-tribal-gaming-industry-are-non-tribal-members/article_9147373f-3dbf-5124-8b3b-ba6112b56ec9.html.

117 *Id.*

118 Taylor, *supra* note 103, at 3–4.

119 751 F.2d 1113 (9th Cir. 1985).

120 475 F.3d 1306 (D.C. Cir. 2007).

121 276 F.3d 1186 (10th Cir. 2002).

122 791 F.3d 648 (6th Cir. 2015).

123 450 U.S. 544 (1981); *see also Soaring Eagle*, 791 F.3d at 666–67.

124 *See supra* Introduction.

Little River Band of Ottawa Indians, based in Manistee, Michigan.[125] Pursuant to the IGRA,[126] the Little River Band entered into a compact with the State of Michigan to conduct class III gaming activities[127] on the Tribe's trust lands.[128] The casino, which opened in 1999,[129] brings in over twenty million dollars in gross revenues annually.[130] The IGRA states that the net profits from the casino may only be used "to fund [the Tribe's] governmental operations or programs"; "provide for the general welfare of the . . . tribe and its members"; "promote tribal economic development"; "donate to charitable organizations"; or "to help fund operations of local government agencies."[131] The Casino's profits constitute an enormous amount of the Little River Band's total budget.[132] The casino has approximately 900 employees, of whom 107 are enrolled Little River Band members, and 27 are enrolled members of other tribes.[133]

In *Little River Band*, the court examined whether the NLRB had jurisdiction over the Little River Band's employment practices.[134] In 2005, six years after opening the casino, the Band's Tribal Council (the Tribe's governing body) enacted the Band's Fair Employment Practices Code (FEPC).[135] Article XVI of the Code (Labor Organizations and Collective Bargaining) and Article XVII (Integrity of Fair Employment Practices Code) regulate collective bargaining and labor-organizing

125 *A Brief History*, LITTLE RIVER BAND OF OTTAWA INDIANS, https://lrboi-nsn.gov/a-brief-history (last visited Sept. 9, 2017).

126 25 U.S.C. § 2701 (2012).

127 *See* 25 U.S.C. § 2703(8) (defining class II gaming activities); *see also The Commission: FAQs*, NAT'L INDIAN GAMING COMMISSION, http://www.nigc.gov/commission/faqs (follow "What is the difference between Class II and Class III gaming?") (last visited Sept. 9, 2017) ("In IGRA[OS1], Congress included the definition of Class II gaming as follows: bingo; when played in the same location as bingo - pull tabs, lotto, punch boards, tip jars, instant bingo, other games similar to bingo, and non-house banked card games authorized or not explicitly prohibited by the state in which the tribal operation is located. All other games are Class III, except for certain social or traditional forms of gaming. Class III games include, but are not limited to the following: baccarat, chemin de fer, blackjack, slot machines, and electronic or electromechanical facsimiles of any game of chance. The NIGC Office of General Counsel reviews games on request by a tribe or a game developer and issues advisory opinions on whether they are Class II or Class III.").

128 NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 540 (6th Cir. 2015).

129 *About Little River Casino Resort*, LITTLE RIVER CASINO RESORT, http://www.lrcr.com/about_us-2 (last visited Sept. 9, 2017).

130 *Little River Band*, 788 F.3d at 540.

131 25 U.S.C. § 2710(b)(2)(B); *Little River Band*, 788 F.3d at 540 (6th Cir. 2015).

132 *Little River Band*, 788 F.3d at 540 ("The revenues from the casino provide over fifty percent of the Band's total budget.").

133 *Id.* ("The record in this case shows that the casino has 905 employees—107 of whom are enrolled members of the Band, 27 of whom are members of other Indian tribes, and 771 of whom are neither members of the Band nor of any other Indian tribe.").

134 *Id.* at 539.

135 *Id.* at 540.

practices and procedures of the casino employees.[136] The FEPC was most recently amended in 2010.[137] Article XVI grants the Band the authority to determine when collective bargaining may occur and prohibits strikes or work stoppages by casino employees.[138] Article XVII, among other things, prohibits the requirement of membership in a labor organization as a condition of employment.[139]

In March 2008, the IBT Local 406[140] filed a Charge Against Employer, claiming that the Tribe had committed a ULP in violation of the NLRA, and in 2010, the Acting General Counsel of the NLRB issued a complaint.[141] The Complaint alleged that the Tribe's FEPC interfered with employees' exercise of their rights guaranteed under the NLRA.[142] In a hearing before the Board, the Tribe argued that the Board lacked jurisdiction, because applying the NLRA to the Band would interfere with the tribe's sovereignty.[143] The Board decided that it did have jurisdiction, that the Little River Band had violated the NLRA, and issued a cease and desist order.[144] The tribe then petitioned the Sixth Circuit for review, and the NLRB cross-appealed for enforcement of the cease and desist order.[145]

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136 *Id.* ("These articles apply to casino employees and labor organizations representing or seeking to represent casino employees.").

137 *Id.*

138 *Id.* at 540–41 ("As amended, Article XVI, *inter alia*, grants to the Band the authority to determine the terms and conditions under which collective bargaining may or may not occur; prohibits strikes, work stoppage, or slowdown by the Band's employees and, specifically, by casino employees; prohibits the encouragement and support by labor organizations of employee strikes; prohibits any strike, picketing, boycott, or any other action by a labor organization to induce the Band to enter into an agreement; subjects labor organizations and employees to civil penalties for strike activity; subjects employees to suspension or termination for strike activity; subjects labor organizations to decertification for strike activity; subjects labor organizations to a ban on entry to tribal lands for strike activity; and requires labor organizations doing business within the jurisdiction of the Band to apply for and obtain a license. Article XVI also precludes collective bargaining over the Band's decisions to hire, lay off, recall, or reorganize the duties of its employees; precludes collective bargaining over any subjects that conflict with the Band's tribal laws . . . . Further, Article XVI prohibits the requirement of membership in a labor organization as a condition of employment. It also prohibits the deduction of union dues, fees, or assessments from the wages of employees unless the employee has presented, and the Band has received, a signed authorization of such deduction.").

139 *Id.* at 541 ("As amended, Article XVII prohibits Band employers, such as the casino, from giving testimony or producing documents in response to requests or subpoenas issued by non-tribal authorities engaged in investigations or proceedings on behalf of current or former employees, when such employees have failed to exhaust their remedies under the FEPC.").

140 International Brotherhood of Teamsters, Local No. 406.

141 *Id.*

142 The Complaint specifically alleged that Articles XVI and XVII of the FEPC interfered with the rights guaranteed to employees under Section 7 of the NLRA, 29 U.S.C. § 157 (2012), and therefore violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (2012). *Little River Band*, 788 F.3d at 541.

143 *Id.*

144 *Little River Band of Ottawa Indians Tribal Gov't*, 359 N.L.R.B. 641, 641, 645 (2013).

145 *Little River Band*, 788 F.3d at 542.

The Sixth Circuit targeted its examination on whether the Board had jurisdiction to enforce the cease and desist order.[146] The court noted that the NLRA is a statute of general applicability and is totally silent as to its relevance to Indian tribes.[147] Citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[148] the court stated that since Congress was silent on the issue, it had, in effect, delegated to the NLRB to decide whether or not and when the term "employer" extended to Indian tribes.[149] Thus, under *Chevron*, "if the Board's interpretation is 'a permissible construction of the statute,'" it should be given controlling weight.[150] This interpretation was the crux of the NLRB's argument: it interprets the NLRA definition of "employer" to include Indian tribes and argues that its construction was reasonable.[151]

The Little River Band argued that instead of just being a question of interpretation of the definition of the word "employee" in the NLRA, this case really turned on the scope of tribal sovereignty, and how to interpret a federal statute that is silent as to its applicability to Indian tribes.[152] The Little River Band argued further that under principles of federal Indian law, the NLRA could not preempt a tribal government's exercise of tribal sovereignty without clear expression from Congress.[153] The court stressed that in relevant past cases, courts tried to separate the issues of tribal sovereignty from the issue of defining "employer,"[154] but in this situation that was impossible.[155]

The *Little River Band* court then reviewed the law and history governing tribal sovereignty to regulate the activities of non-members of tribes.[156] It determined that generally, courts have found that the application of general federal statutes to Indian tribes is presumptive, but they do not always apply.[157] The *Little River Band* court examined the so-called *Coeur d'Alene*[158] framework, utilized by other circuit courts, to "determine the exceptions to the presumptive application of a general federal statute."[159] In that case, the *Coeur d'Alene* court held that

146 *Id.*
147 *Id.*
148 467 U.S. 837 (1984).
149 *Little River Band*, 788 F.3d at 542–43.
150 *Id.* at 543 (quoting *Chevron*, 467 U.S. at 843).
151 *Id.*
152 *Id.*
153 *Id.*
154 San Manuel Indian Bingo Casino v. NLRB, 475 F.3d 1306, 1316 (2007).
155 *Little River Band*, 788 F.3d at 543–44 ("In this case, however, considerations of federal Indian law suffuse every branch of the analysis concerning the application of the NLRA to the casino. At its heart, the question before us is not one of policy, but one of law. We are asked to decide whether federal Indian law forecloses the application of the NLRA to the Band's operation of its casino and regulation of its employees, and we do so *de novo*.").
156 *Id.*at 544.
157 *Id.* at 547.
158 751 F.2d 1113 (9th Cir. 1985).
159 *Little River Band*, 788 F.3d at 547.

the presumption is constrained by three exceptions, and a federal statute silent on Indian tribes will not apply to them if the law (1) touches on purely intramural matters, (2) would abrogate rights guaranteed to the tribe in treaties, or (3) there is proof that Congress did not intend for the law to apply to Indians.[160]

The Little River Band rejected this analysis and argued instead that this analytic framework does not sufficiently protect inherent tribal sovereignty[161] and that the analytical framework of *NLRB v. Pueblo of San Juan*,[162] a Tenth Circuit decision, should control.[163] There,[164] the court held that federal statutes of general applicability do not apply where a tribe exercises its authority as a sovereign, instead of just as a landowner.[165]

The court eventually embraced the *Coeur d'Alene* framework, applied it to the facts in front of them, and determined that the case did not fall within the exceptions to the presumptive applicability of a general statute.[166] One judge dissented, arguing that the majority's decision not only infringed on tribal sovereignty but created a circuit split as well, which he thought to be unwise.[167]

One month after the *Little River Band* decision, another Sixth Circuit panel comprised of different judges released its decision in *Soaring Eagle Casino & Resort v. NLRB*.[168] The Soaring Eagle Casino is owned and operated by a federally-recognized Indian tribe, the Saginaw Chippewa Tribe of Michigan (the Saginaw Tribe).[169] The tribe has over 3000 members, and is based in central Michigan.[170] In 1993, pursuant to the IGRA, the tribe entered into a compact with the State of Michigan to

160 *Coeur d'Alene*, 751 F.2d at 1116 ("A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" (quoting another source)); *see also supra* Part I.

161 *Little River Band*, 788 F.3d at 548.

162 276 F.3d 1186 (10th Cir. 2002).

163 *Little River Band*, 788 F.3d at 549.

164 *See infra* Section II.D (discussing the case in greater detail).

165 *Little River Band*, 788 F.3d at 549 (The court held that "federal statutes of general applicability do not presumptively apply 'where an Indian tribe has exercised its authority as a sovereign . . . rather than in a proprietary capacity such as that of employer of landowner'" (quoting *Pueblo of San Juan*, 276 F.3d at 1199)).

166 *Little River Band*, 788 F.3d at 555 (finding that "[t]he NLRA does not undermine the Band's right of self-governance in purely intramural matters, and we find no indication that Congress intended the NLRA not to apply to a tribal government's operation of tribal gaming, including the tribe's regulation of the labor-organizing activities of non-member employees").

167 *Id.* at 556 (McKeague, J. dissenting). The dissenting judge stated that he was not joining the majority "[b]ecause the majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split . . . ." *Id.*

168 791 F.3d 648 (6th Cir. 2015).

169 *Id.* at 651.

170 *Id.*

operate gaming activities on its reservation.[171] When it established the casino, the Saginaw Tribe also enacted a proprietary gaming code (in part to regulate and license employees), and created a regulatory entity, the Tribal Gaming Commission to enforce that code.[172] The Saginaw tribal council, a twelve-person council elected by the tribe, hires management-level employees for the casino, receives reports on the casino's performance, and approves vendor contracts.[173]

The casino has approximately 3000 employees—seven percent of whom are tribal members (including about thirty percent of all management-level employees).[174] The casino generates an enormous amount of revenue for the tribe: $250 million in gross annual revenues, which constitutes ninety percent of the Saginaw Tribe's income.[175] This income funds the various tribal programs and departments, including a health administration, police and fire departments, utilities, a tribal court system, and tribal education.[176] The casino employee handbook contains portions of the Tribe's gaming code, including sections relevant to employee conduct.[177] Within the section governing employee conduct is a strict no-solicitation policy (including solicitation relating to union activities) on casino property.[178] One non-member employee was employed as a housekeeper for many years.[179] When she engaged in "solicitation"[180] on behalf of the United Automobile Workers,[181] her supervisors warned her that her activities violated the employee handbook and informed her of possible "adverse employment actions."[182] After this warning, however, she allegedly participated in at least three more acts of "solicitation," and was ultimately discharged "for engaging in solicitation activities in violation of the no-solicitation policy."[183]

The Union filed a ULP charge with the NLRB claiming that the

171 *Id.* at 652.
172 *Id.*
173 *Id.* at 651–52.
174 *Id.* at 652.
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.* at 653.
180 Defined in the handbook as

> "[a]ny verbal or written communication and the distribution or emails, circulars, handbills or other documents/literature of any kind by any employee or group of employees to another employee or group of employees that encourages, advocates, demands, or requests a contribution of money, time, effort, personal involvement, or membership in any fund . . . or labor organization of any kind or type . . . ."

Id. at 652–53 (quoting another source).
181 International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.
182 *Id.* at 653.
183 *Id.*

Soaring Eagle Casino violated the NLRA by having a no-solicitation policy, banning employee union and organizing activities, and firing an employee for engaging in union or solicitation activities.[184] In its response to the charge, the Saginaw Tribe argued that the NLRA did not apply to the tribe and the tribe's activities as a sovereign entity.[185] After a hearing, the Administrative Judge presiding over the adjudication determined that the NLRA did apply because the NLRB had jurisdiction over the tribe.[186] The Tribe appealed, and after various NLRB proceedings, the case ended up before the Sixth Circuit.[187]

Although the facts in *Little River Band* and *Soaring Eagle* are extremely similar—and they were decided by the same court (decisions that were only issued one month apart)—the panel in *Soaring Eagle* did not adopt the analytical framework used previously, and made sure to distinguish its opinion from that of *Little River Band*.[188] The panel stated:

> We are bound by the published decisions of prior panels of this Court. . . . Given the legal framework adopted in *Little River* and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights.[189]

However, in coming to this conclusion while explicitly questioning the previous decision of a panel of the same circuit, the court weakened the rationale behind *Little River Band*, undermining the strength of their own decision. The implications of an intra-circuit split—not to mention a circuit split—are troubling.[190] And, these decisions contributed to the undermining of traditional tribal sovereignty and the weakening of the canons of construction of Indian law.

C. *The Ninth Circuit* Coeur d'Alene *Approach*

The *Coeur d'Alene* approach is named for the first case (*Donovan v. Coeur d'Alene Tribal Farm*[191]) that applied a generally applicable federal

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184 *Id.*

185 *Id.*

186 *Soaring Eagle Casino & Resort, an Enter. of the Saginaw Chippewa Indian Tribe of Mich.*, 361 N.L.R.B. 73 (2014).

187 *Soaring Eagle*, 791 F.3d at 654.

188 *Id.* at 662.

189 *Id.* (footnote omitted) (citation omitted).

190 Leaving a circuit split intact effectively subjects individuals, and different tribes, in different areas to different applications of the law and legal regimes.

191 751 F.2d 1113 (9th Cir. 1985).

regulatory law to a tribally-owned business. In that case, the Coeur d'Alene tribe owned and operated a farm on its reservation in Idaho.[192] The tribe had no formal treaty with the U.S. government.[193] The farm sold grains and legumes on the open market in Idaho and outside the state and employed approximately twenty employees, some of whom, including the farm manager, were non-tribal members.[194]

In 1978, an Occupational Safety and Health Administration compliance officer visited the farm and issued citations and a fine for alleged violations.[195] The tribe challenged the Administration's authority to conduct inspections, arguing that Congress did not intend for OSHA to apply to the farm.[196] The court disagreed, citing an earlier Ninth Circuit case from 1980, *United States v. Farris*[197] which held that federal laws that were generally applicable throughout the United States also applied to "Indians on reservations."[198] However, the court noted three exceptions to that general rule, also derived from *Farris:* when (1) "the law touches on exclusive rights of self-governance in purely intramural matters"; (2) "the application of the law would . . . abrogate rights guaranteed in Indian treaties"; or (3) there is proof that Congress did not intend for the law to apply to Indians on their reservations.[199] The court then applied the *Farris* reasoning to the facts and held that none of the exceptions were available to the tribe under the facts of the case, and therefore the Act applied to the farm.[200]

This case established an analytical framework that legislative silence is interpreted as creating a presumption that federal regulatory laws of general applicability apply to the tribe, but this presumption can be rebutted if any of the exceptions exist. First, the presumption would be rebutted if application of the law would interfere with wholly

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192 *Id.* at 1114.

193 *Id.* ("Although the Tribe is organized under federal law, it has no formal treaty with the United States government.").

194 *Id.*

195 *Id.*

196 *Id.* at 1115. (explaining that the issue on appeal was "whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject").

197 624 F.2d 890 (9th Cir. 1980).

198 *Id.* at 893 ("However, federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.").

199 *Coeur d'Alene*, 751 F.2d at 1116 ("A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .' In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them." (citations omitted) (quoting another source)).

200 *Id.* at 1114. ("We reverse the Commission's decision and hold that the Occupational Safety and Health Act applies to the commercial activities carried on by the Coeur d'Alene Tribal Farm.").

intramural aspects of tribal self-governance or with a right reserved by the tribe in a formal treaty with the U.S. government.[201] Then, if either of those apply, the court would require evidence of congressional intent to apply the law to Indian tribes.[202] Importantly, this approach changed the fundamental notion of tribal sovereignty from traditional territory-based sovereignty (control over tribal land and all operations within it) to a focus on the affiliations of an operation's customers or employees.[203]

D. *The Tenth Circuit Approach in* Pueblo of San Juan

The Tenth Circuit used a different analytical framework to come to a very different conclusion in *NLRB v. Pueblo of San Juan*.[204] The Pueblo of San Juan is based in New Mexico, and has more than 5200 members, most of whom live on tribal lands.[205] The Tribe is governed by a tribal council, its authoritative legislative entity.[206] As one of its business operations, the Pueblo leased tribal land to non-tribal companies to generate income and employment opportunities for its members.[207] In 1996, the Pueblo's tribal council enacted a tribal ordinance—a "right-to-work" measure—which among other things, prohibited making agreements containing union-security clauses covering any employees, tribe-members, or non-members.[208] The ordinance, and one of the Pueblo's leases with a lumber company, prohibited employees and unions from entering into any kind of union security agreements.[209] The

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201 Skibine, *supra* note 19, at 125–26.

202 *Id.* at 126.

203 Guss, *supra* note 76, at 1648 ("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.").

204 276 F.3d 1186 (10th Cir. 2002).

205 *Id.* at 1188–89.

206 *Id.* at 1189.

207 *Id.*

208 *Id.* ("Section 6(a) of the ordinance reads: No person shall be required, as a condition of employment or continuation of employment on Pueblo lands, to: (i) resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay to any charity or other third party, in lieu of such payments any amount equivalent to or a pro-rata portion of dues, fees, assessments or other charges regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization.").

209 *Id.*

NLRA expressly allows states and territories to enact such right-to-work ordinances but does not authorize nor prohibit tribes from doing so.[210]

In 1998, the NLRB filed suit in the U.S. District Court for the District of New Mexico claiming that the specific ordinance and lease provisions that prohibit compliance with union-security agreements were preempted by federal law—the NLRA.[211] The NLRB sued seeking declaratory and injunctive relief, alleging that the ordinance and lease were preempted by a federal law, specifically the NLRA.[212] The Tenth Circuit considered whether the NLRA prevented the Pueblo from enacting a right-to-work law and whether provisions similar to those in the ordinance and lease would be valid.[213] The court determined that the NLRB had the burden of showing legislative intent to preempt tribal sovereign power.[214] Then, it decided that the tribe did have the right to enact the right-to-work ordinance, holding that passing the ordinance was an exercise of sovereign authority over economic transactions on the reservation.[215]

E. *The D.C. Circuit Approach in* San Manuel Indian Bingo & Casino

Another approach was developed more recently in *San Manuel Indian Bingo & Casino v. NLRB*.[216] The court in *San Manuel* considered a set of facts very similar to the facts in the 2015 Sixth Circuit cases. The San Manuel Band of Serrano Mission Indians (San Manuel) owned and operated a casino on its reservation in California.[217] Many of the

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210 Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—and Has So Far Gotten Away with It*, 2008 MICH. ST. L. REV. 547, 559–60 (2008).

211 *Pueblo of San Juan*, 276 F.3d at 1189–90.

212 *Id.* ("Specifically, the Board argued that these provisions are invalid under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, due to preemption by the National Labor Relations Act, 29 U.S.C. §§ 151. . . ." (footnote omitted)).

213 *Id.* at 1190. "The central question before us is whether, in light of the United States Constitution's Supremacy Clause, and Congress' plenary power over Indian affairs, the NLRA prevents the Pueblo from enacting a 'right-to-work law' or entering into a lease with provisions making prohibitions similar to those in right-to-work laws." *Id.* (footnote omitted). Later, the court rephrased the central issue of the case explaining,

> the central question here is whether the Pueblo continues to exercise the same authority to enact right-to-work laws as do states and territories, or whether Congress in enacting §§ 8(a)(3) and 14(b) of the NLRA, 29 U.S.C. §§ 158(a)(3) and 164(b), intended to strip Indian tribal governments of this authority as a sovereign.

Id. at 1191.

214 "The burden falls on the NLRB and the Union, as plaintiffs attacking the exercise of sovereign tribal power, 'to show that it has been modified, conditioned or divested by Congressional action.'" *Id.* at 1190. (citation omitted) (quoting another source).

215 *Id.* at 1200.

216 475 F.3d 1306 (D.C. Cir. 2007).

217 *Id.* at 1308.

casino's patrons were non-tribal members, and the casino employed many non-members as well; however, many tribal members held prominent positions of employment at the casino.[218] Casino profits funded tribal government programs; by all accounts, it improved the economic conditions of the tribe.[219]

The case arose when a union filed two ULP charges with the NLRB, and the tribe sought dismissal for lack of jurisdiction, contending that the NLRA did not apply.[220] The NLRB eventually issued a decision and order finding that the NLRA did apply to the tribe, reasoning that there was no legislative history indicating otherwise, and that federal Indian law does not preclude application of the NLRA to tribal commercial activities.[221] This decision broke with decades of precedent of not applying the NLRA in this context and was the primary source of confusion and chaos in this area.

On appeal, the D.C. Circuit considered whether the NLRB could apply the NLRA to the tribe's casino.[222] The court cited *Federal Power Commission v. Tuscarora*,[223] a 1960 case in which the Supreme Court stated that "it is now well settled by many decisions of this Court that a general statute in terms of applying to all persons includes Indians and their property interests."[224] The court then noted that the NLRB had utilized the *Coeur D'Alene* approach in the Board's decision but took the analysis one step further, considering whether or not the particular activity at issue was a matter of more traditional tribal governance, or a more "commercial" enterprise.[225] If the activity was a more "traditional" activity related to tribal governance, then the tribe's sovereignty interests would be higher; if the activity was less "traditional," and more

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218 *Id.*

219 *Id.* ("For many years, the Tribe had no resources . . . . As a result of the Casino, however, the Tribe can now boast full employment, complete medical coverage for all members, government funding for scholarships, improved housing, and significant infrastructure improvements to the reservation.").

220 *Id.* at 1309.

221 *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1059–60 (2004). "Running a commercial business is not an expression of sovereignty in the same way that running a tribal court system is." *Id.* at 1062.

222 *San Manuel*, 475 F.3d at 1308, 1311 ("Our central inquiry is whether the relation between the Tribe's sovereign interests and the NLRA is such that the ambiguity in the NLRA should be resolved against the Board's exercise of jurisdiction. . . . Thus, we analyze this case in two parts: (1) Would application of the NLRA to San Manuel's casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) Assuming the preceding question is answered in the negative, does the term 'employer' in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?").

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

224 *Id.* at 116. In *Tuscarora*, the Supreme Court held that private lands owned by the Tuscarora Indian Nation could be condemned by the Federal Power Commission pursuant to the eminent domain powers conferred to it by the Federal Power Act. *Id.* at 120. However, that was dicta, and not the central part of the Court's holding.

225 *San Manuel,* 475 F.3d at 1309–10.

"commercial," then the tribe's sovereignty interests would be lower.[226] The court noted that "when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest."[227]

The court noted further that tribal sovereignty in the United States did not amount to "absolute autonomy,"[228] and that in this case even though the operation of the casino by the tribe was not purely "commercial,"[229] the law did not infringe the tribe's sovereignty enough to require a more narrow reading of the NLRA.[230] The court ultimately held that the NLRA applied to the San Manuel Casino.[231] Under this approach, if a generally applicable federal regulatory law interfered with "traditional" aspects of tribal self-governance, it would probably not be applied to tribes, but if the federal law interfered only with more "commercial" aspects of tribal self-governance (like casino operations),

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226 *Id.* at 1312–15. ("Many activities of a tribal government fall somewhere between a purely intramural act of reservation governance and an off-reservation commercial enterprise. . . . The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty. Of course, it can be argued any activity of a tribal government is by definition 'governmental,' and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term 'governmental' in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope." (citation omitted)). Some scholars refer to the court's analytical approach in this case as the "Spectrum of Sovereignty Approach." *See* Skibine, *supra* note 19, at 135–38 ("The court reached that conclusion by adopting what could be called a 'spectrum of sovereignty' approach where core tribal sovereignty centers on the tribe's exercise of 'traditional' governmental functions affecting tribal members on tribal lands while the peripheral areas of tribal sovereignty extends to the regulation of tribal commercial activities extending beyond the reservations and involving non-members either as customers or employees." (footnote omitted)).

227 *San Manuel*, 475 F.3d at 1312–13.

228 *Id.* at 1314. ("But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.").

229 *Id.* ("Of course, in establishing and operating the Casino, San Manuel has not acted solely in a commercial capacity. Certainly its enactment of a tribal labor ordinance to govern relations with its employees was a governmental act, as was its act of negotiating and executing a gaming compact with the State of California . . . .").

230 *Id.* at 1315–16 ("[A]pplication of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities. Nevertheless, impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity. . . . We do not think this limited impact is sufficient to demand a restrictive construction of the NLRA.").

231 *Id.* at 1318 ("Given that application of the NLRA to the San Manuel Casino would not significantly impair tribal sovereignty, and therefore federal Indian law does not preclude the Board from applying the NLRA, and given that the Board's decision as to the scope of the term 'employer' in the NLRA constitutes 'a permissible construction of the statute,' we uphold the Board's conclusion finding the NLRA applicable." (citation omitted) (quoting another source)).

then it would apply to the tribe.[232] The decision overruled NLRB precedent—dating back to 1976—that the NLRA did not apply to tribal governments.[233]

III. TRIBAL SOVEREIGNTY LOOKING AHEAD

A. *Delicate Balancing of Interests—What Is Really at Stake Here?*

Resolving this issue requires a careful balancing of the competing interests at stake. On the one hand is the crucial interest of tribes to retain their tribal sovereignty, govern independently, and implement valuable economic development programs—including casinos.[234] On the other hand is the interest of the federal government to protect the rights of its citizens (non-tribal members), and the interests of casino employees' rights to protect themselves from ULPs and organize if they wish. It might be easy to say that if non-tribal employees in the gaming industry desire certain working conditions or legal rights relating to their employment, they should simply choose to work outside of tribal lands; but, for many individuals, this is not an available choice. Often, tribal casinos are the only major source of employment in a rural area.[235]

One example of this type of "balancing" in practice is California's Tribal Labor Relations Ordinance (TLRO).[236] Under the IGRA,[237]

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232 Skibine, *supra* note 19, at 126.

233 Wildenthal, *supra* note 87, at 416. Wildenthal also noted that this "startling" decision was the result of the "growth and success of casinos and other gaming enterprises operated by American Indian Nation governments." *Id.* at 415. ("[NLRB] Member Peter C. Schaumber noted in his dissent—which showed an excellent grasp of Indian law—that providence . . . apparently breeds policy, for the Board today reverses course because as tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian businesses. In response to this new prosperity, the majority undertakes a rebalancing of competing policy interests." *Id.* at 416 (footnote omitted) (internal quotation marks omitted)).

234 Because gaming revenue is the primary source of funding for many tribal governments, casino-employee strikes could be devastating to a tribal government's functions. *See* McBride & Court, *supra* note 80, at 1296 ("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.").

235 *See* Krehbiel-Burton, *supra* note 116.

236 *Model Tribal Relations Ordinance*, CAL. TRIBAL BUS. ALLIANCE, https://www.caltba.org/resources/compacts-and-documents/022_model_tribal_labor_relations_ordinance.pdf/view (last visited Sept. 11, 2017).

237 25 U.S.C. § 2701 (2012) ("The Congress finds that—(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts; (3) existing Federal law does not provide clear

indirect regulation of tribal gaming was authorized through a system of compacting between states and tribes.[238] The IGRA expressly balances tribal sovereignty on one hand with the federal and state governments' interest in regulating tribal gaming on the other hand.[239] California passed the TLRO under the Labor Relations Provision of its tribal-state compact.[240] The TLRO guarantees workers in the gaming industry representational and organizational rights similar to those provided by the NLRA, and specifically defines employee rights and employer responsibilities.[241] The TLRO provides a model of an agreement that considers non-tribal member employee protection and tribal sovereignty at the same time.

B. *Proposed Compromises and Legislation*

In November 2015, the Tribal Labor Sovereignty Act (TLSA) was introduced to the 114th Congress, where it passed the House and was sent to the Senate.[242] On January 9, 2017 a new TLSA was introduced in the Senate,[243] creating a fresh start for Congress. Both versions of the TLSA amend Section 2 of the NLRA (which broadly defines the word "employer") to include enterprises owned and operated by an Indian tribe on Indian land.[244] In 2015, the proposed amendment was supported by the Native American Enterprise Initiative, an initiative of

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standards or regulations for the conduct of gaming on Indian lands; (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

238 *Id.*

239 *See* PEVAR, *supra* note 31, at 276 ("IGRA is a compromise. It seeks to balance tribal sovereignty and the federal government's commitment to tribal self-determination and economic self-sufficiency, on the one hand, with the desire to give the federal and state governments some control over tribal gaming, on the other. . . . [T]he purpose of IGRA is to allow tribes to reap the benefits of gaming, but in a manner that allows some oversight by the federal and state governments." (footnote omitted)); *see also* Meister, Rand, & Light, *supra* note 92, at 378 (explaining that the IGRA "took the form of a political compromise meant to bridge the gap between the state and tribal positions, to balance state and tribal authority, and to ensure that gaming was available to tribal governments as a means of generating revenue in accord with federal interests in tribal self-sufficiency and reservation economic development").

240 Guss, *supra* note 76, at 1634.

241 *Id.*; *see also Model Tribal Relations Ordinance*, CAL. TRIBAL BUS. ALLIANCE, https://www.caltba.org/resources/compacts-and-documents/022_model_tribal_labor_relations_ordinance.pdf/view (last visited Sept. 11, 2017).

242 H.R. 511, 114th Cong. (2015); *see also* Melissa Greenberg, *The National Labor Relations Act and Tribal Sovereignty: An Explainer*, ON LABOR (May 20, 2016), https://onlabor.org/2016/05/20/the-national-labor-relations-act-and-tribal-sovereignty-an-explainer.

243 S. 63, 115th Cong. (2017). As of February 13, 2017, the Bill had been referred to the Senate Committee on Indian Affairs.

244 H.R. 511, 114th Cong. (2015); S. 63, 115th Cong. (2017).

the U.S. Chamber of Commerce.[245] It also garnered significant support from tribes, with a coalition of almost 130 tribes, tribal corporations, and inter-tribal associations writing a letter urging the Senate to approve the bill.[246]

However, while the current proposed amendment is directly relevant to this dispute, it inadequately addresses the issue of how to promote tribal sovereignty while *at the same time* protecting non-tribal employees' labor rights. The proposed amendment provides language exempting tribes from being included within the NLRA's definition of "employer," but is silent as to labor rights. Thus, while it might be considered beneficial to tribal sovereignty, it does nothing for the thousands of non-tribal employees of the casinos across the country who deserve basic labor rights. The Obama White House issued a Policy Statement[247] rejecting support of the 2015 proposed legislation because of this very issue. The Statement emphasized the President's commitment to tribal sovereignty but expressed serious and legitimate concerns about the importance of workers' rights to collective bargaining.[248] It stated that the Obama White House would potentially support a NLRA amendment that included labor standards and protections for non-tribal employees equivalent to those provided in the NLRA.[249] Furthermore, the Statement also expressed support for various tribal-state compacts that exist in which tribes agreed to establish their own labor relations policies, holding them out as an example.[250]

IV. A NEW PROPOSAL

This Part argues that Congress should pass federal legislation, specifically in the form of an amendment to the NLRA, providing that tribal governments be exempted from the statute, along with the other entities listed in Section 2 of the Act, including the United States, and States or political subdivisions thereof.[251] Unlike other proposed solutions,[252] a practicable amendment would also include a provision

245 Greenberg, *supra* note 242.

246 Rick Archer, *Tribes Ask Senate to Pass Labor Board Exemption*, LAW360 (June 6, 2016, 8:55 PM), https://www.law360.com/articles/804068/tribes-ask-senate-to-pass-labor-board-exemption.

247 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 511 – TRIBAL LABOR SOVEREIGNTY ACT OF 2015 (2015).

248 *See id.*

249 *Id.*

250 *Id.*

251 *See* 29 U.S.C. § 152 (2012).

252 Various amendments have been proposed in the past, including the 2015 Tribal Labor Sovereignty Act. *See* Tribal Labor Sovereignty Act of 2015, H.R. 511, 114th Cong. (2015). On June 29, 2017, the Tribal Labor Sovereignty Act was passed in the House of Representatives Education and Workforce Committee. Lydia Wheeler, *GOP Bill to Roll Back Labor Relations*

requiring that tribes adopt some form of labor protections sufficiently equivalent to the standards and procedures set forth in the NLRA, following the guidelines set forth in the Obama White House Policy Statement.

A. *Proposal Specifics—Tribal Labor Sovereignty Act, Amended*

This Note's proposed amendment to the NLRA would conform to the parameters set forth in the Obama Administration's Statement, appropriately and comprehensively considering the rights of both tribes and non-tribal employees. This amendment to the NLRA definition of "employer" would exempt tribes and tribal commercial enterprises operated on tribal land from the NLRA (and thus NLRB jurisdiction completely), while explicitly adopting labor standards and procedures fairly equivalent to those provided by the NLRA. These standards could include, generally, the right of workers to join together to seek to improve wages or working conditions.[253] And, in balancing tribal sovereignty, the amendment could include a provision that would not make it a ULP for management to hire or promote a tribal-member over a known-union supporter, like in the California TLRO, which includes a provision explicitly permitting Indian preferences.[254]

B. *Why Federal Legislation Is a Workable Solution*

The idea that federal legislation—while sometimes seen as infringing upon tribal sovereignty—could actually help tribes protect and strengthen their sovereignty is supported by the history of relations between the federal government and tribal entities in this country, especially in the last fifty years.[255] Beginning in the 1960s, the executive and legislative branches of the federal government have set a course of federal Indian policy that encourages self-determination and economic development.[256] Since the late 1960s, Congress specifically has promoted tribal self-determination and economic advancement, creating various programs to enhance the welfare of tribes and Native American

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Board Rules Advances in House, HILL (June 29, 2017, 4:21 PM), http://thehill.com/regulation/labor/340136-gop-bill-to-roll-back-labor-relations-board-rules-advances-in-house.

253 For a summary of employee rights under the NLRA, see *Employee Rights*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/employee-rights (last visited Sept. 11, 2017).

254 *Model Tribal Relations Ordinance*, CAL. TRIBAL BUS. ALLIANCE § 9, https://www.caltba.org/resources/compacts-and-documents/022_model_tribal_labor_relations_ordinance.pdf/view (last visited Sept. 11, 2017).

255 PEVAR, *supra* note 31, at 12–14.

256 *Id.*

individuals.[257] Thus, Congress would be an appropriate forum to create a workable solution for this issue. And, while federal legislation could be seen by some as weakening tribal sovereignty, in the past tribes have lobbied successfully for federal legislation, crucially for the IGRA.[258]

One commentator has argued that instead of increased federal legislation, which undermines traditional tribal sovereignty, tribes should adopt a "positive" approach to tribal sovereignty, by providing a remedy within a tribal forum.[259] This "positive approach" would require tribes to adopt federal laws as minimum standards and utilize tribal courts to adjudicate labor disputes, keeping adjudication and enforcement within the tribe.[260] However, this approach is inadequate because it is based on the assumption that tribes will independently implement labor protections equal to or stronger than what the NLRA currently requires. While adjudicating disputes through a tribal court might give tribes greater control over the adjudication process, it could still inhibit sovereignty by denying tribes the opportunity to construct and implement their own labor protections. Furthermore, there is still no guarantee of comprehensive labor protections for non-tribal employees, which is desperately needed. And, given that it is estimated that there are hundreds of thousands of non-tribal employees currently employed in tribally-owned casinos,[261] shifting the adjudication forum to tribal courts could only make the process more complex and burdensome for the many non-tribal members that would come into contact with it. By creating *ex-ante*—instead of *ex-post*—procedures that take into consideration both tribal sovereignty and the rights of non-tribal employees, the adjudication process would be simpler.

Another critique of the idea of passing legislation to solve this dispute is that federal legislation would not adequately protect and promote tribal sovereignty. This concern is grounded in the notion that federal legislation that excluded tribes from this specific statute would not improve or mitigate the overall trend toward increasing regulation of tribal activity, which is often seen as an impediment to sovereignty.[262] However, an amendment to the NLRA presents an efficient and relatively practical solution to the current situation: a circuit split that has resulted in disparate interpretations of federal Indian law and policy being applied across the United States, leaving both tribes and non-

257 *See* Greenberg, *supra* note 242.

258 RAND & LIGHT, *supra* note 66, at 30–31 ("Many tribes opposed state regulation of Indian gaming, and lobbied Congress to codify exclusive tribal regulation, both to preserve tribal sovereignty generally and to protect Indian gaming as an economic development strategy for tribal governments. . . . Anticipating that Congress would insist on some form of regulation of Indian gaming, however, the tribes supported federal regulation over state regulation.").

259 Guss, *supra* note 76, at 1647.

260 *Id.* at 1661–62.

261 *See* Tribal Labor Sovereignty Act of 2015, H.R. 511, 114th Cong. (2015).

262 Guss, *supra* note 76, at 1651–52.

tribal employees scrambling for clarity. While requiring tribes to have some standards of labor protections, it would give them some discretion in creating those standards. Finally, it would create uniformity in this area of the law.

CONCLUSION

The current framework for understanding labor rights in tribal-owned businesses is that there can either be labor rights or native rights, but there cannot be both.[263] However, as this Note argues, both labor rights and tribal rights in the gaming context can be preserved and in fact strengthened by federal legislation that comprehensively addresses the valid interests of both Indian tribes and non-tribal employees of these enterprises. An amendment to the NLRA excluding tribes from the definition of "employers," while providing for some labor protections, would clarify an increasingly complex and indecisive field of judicial decisions, thus eliminating the need for the Supreme Court to step in.

263 Julian Brave NoiseCat, *Labor Rights and Tribal Rights Collide at Indian Casinos*, HUFFINGTON POST (June 15, 2015, 12:24 PM), http://www.huffingtonpost.com/2015/06/15/native-americans-labor-unions_n_7573322.html.