TRIBAL POWER, WORKER POWER: ORGANIZING UNIONS IN THE CONTEXT OF NATIVE SOVEREIGNTY

INTRODUCTION

Since 1990, employees of businesses owned and operated by Native nations have increasingly sought to amplify their voices in the workplace through union representation.[1] Many of these (primarily non-Native[2]) workers have invoked the protections of the National Labor Relations Act[3] (NLRA). The protections of federal labor law have been crucial to building worker power in private-sector enterprises. But to many tribal governments, this invocation of a federal statute is an affront to the inherent sovereignty of Native nations.[4]

Labor organizing in tribal enterprises[5] uncovers a seemingly intractable tension between two classes of power-building institutions: unions and tribes. Unionizing workers, often members of non-Native minority groups, feel disenfranchised in their workplaces, while Native governments perceive intervention into their internal affairs as threatening their inherent sovereignty[6] — sovereignty that has been weakened through congressional action and Supreme Court decisions.[7] This tension is especially acute in the ideological context of the modern labor movement, which casts unionism as rooted in values of progressivism and social justice.[8] This Note attempts to ameliorate that tension by

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[1] *See, e.g.*, *Unions Target Organizing Employees of Indian Casinos*, KITSAP SUN (May 23, 1999), https://products.kitsapsun.com/archive/1999/05-23/0025_tribal_rights__unions_target_orga.html [https://perma.cc/32YF-VTVC].

[2] *See* Letter from Randall K.Q. Akee et al., Harvard Project on Am. Indian Econ. Dev., to Steve Mnuchin, Sec'y of the Treasury 6 (Apr. 10, 2020), https://ash.harvard.edu/files/ash/files/hpaied_ash_covid_letter_to_treasury_04-10-20_vsignedvfinv02.pdf [https://perma.cc/4SUM-HBHZ] (estimating that 915,000 of 1.1 million tribal employees are non-Native).

[3] 29 U.S.C. §§ 151–169.

[4] *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, 1265–67 (2007).

[5] Tribal enterprises are economic ventures "owned, sponsored, or run by a Native national government." DAVID KAMPER, THE WORK OF SOVEREIGNTY: TRIBAL LABOR RELATIONS AND SELF-DETERMINATION AT THE NAVAJO NATION 5 (2010).

[6] *See* Colleen O'Neill, *Civil Rights or Sovereignty Rights? Understanding the Historical Conflict Between Native Americans and Organized Labor* 5–6 (Univ. of Nev., Las Vegas, Ctr. for Gaming Rsch. Occasional Paper Series, No. 43, 2018), https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1049&context=occ_papers [https://perma.cc/8ABD-8P43].

[7] *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 95–121 (2002) (describing the legal erosion of tribal sovereignty over time).

[8] *See* Kyoung-Hee Yu, *Inclusive Unionism: Strategies for Retaining Idealism in the Service Employees International Union*, 61 J. INDUS. RELS. 33, 34 (2019).

advocating a labor movement that builds worker power under the protections of tribal, rather than federal, law.

This Note proceeds in four parts. Part I sets out the historical backdrop, while Part II outlines the doctrinal context. A question central to many tribal-labor conflicts is whether general federal regulatory statutes, including the NLRA, apply to Native nations. The Supreme Court has addressed this question only in dictum,[9] and lower courts are divided. Part III argues that, under federal Indian law doctrine, general federal labor statutes do not apply to tribally owned businesses. As several scholars have articulated, interpreting federal labor law as inapplicable to these businesses is consistent with Supreme Court precedent, the text and history of the NLRA, and the nature of tribal enterprise.[10] Part IV examines the implications of this argument. Drawing on examples of existing tribal labor-relations schemes, this Part encourages worker advocates to see organizing in tribal enterprises as an opportunity to amplify workers' voices while honoring Native sovereignty. In the absence of federal regulation, unions and Native nations may find common ground as institutions dedicated to building power for their members.[11]

I.

Workers' power to self-govern through unionization hit an apex in the mid-twentieth century. The original NLRA, promulgated as the Wagner Act in 1935, promoted a goal of building worker power and established a framework for self-governance in the private-sector workplace through collective bargaining.[12] Workers organized under the NLRA and its public-sector corollaries are able to earn more than non-unionized workers, enjoy more benefits and greater stability, and have more control over the conditions of their employment.[13] Since the 1930s, however, union protections have been eroded: changing economic forces

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[9] *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

[10] *See* Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 719–25 (2004); Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J.C.R. & SOC. JUST. 123, 155–76 (2016); Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations Within the Reservation*, 2008 MICH. ST. L. REV. 505, 538–42; Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 431–52 (2007).

[11] *Cf.* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1863–64 (2019) (identifying both federal Indian law and unions as tools for distributing power to plural groups).

[12] *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 27–28 (2010).

[13] *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 20–22 (1984) (listing positive effects of collective bargaining, including higher wages, job security, and higher productivity).

weakened traditionally unionized American industries;[14] the Taft-Hartley amendments of 1947[15] shifted the NLRA's purpose away from promoting worker power;[16] state statutes and unfavorable court decisions have limited public-sector workers' ability to bargain collectively;[17] and aggressive employer resistance to organizing has become commonplace, limiting workers' ability to form new unions.[18]

As union membership declined, some unions, especially in the service sector, began explicitly to link the labor movement to broader social justice issues, positioning collective action as an essential tool for building power among marginalized groups.[19] Unions became involved in community organizing and nonlabor social movements.[20] This approach has seen some notable successes, as high-profile collective actions have helped cast unions as drivers of social justice.[21]

Unions and Native nations encountered intermittent conflict throughout the twentieth century. During the Depression, pay disparities between Native and non-Native miners contributed to Navajo workers' crossing picket lines.[22] In the mid-twentieth century, several tribal governments enacted "right-to-work" laws;[23] in response, unions called on the National Labor Relations Board (NLRB) to assert jurisdiction over tribally owned businesses operating in Indian country.[24]

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[14] *See* ESTLUND, *supra* note 12, at 165–68.

[15] Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.) (amending the NLRA).

[16] *See* ESTLUND, *supra* note 12, at 29.

[17] *See* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POL'Y RSCH., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 4 (2014), https://www.cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/4CSE-CUJC]; *see also, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

[18] *See* CELINE MCNICHOLAS ET AL., ECON. POL'Y INST., UNLAWFUL 5 (2019), https://www.epi.org/files/pdf/179315.pdf [https://perma.cc/DY6E-M8SL] (finding that employers were charged with violating labor law in more than forty percent of union campaigns).

[19] *See* RICK FANTASIA & KIM VOSS, HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT 120–21 (2004).

[20] *See* Ruth Milkman, *Toward a New Labor Movement? Organizing New York City's Precariat*, *in* NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 1, 8–9 (Ruth Milkman & Ed Ott eds., 2014).

[21] *See, e.g.*, Lucas A. Franco, *Organizing the Precariat: The Fight to Build and Sustain Fast Food Worker Power*, 45 CRITICAL SOCIO. 517, 518 (2019); Dana Goodyear, *The Social-Justice Imperative Behind the L.A. Teachers' Strike*, NEW YORKER (Jan. 16, 2019), https://www.newyorker.com/news/dispatch/the-social-justice-imperative-behind-the-la-teachers-strike [https://perma.cc/8RJ9-83T2].

[22] *See* COLLEEN O'NEILL, WORKING THE NAVAJO WAY: LABOR AND CULTURE IN THE TWENTIETH CENTURY 115–16 (2005).

[23] *See* O'Neill, *supra* note 6, at 2. "Right-to-work" laws allow workers who are represented under a union's collective bargaining agreement to refuse to pay dues. *See* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 857 (2014).

[24] *See* Fort Apache Timber Co., 226 N.L.R.B. 503, 506 (1976); Tex.-Zinc Mins. Corp., 126 N.L.R.B. 603, 604, 607 (1960), *aff'd sub nom.* Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir. 1961).

The Board declined to do so,[25] and unions continued to organize in tribal enterprises without the protections of federal labor law.[26]

An increase in service-sector organizing in the 1990s coincided with the growth of Indian gaming and generated renewed interest in labor organizing in tribally owned enterprises.[27] In 1988, Congress promulgated the Indian Gaming Regulatory Act[28] (IGRA) with a purpose to promote sustainable self-governance by Native nations.[29] IGRA requires states that allow gaming to permit Native nations to develop gaming enterprises, provided the two governments negotiate a compact setting out terms of operation.[30] As states and Native nations negotiated IGRA compacts, labor organizers sought to ensure that gaming jobs would be union jobs.[31] This activism proved a turning point in the broader relationship between organized labor and Native nations.

II.

Union campaigns in casinos sparked renewed legal battles over control of labor relations in Indian country. Two key inquiries underlie these legal conflicts. First, under what circumstances do general federal regulatory statutes like the NLRA apply to Native nations? Second, in the context of the NLRA specifically, are Native nations "employers" subject to regulation by the Act?[32] This Part begins by describing how courts have approached the former question. It then turns to the latter, examining how the NLRB has come to exert control over tribal enterprises.

A. The Applicability of General Federal Laws to Native Nations

Whether and under what circumstances general federal statutes apply to Native nations is one of the most contested issues in federal Indian

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[25] *See Fort Apache*, 226 N.L.R.B. at 506.

[26] *See, e.g.*, David Kamper, *Organizing in the Context of Tribal Sovereignty: The Navajo Area Indian Health Service Campaign for Union Recognition*, LAB. STUD. J., Winter 2006, at 17, 17–18.

[27] *See* O'Neill, *supra* note 6, at 3–4; *see also* KAMPER, *supra* note 5, at 33–37.

[28] 25 U.S.C. §§ 2701–2721.

[29] *Id.* § 2702(1) (stating the Act's purpose as "promoting tribal economic development, self-sufficiency, and strong tribal governments").

[30] *See id.* § 2710(d).

[31] *See* Daniel J.B. Mitchell, *Unions and Direct Democracy in California: A New Pattern Emerging?*, CAL. POL'Y OPTIONS, 2008, at 197, 197.

[32] The potential application of the NLRA to Native nations raises other questions as well. For example, does the NLRA apply to privately owned businesses operating on tribal land? If so, does the NLRA preempt tribal regulation of those businesses? *Cf.* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1189–90 (10th Cir. 2002) (en banc) (considering whether § 8(a)(3) of the NLRA preempted a tribal right-to-work ordinance, which applied to all employment on tribal lands). While the principles discussed here are relevant to these questions, they are outside the scope of this Note, which focuses on labor-management relationships within tribally owned enterprises.

law.[33] At the heart of this question are two competing sources of authority. On the one hand, Professor Felix Cohen's influential *Handbook of Federal Indian Law* identifies canons of construction that guide judicial decisions in Indian law. These canons instruct: statutes and legal agreements must be "liberally construed in favor of the Indians"; "all ambiguities are to be resolved in their favor"; and "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[34] The Supreme Court has regularly invoked these canons.[35]

On the other hand, the Supreme Court's main foray into addressing whether general federal laws regulate Native nations stands to the contrary. In *Federal Power Commission v. Tuscarora Indian Nation*,[36] the Court stated that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[37] Because *Tuscarora* itself concerned a statute that specifically addressed the use of tribal land,[38] its principle of general applicability is widely understood to be dictum.[39] The Supreme Court has never revisited the question.[40] These two nonbinding authorities — the *Handbook* canons and the *Tuscarora* dictum — provide the backdrop for adjudicators considering the application of general federal statutes to Native nations.

Federal courts have adopted varying approaches to these competing authorities.[41] A plurality have followed an approach outlined by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*,[42] which held that statutory silence regarding Native nations in the Occupational Safety and Health Act[43] (OSHA) presumptively indicated an intent to regulate tribes.[44] This presumption, however, did not apply where:

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[33] *See generally* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 189–91 (3d ed. 2015) (discussing case law on statutes of general applicability).

[34] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1) (Nell Jessup Newton ed., 2017) [hereinafter COHEN]. The *Handbook* also identifies a fourth canon that "treaties and agreements are to be construed as the Indians would have understood them." *Id.*

[35] *See* Wildenthal, *supra* note 10, at 464 n.162 (collecting cases).

[36] 362 U.S. 99 (1960).

[37] *Id.* at 120. *But cf.* Elk v. Wilkins, 112 U.S. 94, 99–100 (1884) (stating that under the Constitution as originally established, "[g]eneral acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them," *id.* at 100).

[38] *See Tuscarora*, 362 U.S. at 111.

[39] *See* Singel, *supra* note 10, at 703–06; *see also, e.g.*, Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985).

[40] *See* Bryan H. Wildenthal, *Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update*, 6 AM. INDIAN L.J. 98, 113 (2017).

[41] This doctrinal inconsistency has been extensively covered by other scholars. For a thorough overview of how federal courts have approached congressional silence with respect to Native nations, see Skibine, *supra* note 10, at 130–55.

[42] 751 F.2d 1113.

[43] Pub. L. No. 91-956, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651–678).

[44] *See Coeur d'Alene*, 751 F.2d at 1116.

> (1) [T]he 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.[45]

In these cases, express statutory language is called for.[46] *Coeur d'Alene* also held that operating a commercial enterprise was not "purely intramural," and OSHA regulation of tribal enterprises therefore did not infringe on self-governance.[47]

The Second, Sixth, and Eleventh Circuits have since adopted *Coeur d'Alene*.[48] The Seventh Circuit has adopted a similar but distinct approach under which courts are asked to distinguish *governmental* and *commercial* functions of tribal governments, exempting tribal employers from federal regulation only when they "exercis[e] governmental functions that when exercised by . . . other governments are given special consideration."[49]

Two federal circuits have rejected *Coeur d'Alene*. The Eighth Circuit has stated that *Tuscarora* "does not apply when the interest . . . affected is a specific right reserved to the Indians"[50] and that a right to self-governance is implied for federally recognized tribes.[51] And in *NLRB v. Pueblo of San Juan*,[52] the Tenth Circuit invoked the canon that "doubtful expressions of legislative intent must be resolved in favor of the Indians"[53] to place the burden on the NLRB to demonstrate that Congress had intended the NLRA to "strip Indian tribal governments" of the authority to legislate labor relations,[54] ultimately finding that it had not.[55]

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45 *Id.* (alteration in original) (internal quotation marks omitted).

46 *Id.*

47 *Id.* "[P]urely intramural matters" included "tribal membership, inheritance rules, and domestic relations." *Id.* (citing United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980)). Because the Tribe had never entered into a treaty with the United States, the second exception did not apply. *See id.* at 1117.

48 *See* Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179, 182 (2d Cir. 1996); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 551–52 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2508 (2016); Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1129 (11th Cir. 1999). The Sixth Circuit adopted *Coeur d'Alene* over the objection of four of the six judges considering the question in two related cases. *See* Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 675 (6th Cir. 2015); *id.* (White, J., specially concurring in part and dissenting in part); *Little River*, 788 F.3d at 561 (McKeague, J., dissenting).

49 Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993).

50 EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248 (8th Cir. 1993).

51 *See id.* at 248–49.

52 276 F.3d 1186 (10th Cir. 2002) (en banc).

53 *Id.* at 1191 (quoting South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986)).

54 *Id.*

55 *Id.* at 1200.

The result is a fractured circuit split: a plurality of federal courts treat general regulatory laws as presumptively applicable to tribes, subject only to a few narrow exceptions. Others have followed Cohen's canons to reverse the presumption, requiring evidence that Congress intended the law to apply to Native nations. And one, the Seventh Circuit, applies shifting presumptions depending on whether it views the tribal activity in question as "commercial" or "governmental" in nature.[56]

B. Tribal Enterprises as "Employers" Under the NLRA

Approaches to the second question — whether Native nations are "employers" under the NLRA — have evolved since the Board first considered the issue in the 1970s. In *Fort Apache Timber Co.*,[57] the NLRB held that, although the NLRA is silent with respect to Native nations, because section 2(2) of the Act explicitly excludes federal and state governments from the Board's jurisdiction,[58] and because the defendant business was wholly owned by a government — the Fort Apache Tribal Council — the business was a government entity and therefore "implicitly exempt" from regulation.[59] This holding was undisturbed until 1992, when the Board appeared to apply *Coeur d'Alene* to hold that a tribal enterprise operating off-reservation was an employer subject to NLRB jurisdiction, although *on-reservation* enterprises remained exempt.[60]

In 2004, the Board formally overruled *Fort Apache* to hold that Native nations are "employers" under section 2(2) of the Act.[61] Since that case, *San Manuel Indian Bingo & Casino*,[62] the Board has asserted jurisdiction over labor relations in tribal enterprises. *San Manuel* applied *Coeur d'Alene* to hold that, because the employer in question — a casino — was commercial in nature, it could "hardly be described as 'vital' to the tribes' ability to govern themselves or as an 'essential attribute' of their sovereignty."[63] The Board therefore held that it was not statutorily precluded from asserting jurisdiction[64] — a holding the D.C.

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[56] *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493, 495 (7th Cir. 1993). The D.C. Circuit has also adopted an intermediate approach. *See infra* note 65 and accompanying text.

[57] 226 N.L.R.B. 503 (1976). For an overview of NLRB regulation of tribal labor relations, see KAMPER, *supra* note 5, at 29–32.

[58] *Fort Apache*, 226 N.L.R.B. at 504 n.5.

[59] *Id.* at 506.

[60] Sac & Fox Indus., Ltd., 307 N.L.R.B. 241, 244 (1992); *see also* Yukon Kuskokwim Health Corp., 328 N.L.R.B. 761, 763 (1999). A dissent objected that asserting jurisdiction over the Tribe's off-reservation facilities while declining jurisdiction over on-reservation enterprises was nonsensical. *See Sac & Fox Indus.*, 307 N.L.R.B. at 247 (Member Devaney, dissenting).

[61] *See* San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1059 (2004), *aff'd*, 475 F.3d 1306 (D.C. Cir. 2007).

[62] 341 N.L.R.B. 1055.

[63] *Id.* at 1061.

[64] *See id.* at 1063.

Circuit enforced in an opinion that weighed general federal regulatory interests against the infringement on tribal sovereignty.[65]

The *San Manuel* Board nonetheless held that a "blanket assertion of jurisdiction" over Native nations was inappropriate as a policy matter.[66] It therefore introduced a new rule: when Native nations operate in the "particularized sphere of traditional tribal or governmental functions," the Board should decline jurisdiction.[67] In a companion case decided the same day, the Board applied this principle to decline jurisdiction over a hospital run by a coalition of Native Alaskan governments.[68] This pair of cases established the Board's present stance.[69]

III.

Several scholars have addressed *Coeur d'Alene*'s shaky foundations and the problems associated with applying federal labor law to tribal enterprises.[70] This Part builds on that scholarship to argue that the NLRA should not regulate labor organizing in tribal enterprises. First, such regulation is inconsistent with Supreme Court jurisprudence since *Tuscarora*.[71] Second, the text and history of the NLRA do not indicate that Congress intended to regulate tribal enterprises. Third, decisions that distinguish between tribal enterprise and self-government misunderstand the nature of enterprise as a tool *of* self-government.

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[65] *See San Manuel*, 475 F.3d at 1308. The court acknowledged that Board jurisdiction hampered sovereignty but held that any impingement was "ancillary" to "primarily commercial" activity. *Id.* at 1315. The D.C. Circuit therefore promulgated a test that it saw as consistent with *Coeur d'Alene*, while neither formally adopting that framework nor rejecting the Eighth Circuit's approach. *See id.*

[66] *San Manuel*, 341 N.L.R.B. at 1062.

[67] *Id.* at 1063. The Board may decline jurisdiction by law. *See* 29 U.S.C. § 164(c).

[68] *See* Yukon Kuskokwim Health Corp. (*Yukon II*), 341 N.L.R.B. 1075, 1075–77 (2004). The Board did not explain how the hospital was able to perform a "unique governmental function" while failing to satisfy *Coeur d'Alene*'s exception for laws "touch[ing] 'exclusive rights of self-governance.'" Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893–94 (1980)); *see Yukon II*, 341 N.L.R.B. at 1076–77.

[69] *See Yukon II*, 341 N.L.R.B. at 1076. The Board has upheld this framework. *See, e.g.*, Viejas Band of Kumeyaay Indians, No. 21-CA-166290, 2016 NLRB LEXIS 734, at *6 (N.L.R.B. Oct. 11, 2016). *But cf.* Chickasaw Nation Operating Winstar World Casino, 362 N.L.R.B. 942, 943–45 (2015) (interpreting a treaty as precluding NLRB jurisdiction).

[70] *See* sources cited *supra* note 10; *see also* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 682 (1994) [hereinafter Limas, *Application*]; Vicki J. Limas, *The* Tuscar*organization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467, 470 [hereinafter Limas, Tuscar*organization*]; Anna Wermuth, *Union's Gamble Pays Off: In* San Manuel Indian Bingo & Casino*, the NLRB Breaks the Nation's Promise and Reverses Decades-Old Precedent to Assert Jurisdiction over Tribal Enterprises on Indian Reservations*, 21 LAB. LAW. 81, 98–102 (2005).

[71] *See, e.g.*, Wildenthal, *supra* note 10, at 457–73.

A. Supreme Court Jurisprudence Since Tuscarora

The Supreme Court has not revisited the *Tuscarora* language that has caused so much consternation in courts and scholarship and that directly contradicts early precedent.[72] But subsequent decisions have favored the canonical presumption against applying general federal laws to Native nations over the *Tuscarora* principle.[73]

The Court's support for the canons is strongest in cases that the Court deems as striking at the heart of self-government. In *Santa Clara Pueblo v. Martinez*,[74] the Court held that the Indian Civil Rights Act[75] (ICRA) did not authorize civil suits against tribal officers, reasoning that "proper respect . . . for tribal sovereignty" mandated "tread[ing] lightly in the absence of clear indications of legislative intent."[76] *Merrion v. Jicarilla Apache Tribe*[77] reaffirmed this principle in upholding the Jicarilla Apache Tribe's power to tax oil extracted from reservation land.[78] Holding that the right to self-government included the "power to . . . raise revenues to pay for the costs of government,"[79] *Merrion* reiterated *Santa Clara*'s exhortations to "tread lightly"[80] to reject the argument that Congress had implicitly preempted the Tribe's taxing power.[81]

Perhaps the strongest support for the presumption against applying general laws to Native nations comes from a case in which the Court found that Congress *did* intend to abrogate sovereignty. *United States v. Dion*[82] considered whether general conservation statutes abrogated Yankton Sioux Tribe members' right to hunt on reservation lands.[83] The Yankton Sioux's treaty neither expressly reserved nor restricted

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[72] *See* Elk v. Wilkins, 112 U.S. 94, 99–100 (1884) (stating that under the Constitution as originally established, "[g]eneral acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them," *id.* at 100); United States v. Kagama, 118 U.S. 375, 381–82 (1886) (suggesting that Native nations are "not brought under the laws of the Union," *id.* at 382). The Court's majority has cited the *Tuscarora* majority only three times, most recently in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248 & n.21 (1985) (noting that *Tuscarora* "implicitly" affirmed principles of construction requiring plain and unambiguous expression of intent to extinguish Indian title).

[73] *See* Smith, *supra* note 10, at 513–15.

[74] 436 U.S. 49 (1978).

[75] 25 U.S.C. §§ 1301–1303.

[76] *Santa Clara*, 436 U.S. at 60; *see id.* at 59–60, 72. ICRA is not a statute of general applicability: *Santa Clara* concerned tribal determinations about membership. *See id.* at 54. Nonetheless, the Court's reasoning is instructive.

[77] 455 U.S. 130 (1982).

[78] *See id.* at 135–36, 149.

[79] *Id.* at 144.

[80] *Id.* at 149 (quoting *Santa Clara*, 436 U.S. at 60).

[81] *See id.* at 149–50.

[82] 476 U.S. 734 (1986).

[83] *See id.* at 736.

hunting rights.[84] Because treaty rights are reserved unless expressly relinquished, the Court inferred a right to hunt and fish and demanded "clear evidence that Congress *actually considered* the conflict" with the impliedly reserved hunting rights and had chosen nonetheless to proceed.[85] Although the Court found that Congress had done so in this case,[86] this "actual consideration" test — applied to rights not expressly reserved by treaty — introduced the Court's strongest demand yet for evidence of congressional intent to abrogate Native sovereignty.

Dion left unresolved whether the "actual consideration" test applies outside of the treaty context.[87] But *Dion* construed treaty rights broadly, inferring a right to hunt and fish from a reserved right to "undisturbed possession" of tribal land.[88] The Court also noted that implicit rights are retained by nations that have *not* treated with the United States.[89] A key question after *Dion* is whether its broad construal of reserved rights applies with equal force to the right to self-government[90] — a right that courts have repeatedly held to be implied for all Native nations.[91]

One year after *Dion*, in *Iowa Mutual Insurance Co. v. LaPlante*,[92] the Court declined to apply a general federal statute to a Native government. The *LaPlante* Court held that a dispute between a non-Native insurance company and tribal citizens was not subject to jurisdiction created by the federal diversity statute.[93] Although Congress has the power to grant federal jurisdiction over disputes involving Native parties, the Court held that doing so infringes on the authority of tribal courts and some expression of congressional intent is therefore required.[94] Because the statute in question and its legislative history

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[84] *See id.* at 737.

[85] *Id.* at 740 (emphasis added); *see also id.* at 737–40.

[86] Both the history and the text of one of the relevant statutes acknowledged its impact on Native hunting rights. *See id.* at 740–45.

[87] *See* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 94 (1991).

[88] *Dion*, 476 U.S. at 737–38.

[89] *Id.* at 745 n.8 ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."); *see also* Antoine v. Washington, 420 U.S. 194, 204 n.10 (1975) (explaining that reservations established by executive order retain rights on par with those established by treaty).

[90] *See* Skibine, *supra* note 87, at 100–01.

[91] *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014); United States v. Wheeler, 435 U.S. 313, 326–27 (1978); *see also* 25 U.S.C. §§ 1301(1)–(2).

[92] 480 U.S. 9 (1987).

[93] *See id.* at 11, 17–18.

[94] *See id.* at 17–18.

"ma[de] no reference to Indians,"[95] the Court declined to assert jurisdiction.[96]

Recent Supreme Court cases have reaffirmed the call for clear congressional intent to limit sovereignty.[97] These Supreme Court cases, taken together, paint a picture that is unfavorable to *Tuscarora*: Where the Court has construed statutes that specifically deal with Native interests, it has applied the canons to favor Native sovereignty.[98] Where the Court has considered the application of *general* federal statutes to Native sovereigns, it has demanded a high threshold of persuasion that Congress intended to regulate.[99] It has also taken an expansive view of reserved treaty rights.[100] In all, these cases are more favorable to the presumption against applying general federal laws to Native nations than they are to *Tuscarora*'s dictum.[101]

B. Regulation of Native Nations Under the NLRA

Viewed through the lens of the Indian law canons, the NLRA does not regulate tribal enterprises. The Act is a general federal regulatory statute that is silent with respect to Native nations[102]: its text does not

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[95] *Id.* at 17.

[96] *See id.* at 17–18. There is a trend in the twentieth-century Supreme Court cases bolstering Native sovereignty: *Santa Clara*, *Merrion*, *Dion*, and *LaPlante* were all authored by Justice Thurgood Marshall.

[97] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1698 (2019); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790–91 (2014) (invoking *Dion* to hold that IGRA did not abrogate tribal sovereign immunity in suits involving off-reservation commercial gaming and stating that it is an "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *id.* at 790).

[98] *See Bay Mills*, 572 U.S. at 790; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978).

[99] *See LaPlante*, 480 U.S. at 17–18; United States v. Dion, 476 U.S. 734, 738–39 (1986); *see also Herrera*, 139 S. Ct. at 1698.

[100] *See Dion*, 476 U.S. at 737; Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968); *see also* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1013–15 (2019) (plurality opinion).

[101] Some courts and commentators argue that *Montana v. United States*, 450 U.S. 544, 565–66 (1981), limits federal regulation of tribal labor relations. *See* Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 662–69 (6th Cir. 2015); Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and* NLRB v. San Manuel Band of Mission Indians, 43 IDAHO L. REV. 127, 164 (2006). *But see* Skibine, *supra* note 87, at 122–26. *Montana* held that Native nations may regulate "nonmembers who enter consensual relationships with the tribe," 450 U.S. at 565, and that tribes retain power to regulate non-Indian conduct that affects "the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566. *Soaring Eagle* held that Native nations can "prevent application of a [general] federal statute," 791 F.3d at 666, where such application would "impinge[] on the Tribe's control over its own members and its own activities" *or* where *Montana* applies, *id.* at 667. Because tribal employees have a consensual commercial relationship with a Native nation, the panel held that employment falls under the *Montana* exception. *See id.* at 667–68. This reasoning is useful for understanding the scope of Native nations' authority to regulate non-Natives, but *Montana* and its progeny do not govern the applicability of *federal* laws to Native nations. *See* Wildenthal, *supra* note 40, at 131–34.

[102] *See* Limas, *Application*, *supra* note 70, at 709–10.

mention tribal government employers, and Congress has never elected to alter this silence.[103] The statute's applicability to tribal enterprises is ambiguous. Applying Cohen's canons, it should therefore be "construed in favor of the Indians" — that is, against regulation.[104]

Under traditional canons of statutory interpretation, the Act's ambiguity could be read as presumptively regulating Native nations. Section 2(2) of the NLRA explicitly exempts "the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof" from regulation.[105] These explicit exemptions could be — and have been — construed as foreclosing any *implicit* exemptions from section 2(2).[106] But section 2(2) has not always been construed narrowly. The original Act was silent with respect to territorial governments as well as to Native nations. But, as the *San Manuel* dissent pointed out, federal courts understand territorial governments to be exempt from regulation.[107] Sovereign employers were excluded from the NLRA at least in part in response to public sentiment that collective action against a public employer was "intolerable as a rejection of the sovereignty of the government."[108] It is this logic that allows courts to assume that territorial governments are exempt from the Act, and it applies with equal force to tribal sovereigns; indeed, this was precisely the logic the Board applied in *Fort Apache*.[109]

Moreover, the NLRA was promulgated at the "historical nadir of . . . American Indian political and economic power," when Congress's primary concern with respect to Native nations was *decreasing* federal oversight.[110] The legislative history of the NLRA makes no reference

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[103] *See* Wildenthal, *supra* note 10, at 445–47, 449–50 (discussing proposed amendments to the Indian Self-Determination Act of 1975). Congress *has* amended other statutes to explicitly address tribal employers. *See, e.g.*, Pension Protection Act of 2006, Pub. L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780, 1051 (codified at 29 U.S.C. § 1002(32)) (amending the Employee Retirement Income Security Act of 1974 to exempt insurance plans covering tribal employees acting in "essential governmental functions").

[104] COHEN, *supra* note 34, § 2.02.

[105] 29 U.S.C. § 152(2).

[106] *See* San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1058–59 (2004).

[107] *See id.* at 1070 & n.50 (Member Schaumber, dissenting) (first citing Chaparro-Febus v. Int'l Longshoremen Ass'n, Loc. 1575, 983 F.2d 325, 329–30 (1st Cir. 1993) (proceeding directly to the analysis of whether the defendant organization was a political subdivision of the Commonwealth of Puerto Rico without considering whether Puerto Rico itself was covered by the Act); and then citing V.I. Port Auth. v. SIU, 354 F. Supp. 312, 312–13 (D.V.I. 1973), *aff'd*, 494 F.2d 452 (3d Cir. 1974) (same with respect to the U.S. Virgin Islands)); *see also* Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 997–98 (9th Cir. 1997) (same with respect to the Northern Mariana Islands).

[108] R.W. Fleming, John A. Sibley Lecture, *Public Employee Unionism*, 9 GA. L. REV. 1, 2–3 (1974); *see also* NLRB v. Nat. Gas Util. Dist., 402 U.S. 600, 604 (1971).

[109] *See* Fort Apache Timber Co., 226 N.L.R.B. 503, 506 (1976).

[110] Stephen H. Greetham, *Tribes in "Unexpected Places": The NLRA, Tribal Economic Actors, and Common Law Expectations of Tribal Authenticity*, 38 AM. INDIAN Q. 427, 429 (2014); *see* McClatchey, *supra* note 101, at 148–50.

to Native nations or to tribal enterprises;[111] it was likely unimaginable to Congress that Native nations might become employers worthy of regulation.[112] This history, the statute's silence, and the absence of any legislative discussion of Native nations suggest that Congress did not intend for tribal governments to be "employers" under the Act.

The Supreme Court has required more before applying a general statute to Native nations.[113] And while the inconsistency of Board and court interpretations of the Act and the absence of congressional guidance could be read as pointing either *toward* or *against* reading section 2(2) as covering Native governments, this type of ambiguity is precisely what Cohen's canons are intended to resolve.[114] Applying the presumption in favor of Native interests, the Act's public-sector exception should be understood as excluding tribal enterprises from regulation.

C. Commercial Enterprise as Self-Government

Even assuming that tribal governments are covered under the plain language of the Act, it is a mistake to hold that regulating tribal businesses does not impinge on their sovereignty. It is under this logic that courts and the Board have held that "commercial" tribal enterprises do not fall under *Coeur d'Alene*'s exception for laws touching on "aspect[s] of tribal self-government."[115] This reasoning misunderstands the role of enterprise as a tool of self-government. The power to raise revenue is an "essential attribute" of sovereignty.[116] But many Native nations lack a stable tax base.[117] Enterprise is therefore a key source of revenue

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[111] *See* NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 1001 (9th Cir. 2003) (noting that "[t]here is no pertinent legislative history in the NLRA . . . to shed light" on whether Congress intended the NLRA to apply to Indian tribes).

[112] McClatchey, *supra* note 101, at 149–50; *cf.* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987) (reasoning that because "[t]ribal courts . . . were virtually unknown in 1789," it is unlikely that Congress intended its grant of diversity jurisdiction to limit tribal court jurisdiction).

[113] *See supra* section III.A, pp. 1170–72. Nothing in the NLRA's text or history indicates that Congress intended the Act to regulate Native nations, *see Chapa De*, 316 F.3d at 1001, much less demonstrates that Congress "actually considered" the effect of the Act on tribal self-government, United States v. Dion, 476 U.S. 734, 740 (1986).

[114] *Cf.* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) (noting that "in matters of Indian law," the *expressio unius* canon "must often be set aside").

[115] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116–17 (9th Cir. 1985); *see, e.g.*, San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1061–62 (2004).

[116] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

[117] *See* Matthew L.M. Fletcher, Keynote Address, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771–74 (2004). As states may impose taxes on non-Indian businesses operating within reservation boundaries, tribal governments may decline to impose taxes to avoid dual taxation. *See id.* at 771, 773. Many also decline to tax tribal members, believing that doing so would be impractical, politically difficult, and counter to the purpose of tribal government. *See id.* at 773–74. Tribal governments also may not tax property that is located on trust land or owned by non-Indians. *See* Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor?: The Case for Tribal Primacy in Taxation in Indian Country* 5 (Joint Occasional Papers on Native Affs., No. 2016-1, 2016), http://nni.

supporting many governmental functions.[118] The primary purpose of tribal enterprises in this context is not simply to accumulate wealth, but rather to build "social, cultural and economic welfare" within a community.[119]

Tribal enterprises are controlled by tribal governments, and their leadership is responsible to a constituent community.[120] In this way, tribal enterprises more closely resemble government subdivisions than private companies.[121] Many Native nations have established economic development corporations managed and run by elected tribal leadership, opting for a model of "collective capitalism" over individual entrepreneurship.[122] Nations have taken variations on this approach: in some, like the Mississippi Band of Choctaw Indians, tribal councils directly oversee investment and hiring decisions about business concerns, and the profits of those ventures are "reinvested or redistributed" in the community.[123] In others, a central business concern — for instance, the San Manuel Casino — is overseen by a business committee elected by tribal citizens.[124]

Intertwined business and government structures are not typical in federal and state governments, but they do exist. Many states generate revenue through lotteries that fund education and public services[125] — a parallel to gaming that the Supreme Court noted in *California v. Cabazon Band of Mission Indians*.[126] These initiatives are understood as legitimate exercises of state power[127] and are bound up in government operations. California's lottery, for instance, is overseen by a commission appointed by the governor with the advice and consent of the state

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arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf [https://perma.cc/7FSH-W449].

118 *See* Fletcher, *supra* note 117, at 775.

119 Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 53 (2002).

120 *Cf.* Duane Champagne, *Tribal Capitalism and Native Capitalists: Multiple Pathways of Native Economy*, *in* NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC DEVELOPMENT IN THE TWENTIETH CENTURY 308, 324–25 (Brian Hosmer & Colleen O'Neill eds., 2004).

121 *Cf.* NLRB v. Nat. Gas Util. Dist., 402 U.S. 600, 604–05 (1971) (defining a political subdivision as an entity "created directly by the state . . . or . . . administered by individuals who are responsible to public officials or to the general electorate").

122 Champagne, *supra* note 120, at 322.

123 *Id.* at 323.

124 *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

125 *See* McClatchey, *supra* note 101, at 183; Wildenthal, *supra* note 10, at 514–15.

126 480 U.S. 202, 210–11, 218–19 (1987).

127 *See* Reeves, Inc. v. Stake, 447 U.S. 429, 442 n.16 (1980) ("[A] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . ." (quoting New York v. United States, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting))).

senate;[128] this structure is not unlike that of the oversight of the San Manuel Casino. Adjudicators disserve tribal governments when they fail both to recognize these parallels and to understand the role that commercial enterprises play in supporting the essential functions of tribal government.[129]

Both Congress and the Supreme Court have recognized the interrelationship of self-government and gaming specifically. In *Cabazon*, the Court held that state attempts to regulate tribal gaming would "impermissibly infringe on tribal government."[130] IGRA codified *Cabazon* and explicitly linked the economic impact of gaming to sustainable self-government: under IGRA, tribal gaming revenues *must* be used to further the goals of tribal self-government.[131] And as a tool for economic development, gaming has worked. In the decade after IGRA's passage, per capita income on reservations with gaming facilities increased thirty-six percent.[132] Wild financial success has been the exception, not the rule.[133] But gaming has had a significant impact on some nations. At one point, profits from the Foxwoods Casino allowed the Mashantucket Pequot Tribal Nation to guarantee every citizen a home, a basic income, and a full education through graduate school.[134] The San Manuel Casino allowed the San Manuel Band to provide "full employment, complete medical coverage[,] . . . scholarships, improved housing, and significant infrastructure improvements to the reservation."[135] These examples illustrate that tribal enterprises are not private; they are bound up in the operation of government.

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[128] *The Lottery Commission*, CAL. LOTTERY, https://www.calottery.com/about-us/lottery-commission [https://perma.cc/MD34-69VY].

[129] *Cf.* San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1061 (2004) (stating that gaming can "hardly be described as 'vital' to the tribes' ability to govern themselves or as an 'essential attribute' of their sovereignty").

[130] *Cabazon*, 480 U.S. at 222.

[131] *See* 25 U.S.C. §§ 2701(4), 2710(b)(2)(B) ("[N]et revenues from any tribal gaming are not to be used for purposes other than — (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." *Id.* § 2710(b)(2)(B)).

[132] *See* JONATHAN B. TAYLOR & JOSEPH P. KALT, AMERICAN INDIANS ON RESERVATIONS: A DATABOOK OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES, at xi (2005), https://hpaied.org/sites/default/files/publications/AmericanIndianson ReservationsADatabookofSocioeconomicChange.pdf [https://perma.cc/33VM-JCLA].

[133] *See* Shane Plumer, *Turning Gaming Dollars into Non-gaming Revenue: Hedging for the Seventh Generation*, 34 SUA SPONTE: L. & INEQ. ONLINE 515, 515 (2016).

[134] Naomi Mezey, Note, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 725 (1996).

[135] San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

IV.

Disputes over the applicability of the NLRA to tribal enterprises engender what Jonathan Guss has called a "negative approach to sovereignty."[136] When unions invoke the NLRA, Native nations often respond by asserting their right to be free from the Act's regulation — and from unions generally.[137] This struggle orients both labor organizing and assertions of tribal sovereignty around jurisdictional disputes and away from the ultimate value at the heart of both: building power.[138] Tribal enterprises and unions are mechanisms for redistributing wealth and power to groups that have historically been denied both.[139] These goals can be superficially in conflict when tribal enterprises employ large numbers of non-Natives. But this overlapping ethos presents an opportunity for unions and Native nations to work together to create a world that is better for both.

A. Tribal Law as Alternative to Federal Law

Unions' fight to apply the NLRA to tribal enterprises rests on a false premise: that without federal law, tribal employees will lack any legal protections.[140] Like other sovereigns exempted from the NLRA, Native nations have the authority to promulgate labor regulations and an economic and sovereign interest in doing so.[141] Many tribal governments have developed comprehensive labor codes. The following examples provide some insight into how unions and Native nations can coexist and exhibit mutual respect — even, in some cases, allowing workers greater protection than is currently available under federal law.

The Navajo Nation provides a leading example of effective tribal-labor relations. In the 1990s, the Navajo Council promulgated a labor code that established collective bargaining rights for employees of the Navajo government and tribally owned corporations.[142] The Laborers' International Union of North America (LiUNA) subsequently campaigned to unionize the Navajo Area Indian Health Service

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136 Jonathan Guss, Comment, *Gaming Sovereignty? A Plea for Protecting Worker's Rights While Preserving Tribal Sovereignty*, 102 CALIF. L. REV. 1623, 1626 (2014) (emphasis omitted).

137 *See id.* at 1648–51.

138 *Cf.* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1422 (1993) (observing that Senator Robert Wagner described the battle for labor control as a battle for "sovereign power" (quoting 79 CONG. REC. 7565, 7566 (1935) (statement of Sen. Wagner))); Blackhawk, *supra* note 11, at 1863–64.

139 *See supra* section III.C, pp. 1174–76. *See generally* FREEMAN & MEDOFF, *supra* note 13, at 78–93 (arguing that unions tend to reduce income inequality).

140 *See, e.g.*, *Unions Target Organizing Employees*, *supra* note 1 (quoting a union leader describing tribal employees as existing in a "legal no-man's land").

141 *See* KAMPER, *supra* note 5, at 73.

142 *See id.* at 86.

(IHS).[143] The IHS — unlike many tribal enterprises — employs a majority Native workforce.[144] The union therefore served as a tool for both improving workplace conditions and amplifying the political will of tribal citizens.[145] Union organizers found that Navajo law presented some advantages over federal law: Unlike federal law, the Navajo code mandates employer neutrality, thus prohibiting employers from engaging in anti-union campaigns.[146] Navajo law also provides for card-check recognition, whereby a union is automatically recognized if more than fifty-five percent of workers express support by signing union cards.[147] Ultimately, the IHS campaign yielded a collective bargaining agreement without Board or court involvement.[148]

The Mashantucket Pequot Tribal Nation provides a contrasting example.[149] In 2007, the United Auto Workers (UAW) won an NLRB-administered election among majority non-Native dealers at Foxwoods Casino.[150] Earlier that year, in response to both the UAW campaign and the *San Manuel* decisions, the Tribe, which owns Foxwoods, had promulgated a labor code that was largely hostile to unions.[151] Following the election, the Tribe unsuccessfully challenged the NLRB's jurisdiction;[152] in parallel, the Tribe and union negotiated. Following this negotiation, the Tribe's labor ordinance was amended both to allow union security agreements for contracts negotiated under tribal law and to establish a

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[143] *See id.* at 101. LiUNA had represented employees of the Navajo Area IHS when it was managed by the federal government. *See id.* at 105. The 2001 campaign arose out of a decision to transfer management of the health service to the Navajo Native Council. *See id.* at 104.

[144] *See id.* at 101; *see also id.* at 136–39 (discussing the ways in which a primarily Native workforce complicates, rather than simplifies, tribal labor relations).

[145] *See id.* at 102.

[146] *See id.* at 143–47.

[147] *See id.* at 86–87. Card-check is faster and less cumbersome than the election process established under federal law — a process employers frequently exploit to undermine organizing efforts. *See* SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 52 (2020), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5a8f2a8064_CleanSlate_Report_FORWEB.pdf [https://perma.cc/2DYS-XXKM].

[148] *See* Kamper, *supra* note 26, at 34–35.

[149] The Mashantucket Pequot Tribal Nation operates Foxwoods, one of the largest resort casinos in North America. *See About Us*, FOXWOODS RESORT CASINO, https://www.foxwoods.com/about/about-us [https://perma.cc/MVS6-S2JK]. For a detailed account of the union campaign discussed here, see Derek Ghan, *Federal Labor Law and the Mashantucket Pequot: Union Organizing at Foxwoods Casino*, 37 AM. INDIAN L. REV. 515 (2012).

[150] KAMPER, *supra* note 5, at 203; *see* Harriet Jones, *UAW Brokers First Union Contract Under Tribal Law*, NPR (Mar. 14, 2010, 12:01 AM), https://www.npr.org/templates/story/story.php?storyId=124625523 [https://perma.cc/MV32-DHJW].

[151] *See* Ghan, *supra* note 149, at 530–31.

[152] *See id.* at 535–36.

neutral third-party dispute resolution procedure.[153] The ordinance retained its no-strike provision.[154] The result was a legal framework resembling many public-sector collective bargaining laws, without injuring Mashantucket Pequot sovereignty.[155] At least three unions have since organized under Mashantucket Pequot law.[156]

California's IGRA compacting process has created a third example of how Native nations may regulate tribal labor relations. Many Native nations in California have adopted tribal labor relations ordinances (TLROs) as a condition of their gaming compacts negotiated with the state.[157] TLROs promulgated in response to compacting provide an interesting model of what Professor David Kamper calls "interdependent self-determination,"[158] as compacting requires unions and Native governments to work together to build a labor-relations framework that is rooted in Native sovereign power. In some cases, the resulting ordinances are more friendly to labor than many state labor laws. Although the model California TLRO prohibits most strikes, it allows them when collective bargaining has reached an impasse.[159] In these cases, the TLRO also permits secondary boycotting — thus offering protection beyond that offered by the NLRA.[160] The San Manuel ordinance authorizes unions to negotiate subjects beyond the "terms and conditions of employment,"[161] and the Tribe's gaming compact prohibited discrimination on the basis of sexual orientation before federal law did.[162] California's TLROs have been criticized by champions of sovereignty.[163]

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153 *See id.* at 536–37, 537 n.160.

154 *See id.* at 537.

155 *See id.*; Jones, *supra* note 150.

156 *See Mashantucket Tribe Oversees Another Union Election for Casino Workers*, INDIANZ.COM (Apr. 5, 2018), https://www.indianz.com/IndianGaming/2018/04/05/mashantucket-tribe-oversees-another-unio.asp [https://perma.cc/5RR4-3UWG].

157 *See* KAMPER, *supra* note 5, at 79.

158 *Id.*

159 Model Tribal Labor Relations Ordinance §§ 6(2), 11 (Sept. 14, 1999) [hereinafter Model TLRO], https://www.tasin.org/home/showdocument?id=8 [https://perma.cc/43RE-CFPB].

160 *Compare id.*, *with* 29 U.S.C. § 158(b)(4).

161 *See* Wermuth, *supra* note 70, at 104–05; *cf.* 29 U.S.C. § 158(d) (limiting employers' obligation to bargain in good faith to "wages, hours, and other terms and conditions of employment").

162 *See* Tribal-State Compact Between the State of California and the San Manuel Band of Mission Indians § 12.3(f), http://www.cgcc.ca.gov/documents/compacts/amended_compacts/San_Manuel_Compact_2016.pdf [https://perma.cc/5UD4-ZZWJ].

163 *See* KAMPER, *supra* note 5, at 79–80. Because the ordinances are imposed by the state as a condition of gaming, some commentators view them as undermining one of the core functions of self-government — legislation. *See id.*; Guss, *supra* note 136, at 1635–36. TLROs adopted through compacting are frequently identical to one another, inviting criticism that they reflect California state policy, not the interests of the promulgating nations. *See* Guss, *supra* note 136, at 1634–36; *see also* Model TLRO, *supra* note 159. This criticism is a reminder that the power-building potential of collaborative lawmaking depends on the exercise of power by Native nations; states imposing regulation under the auspices of government-to-government contracting does not bolster sovereignty.

But the underlying principle of encouraging the promulgation of tribal labor law through the compacting process presents a promising model of interdependent self-determination.

As the California and Mashantucket Pequot examples illustrate, many tribal labor codes are promulgated in response to ongoing union organizing. As a result, these codes, unlike state and federal laws, arise out of both explicit and implicit negotiations over jurisdiction, sovereignty, and worker power. This context provides an opportunity for worker advocates and tribal governments to engage in collaborative lawmaking, moving away from the "negative" approach identified by Guss and toward a positive, interdependent approach to power-building that better serves both workers and sovereignty.[164] Against the backdrop of a legal landscape that is hostile to tribal jurisdiction over labor relations, unions may voluntarily recognize a tribal government's authority to gain bargaining power in tribal enterprises.[165] On the other hand, if, as this Note argues, tribal enterprises are not employers under the NLRA, the absence of federal law allows Native nations to build systems that better support workers.

Scholars have argued that the NLRA is inadequate to protect efforts to build worker power.[166] Professors Sharon Block and Benjamin Sachs have called for a "clean slate" for labor law.[167] Tribal labor regulation presents just such a clean slate. Several of the Clean Slate proposals have already been implemented in tribal labor codes, including improved organizer access to workers,[168] card-check recognition,[169] and an expanded range of bargaining subjects.[170] The resolution of labor disputes under tribal jurisdiction also benefits from small dockets and culturally specific alternative dispute resolution mechanisms.[171]

Federal labor law's inadequacy as a tool for building worker power therefore grants Native governments their own positive leverage — not the implicit threat that accompanies the lack of NLRB jurisdiction, but the promise of a better alternative. It is this promise of a better alternative that Professor Scott Lyons had in mind when, shortly after *San Manuel*, he called on Native nations to "head [the Board] off at the pass and develop even stronger labor laws and worker protections — that is,

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164 *Cf.* Guss, *supra* note 136, at 1661–66 (characterizing stronger labor and employment protections as positive assertions of tribal sovereignty).

165 *Cf.* Ghan, *supra* note 149, at 542–47 (discussing the negative corollary to this approach, wherein unions leverage the threat of Board jurisdiction to strengthen their bargaining power).

166 *See, e.g.*, ESTLUND, *supra* note 12, at 30–31.

167 BLOCK & SACHS, *supra* note 147, at 20.

168 *See id.* at 50; Model TLRO, *supra* note 159, § 8(a).

169 *See* BLOCK & SACHS, *supra* note 147, at 52; KAMPER, *supra* note 5, at 86–87.

170 *See* BLOCK & SACHS, *supra* note 147, at 66; Wermuth, *supra* note 70, at 104–05.

171 *See* Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 499–500.

stronger unions — than what the Americans currently enjoy. Make Indian enterprises the envy of workers everywhere."[172]

B. Reinforcing Sovereignty as an Act of Solidarity

Realizing Professor Lyons's vision requires cooperation from both Native nations and labor activists. Outside of the United States, some unions and indigenous groups have come together as allies in combating the harms of capitalism and settler colonialism, recognizing the shared mission of unions and indigenous communities as power-building institutions.[173] Solidarity is the core value of the labor movement; a motivating sentiment of organized labor is the conviction that "[a]n injury to one is an injury to all."[174]

This value is not always reflected in American unions' relationships to Native nations. Using language that echoes countless employer reactions to union campaigns,[175] the AFL-CIO has stated that it supports "the principle of sovereignty" for Native nations while advocating for the United States government to assert control over tribal-labor relations.[176] Twenty-first-century American unions have positioned themselves as tools for combating racist power structures.[177] Yet even as Native income per capita is less than half of the national average,[178] unions have exploited fears of "rich Indians" to garner support from

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[172] Scott Lyons, *Unionization in Indian Country Can Be an Act of Sovereignty*, INDIAN COUNTRY TODAY (Oneida, N.Y.), July 14, 2004, at A5.

[173] *See* Stéphane Le Queux, *Labour and the Kanak People's Struggle for Sovereignty*, 25 J. INT'L CTR. FOR TRADE UNION RTS., no. 4, 2018, at 10, 12 (translating the slogan of a trade union in the French colony of New Caledonia as "Factories, Tribes, Same Struggle").

[174] *See, e.g.*, Dennis Williams, *From the President: Understanding Our Union's Core Values*, SOLIDARITY MAG. (June 16, 2017), https://uaw.org/solidarity_magazine/president-understanding-unions-core-values [https://perma.cc/3MBW-57WA].

[175] *See, e.g.*, Karen Baynes-Dunning, *SPLC Response to Union Petition*, S. POVERTY L. CTR. (Nov. 19, 2019), https://www.splcenter.org/news/2019/11/19/splc-response-union-petition [https://perma.cc/9FS8-WU8X] (proclaiming "support for unions" while declining to recognize a staff union).

[176] William Samuel, *Letter Opposing a Bill that Would Deprive Workers Employed by Tribal-Owned and -Operated Enterprises Their Rights and Protections Under the NLRA*, AFL-CIO (Apr. 13, 2018), https://aflcio.org/about/advocacy/legislative-alerts/letter-opposing-bill-would-deprive-workers-employed-tribal-owned [https://perma.cc/H9JX-JHN9].

[177] *See, e.g.*, Williams, *supra* note 174 (identifying a core value of the UAW as "[F]ight[ing] for Everyone; Not Just Ourselves" and touting the union's role in advocating antiracist causes); Shwanika Narayan & Roland Li, *Port of Oakland Shut Down by Dockworkers in Observation of Juneteenth*, S.F. CHRON. (June 19, 2020, 3:09 PM), https://www.sfchronicle.com/business/article/Port-of-Oakland-shut-down-by-dockworkers-in-15352644.php [https://perma.cc/7S4P-3ZPM].

[178] RANDALL K.Q. AKEE & JONATHAN B. TAYLOR, SOCIAL AND ECONOMIC CHANGE ON AMERICAN INDIAN RESERVATIONS: A DATABOOK OF THE US CENSUSES AND THE AMERICAN COMMUNITY SURVEY 1990 – 2010, at 16 (2014), https://static1.squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDatabook2014-05-15.pdf [https://perma.cc/LS34-5JZ5].

non-Native workers.[179] And unions, through litigation, have encouraged and benefited from courts' racist preconceptions of "Indianness" in setting the boundaries of acceptable exercises of sovereign power.[180]

It does not serve the mission of the labor movement to benefit from these wrongs. As union leaders and labor activists fight for a world in which power is redistributed away from the hands of the few, solidarity requires that those efforts be situated within the broader context of genocide, systematic dispossession, and the destruction of Native sovereignty. When unions approach organizing in the tribal context as a fight over NLRB jurisdiction, they seek to build worker power at the expense of Native self-determination. But power-building is not a zero-sum game. By centering tribal organizing on disputes over Board jurisdiction rather than turning to tribal labor law as a first choice, unions miss the opportunity to engage collaboratively with Native nations to build institutions that better serve both.

CONCLUSION

Union organizing under tribal law is not without complications. First, courts have held that the NLRA has a broad preemptive effect, granting the Board exclusive jurisdiction over matters "arguably" within the protections of the Act.[181] It is unclear how this doctrine relates to the promulgation of tribal labor ordinances, especially if tribal enterprises are not considered sovereign entities in the eyes of federal law. This question is only lightly addressed in the literature and in the federal courts[182] and is the subject of future research.

Second, the prospect of relying on tribal adjudication has caused some labor leaders concern. While the interrelationship of tribal enterprises and tribal government is precisely what makes NLRB jurisdiction inappropriate, it also raises the specter of partiality and muddied motivations in administrative and judicial proceedings.[183] Native nations are diverse and do not reflect any one mode of governance.[184] But tribal

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[179] *See, e.g.*, Ghan, *supra* note 149, at 541–42.

[180] *See, e.g.*, Response of Intervenor Unite Here! International Union to Petitioners' Petition for Rehearing or Rehearing *En Banc* at 5–11, San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007) (No. 05-1392) ("Sovereignty is not the broad concept the Band espouses. It is about the maintenance of the key elements of culture." *Id.* at 6.); *see also* Limas, Tuscar*organization*, *supra* note 70, at 476–79, 477 n.50 (detailing the ways in which courts' distinction between "commercial" and "governmental" activities builds on and reinforces racist conceptions of sovereignty).

[181] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

[182] *See* Limas, Tuscar*organization*, *supra* note 70, at 481–82; *see also* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002) (en banc); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 549–50 (6th Cir. 2015).

[183] *See* Singel, *supra* note 171, at 498.

[184] *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1080–81 (2007).

adjudicators are no less likely to be impartial than are state adjudicators considering disputes involving state employees. Professor Wenona Singel has even suggested that "[t]ribal councils are more likely [than federal tribunals] to be sympathetic to labor interests," as tribal adjudicators are more likely to come from working class backgrounds.[185] Finally, unions and tribal governments may contract around this concern through bargaining: the UAW 2121 contract, for instance, provides for the resolution of labor disputes through a neutral panel of arbitrators who defer to the Mashantucket Pequot Tribal Council only on matters of interpreting Mashantucket Pequot law.[186]

Even worker advocates who are critical of the NLRA may feel anxious about departing into the unknown of tribal labor law; the NLRA is flawed, but it is at least a devil that unions know. Native nations are diverse and will continue to take myriad approaches to promulgating labor laws; some approaches will undoubtedly be restrictive.[187] This is the inevitable result whenever subnational entities are permitted to function as "laboratories of democracy"[188] and is equally true when states and cities legislate — yet this variability has not stopped worker advocates from calling for the regulation of labor through those more localized political entities.[189] If this approach is acceptable when it comes to states and cities, it is acceptable when it comes to tribes.

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As a matter of federal Indian law, NLRB jurisdiction over tribal enterprises sits on unstable foundations. As a matter of labor policy, approaching tribal union organizing through an NLRA-centric lens undermines both Native sovereignty and the values of the labor movement itself. Labor organizers and activists should reject this framework, and instead seek to build worker power while respecting Native sovereignty by organizing and bargaining within the parameters of tribal law.

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185 Singel, *supra* note 171, at 499; *cf.* Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 3–4 (1997) (describing "special strengths of the tribal courts," *id.* at 3).

186 *See* Ghan, *supra* note 149, at 537 & n.165; *see also* KAMPER, *supra* note 5, at 87 (listing third-party arbitration as one of the collective bargaining rights guaranteed under Navajo law).

187 *See, e.g.*, Gale Courey Toensing, *Saginaw Chippewa Fights Federal Unions with Ban, Education*, INDIAN COUNTRY TODAY (Oneida, N.Y.), Mar. 12, 2008.

188 *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

189 *See, e.g.*, Moshe Z. Marvit, *The Way Forward for Labor Is Through the States*, AM. PROSPECT (Sept. 1, 2017), https://prospect.org/labor/way-forward-labor-states [https://perma.cc/8RAG-4ZMM].