

THE *TUSCARORA* ORGANIZATION OF THE TRIBAL WORKFORCE

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INTRODUCTION¹

Despite the “government-to-government”² rhetoric of the United States when describing its relationship to American Indian nations,³ economic self-sufficiency has paradoxically eroded Indian nations’ status as sovereign governments. In a number of areas, but in employment particularly, the U.S.–Indian relationship has reverted to past stereotypes, paternalism, and assimilationism.⁴ Two views influence this regression: that “commercial,” or “non-traditional,” tribal economic development activities have “little to do with tribal self-government;”⁵ and that Indian nations’ commer-

1. This Essay derives from my participation on the panel “Labor and Employment Laws in Indian Country,” sponsored by the Section on Indian Nations and Indigenous Peoples at the Association of American Law Schools 2008 Annual Meeting. The other panelists, Kaighn Smith, Jr., Wenona T. Singel, and Bryan H. Wildenthal, have all contributed greatly to the scholarly dialogue engendered by the recent National Labor Relations Board and D.C. Circuit decisions applying the National Labor Relations Act to the tribal casino operations of the San Manuel Band of Serrano Mission Indians and others. Mr. Smith, a longtime practitioner of federal Indian law, participated on the amici brief of the Indian Tribes and Tribal Organizations before the D.C. Circuit. Professor Singel published a criticism of the Board decision shortly after its release. See Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004). Professor Wildenthal recently published a meticulous and comprehensive analysis exposing the faulty reasoning in both decisions, as well as that of the underlying authority used in each. See Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007). The purpose of this Article is not to re-examine the legal analyses of the decisions but to highlight the difficulties they present for Indian nations in the management of their employment relations. I refer the reader to Professor Wildenthal’s analysis throughout.

2. All three branches of the U.S. Government have used this term to describe U.S.–Indian relations. See, e.g., Indian Tribal Justice Act, 25 U.S.C. § 3601 (2000); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 458aaa-3, 458aaa-4 (2000); Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. § 4301 (2000); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994); U.S. Dep’t of Justice, Office of Tribal Justice, FAQs about Native Americans, <http://www.usdoj.gov/otj/nafaqs.htm#otj26> (last visited Apr. 14, 2008).

3. The terms “Indian nations” and “Indian tribes” shall be used interchangeably. Both denote American Indian groups’ status as distinct political entities.

4. Kaighn Smith observed in his presentation that “we are in a new assimilationist era,” and pointed out that courts are forcing Indian nations to assimilate their economies. Kaighn Smith, Jr., Remarks at Association of American Law Schools Annual Meeting (Jan. 5, 2008) (author’s notes). See also Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1124-25 (2005); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 846-48 (2007); Wildenthal, *supra* note 1, at 529.

5. Berger, *supra* note 4, at 1050. Although Professor Berger writes in the context of Indian nations’ treatment of nonmembers in tribal courts, the same issues arise with respect to tribal employment of nonmembers.

cial interactions with non-tribal members, usually non-Indians, in the course of tribal economic development activities require federal oversight. Thus, when non-Indians happen to be employed in “commercial” tribal activities that fund and support Indian nations’ political, social, cultural, and economic infrastructures—their very nationhood—Indian nations are deemed not to be acting as governments, but rather as private actors. A third contributing view is that prosperous Indians cannot be “real” Indians as they do not comport with the non-Indian population’s stereotypical images and beliefs about Indians,⁶ implicitly justifying their treatment as private actors rather than sovereign governments. These views are illustrated by the trend beginning in the 1980s toward applying federal labor and employment laws to the economic development activities of Indian nations, which ironically coincides with tribal economic initiatives toward self-sufficiency and self-determination pursuant to federal laws such as the Indian Self-Determination and Education Assistance Act (ISDEA)⁷ and the Indian Gaming Regulatory Act (IGRA).⁸

The latest development in this trend is the assumption of jurisdiction by the National Labor Relations Board (NLRB or “Board”) over union organizing activities at tribal workplaces, particularly casinos,⁹ and challenges to tribal labor laws. Last year in *San Manuel Indian Bingo & Casino v. NLRB*, the D.C. Circuit upheld an NLRB order applying the National Labor Relations Act (NLRA)¹⁰ to the San Manuel Band’s casino operation.¹¹ Although the court affirmed the Board’s determination that Indian nations are covered employers under the NLRA and the resulting assertion of jurisdiction over the casino workplace, the court’s holding focused on the Board’s assertion of jurisdiction over the casino operation.¹² It did not comment on

6. See Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 328 (2006).

7. 25 U.S.C. § 450 (2000).

8. *Id.* §§ 2701-2721.

9. For example, the NLRB recently directed elections in *Foxwoods Resort Casino*, Case No. 34-RC-2230 (Oct. 24, 2007), http://www.nlr.gov/shared_files/Regional%20Decisions/2007/34-RC-2230%2010-24-07.pdf; and *Soaring Eagle Casino and Resort*, Case No. GR-7-RC-23147 (Nov. 20, 2007), http://www.nlr.gov/shared_files/regional%20Decisions/2007/7-RC-23147%2011-20-07.pdf. See Wildenthal, *supra* note 1, at 423-31, for a brief history of the San Manuel tribe and its casino.

10. 29 U.S.C. §§ 151-187. The NLRA governs labor-management relations and collective bargaining in the private sector and protects the right of employees to engage in concerted activity for “mutual aid or protection.” *Id.* § 151. The latter protection extends to non-unionized employees as well as those who are represented.

11. *San Manuel Indian Bingo & Casino v. NLRB.*, 475 F.3d 1306 (D.C. Cir. 2007). The Board decision had departed from thirty-year-old precedent under which it had treated Indian nations as governmental entities.

12. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004).

the more far-reaching aspect of the Board's decision, which is how and when the Board will decide to exercise its discretionary jurisdiction over *any* tribal employment activity. Essentially the Board bifurcated tribal employment into two categories—"commercial" and "traditionally tribal or governmental"—for the purpose of determining whether the NLRA would govern the relationship, without defining the contours of either category.¹³ As a result, these categories will be defined by federal courts or administrative bodies such as the NLRB.

This Essay will explore the detrimental effects of federal regulation on tribal employment. Unlike private sector employers, Indian nations rely on revenue from their business activities to fund their governments and government services, because unlike federal, state, and local governments, Indian nations cannot rely on tax revenue for such funding.¹⁴ Application of federal labor and employment laws such as the NLRA to Indian nations' business activities diminishes their sovereignty by substantially interfering with their ability to manage and control their economic development. If they become subject to federal regulation, Indian nations' regulatory and adjudicatory authority over employment relationships will be significantly curtailed. Not only will they be subject to federal laws in addition to their own laws governing employment, some federal laws may preempt tribal laws or preclude traditional remedies. Most employment disputes will be resolved in federal, rather than tribal, courts and may be subject to a wide range of federal statutory remedies.

As the *San Manuel* Board decision demonstrates, not all tribal employment activities may be subject to federal laws, so Indian nations must proceed with uncertainty, as courts have not clearly articulated conditions that will trigger federal regulation;¹⁵ different managerial schemes and policies may be needed for different types of employment, but it would not be clear where the differences lie. Threshold issues of coverage would therefore be decided by courts or agencies. In addition, tribal treasuries will be subject to additional recordkeeping and administrative costs, legal fees, and damage awards. Employment and training opportunities for citizens, such as those provided by tribal employment rights ordinances, may be curtailed or bargained away. Wide-ranging federal regulation is not conducive to a climate of economic development and self-sufficiency for the vast majority of Indian nations that do not benefit from lucrative casinos for their livelihoods.¹⁶

13. *Id.* at 1062.

14. See generally Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

15. *San Manuel*, 341 N.L.R.B. at 1063.

16. In 2006, eighty-four percent of all Indian gaming revenue came from twenty-eight percent of the total number of gaming operations (a number of Indian nations own

I. REGULATION OF TRIBAL EMPLOYMENT AS AN ATTRIBUTE OF SOVEREIGNTY UNDER *MONTANA*

The U.S. Supreme Court has long acknowledged Indian nations' inherent regulatory and adjudicatory authority over matters pertaining to tribal economic activity and commercial relations, even when non-Indians are involved. It cited two examples of this authority in *Montana v. United States*:¹⁷

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members *who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements*. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.¹⁸

Employment is a consensual contractual relationship.¹⁹ Most Indian nations cannot staff their workforces solely with tribal members, so non-members, including non-Indians, will certainly be parties to most tribal employment relationships. Persons who enter into an employment relationship with an Indian nation have voluntarily placed themselves under that nation's authority to regulate the relationship, just like a citizen of one state who takes a job working for another state. Under *Montana*, an Indian nation may regulate its employment activities as it deems appropriate for its political, economic, cultural, and social welfare. Likewise, the Indian nation may adjudicate employment and other disputes arising through the consensual employment relationship in a manner that promotes and preserves the economic security and the welfare of its nation and citizens. Fundamentally, rights and obligations arising from the employment relationship, including defense of lawsuits or other types of disputes, directly affect the economic security and welfare of the nation. Like any sovereign, Indian nations must be able to control the circumstances under which they may be liable, as well as the extent of their liability. These points were recognized by Board Member Peter Schaumber, who dissented from the Board's decision in *San Manuel*:

multiple gaming operations). NAT'L INDIAN GAMING COMM'N, NIGC ANNOUNCES 2006 INDIAN GAMING REVENUES, PR-63-07-2007 (June 4, 2007), *available at* <http://www.nigc.gov/ReadingRoom/PressReleases//PR63062007/PR63072007/tabid/784/Default.aspx>.

17. 450 U.S. 544 (1981) (holding that Crow Tribe did not have regulatory jurisdiction over hunting and fishing by non-Indians on reservation fee land).

18. *Id.* at 565-66 (internal citations omitted) (emphasis added).

19. *MacArthur v. San Juan County*, 497 F.3d 1057, 1072-73 (10th Cir. 2007).

The fact that a tribe may, as here, employ some nonmembers in the conduct of its business no more negates the scope of its sovereignty than the fact that a State government employs nonresidents. Tribes cannot reasonably be expected to look only to their members for all of the skills and expertise necessary to carry out their activities. A tribe's ability to establish and control the terms and conditions of employment for its member and nonmember employees is an essential aspect of self-government that clearly "has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."²⁰

Within the federal courts, only the Tenth Circuit recognizes that regulation of economic activity, including employment activity, is an attribute of sovereignty. It utilizes this correct premise for the analysis of whether federal labor and employment laws apply to the tribal workforce: that Indian nations, as *governments*, engage in economic activity, including employment activity, *and regulate that activity* in order to fund their governments and ensure their national welfare and self-sufficiency, as well as that of their citizens. In *NLRB v. Pueblo of San Juan*,²¹ in which the court upheld a tribal right-to-work law,²² it stated that "tribes retain sovereign authority to regulate economic activity within their own territory."²³ Recently, the Tenth Circuit again applied the premise that regulation of tribal employment activity is an exercise of sovereignty in *MacArthur v. San Juan County*.²⁴ It found that an employment relationship between a nonmember and a tribal member within the boundaries of a reservation falls within the "consensual relationship" exception in *Montana*.²⁵ By extension, an employment relationship between a nonmember and the tribe itself would certainly fall within the consensual relationship exception.

II. FEDERAL REGULATION OF TRIBAL EMPLOYMENT AS PRIVATE COMMERCIAL ACTIVITY UNDER *TUSCARORA-COEUR D'ALENE*

As shown below, however, most courts have refused to view tribal employment in this way and have treated Indian nations' economic development activities like private sector business activities. Behind decisions holding that Indian nations are covered by federal labor and employment laws lies an obscure Supreme Court case from 1960. In *Federal Power Commission v. Tuscarora Indian Nation*,²⁶ the Court made the unprece-

20. *San Manuel*, 341 N.L.R.B. at 1067 (Member Schaumber, dissenting) (quoting *Montana*, 450 U.S. at 566) (citations omitted).

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

22. *Id.* at 1200.

23. *Id.* at 1192-93.

24. 497 F.3d 1057 (10th Cir. 2007).

25. *Id.* at 1072.

26. 362 U.S. 99 (1960). *Tuscarora* had nothing to do with employment; it involved whether land held in fee simple by the Tuscarora Nation could be condemned under the Federal Power Act, 16 U.S.C. §§ 791(a)-823(b) (2000).

mented statement that “a general statute in terms applying to all persons includes Indians and their property interests.”²⁷ Therefore, when employees or federal agencies began to file lawsuits or charges against Indian nations alleging violations of general federal labor and employment statutes, they cited this so-called “*Tuscarora* rule.” However, because these statutes said nothing about Indians at all, Indian nations responded that under longstanding federal Indian law canons of statutory construction,²⁸ these general statutes did not apply to them because of their sovereign status.

In an attempt to reconcile this conflict, the Ninth Circuit developed three exceptions to the “*Tuscarora* rule” in *Donovan v. Coeur d’Alene Tribal Farm*,²⁹ in which that court held that the Occupational Safety and Health Act (OSHA)³⁰ applied to a tribal agricultural business.³¹ The *Tuscarora* rule will not apply if:

- (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.”³²

The *Tuscarora-Coeur d’Alene* analysis has been widely followed in cases involving a variety of federal labor and employment laws in addition to OSHA, including the Age Discrimination in Employment Act (ADEA)³³ and the Employee Retirement Income Security Act (ERISA).³⁴ Generally, courts considered the first and third exceptions, which almost always resulted in the application of the law to the tribal employment activity in question when the activity involved transactions in interstate commerce and when non-Indians were involved.³⁵ This is because *Coeur d’Alene* very

27. *Tuscarora*, 362 U.S. at 116. Many commentators have criticized *Tuscarora*, most recently Professor Wildenthal, who calls it “one of the most reviled decisions in modern Indian law.” Wildenthal, *supra* note 1, at 422. See also San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1071 n.62 (2004), for a summary of criticisms.

28. See Wildenthal, *supra* note 1, at 431-45 for a discussion of the canons. Briefly, they are as follows: “(1) ambiguities in a federal statute must be resolved in favor of Indians and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.” *Id.* at 17 (quoting *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007)).

29. 751 F.2d 1113 (9th Cir. 1985).

30. 29 U.S.C. §§ 651-678.

31. *Coeur d’Alene*, 751 F.2d at 1114; accord *Reich v. Mashantucket Pequot Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (stating that OSHA applies to tribal construction company performing work on casino that employs nonmembers); *U.S. Dep’t Labor v. O.S.H.A.*, 935 F.2d 182 (9th Cir. 1991) (stating OSHA applies to lumber mill on reservation that sold lumber in interstate commerce, and half of employees were nonmembers).

32. *Coeur d’Alene*, 751 F.2d at 1116.

33. 29 U.S.C. §§ 621-634 (2000).

34. *Id.* §§ 1001-1461.

35. See, e.g., *Cano v. Cocopah Casino*, No. CV-06-2120-PHX-JAT, 2007 U.S. Dist. LEXIS 54377, at *9-10 (D. Ariz. July 24, 2007) (ADEA applies to tribally-owned casino that

narrowly defined the first exception by confining “intramural matters” to “conditions of tribal membership, inheritance rules, and domestic relations.”³⁶ The third exception turned the canons on their head by starting from the assumption that Congress intended the statute to apply and requiring the Indian nation to prove otherwise, rather than assuming that the statute does not apply and requiring proof that Congress intended it to apply.

III. FEDERAL REGULATION OF TRIBAL EMPLOYMENT DEPENDENT ON WHETHER “COMMERCIAL” OR “GOVERNMENTAL/TRADITIONALLY TRIBAL” UNDER *SAN MANUEL* DECISIONS

In *San Manuel*, the Board determined that Indian nations are “employers” within the meaning of the NLRA and are therefore subject to its authority.³⁷ It applied the *Tuscarora-Coeur d’Alene* analysis and determined that application of the NLRA to the San Manuel’s casino employment activities did not fall within any of the exceptions. It then determined that tribal employment is of two basic types and that it would exercise its discretionary jurisdiction depending upon which type of employment was at issue, a determination it would make on a case-by-case basis.³⁸ The Board acknowledged that a case-by-case determination would lack predictability but was satisfied that “the process of litigation will mark the contours in due time.”³⁹

On the one hand, the Board explained that it would assert jurisdiction over “commercial businesses”:

As tribal businesses prosper, they become significant employers of non-Indians and serious competitors with non-Indian owned businesses. When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way.

When the Indian tribes act in this manner, the special attributes of their sovereignty are not implicated. Running a commercial business is not an expression of sovereignty in the same way that running a tribal court system is.⁴⁰

On the other hand, it would decline to assert jurisdiction when the employment activity is “traditionally tribal” or “governmental”:

employs both members and nonmembers); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685-86 (9th Cir. 1991) (ERISA applies in both because no interference with self-government).

36. *Coeur d’Alene*, 751 F.2d at 1116.

37. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1059 (2004). See *infra* notes 69-73 and accompanying text.

38. *San Manuel*, 341 N.L.R.B. at 1063.

39. *Id.*

40. *Id.* at 1062.

At times, the tribes continue to act in a manner consistent with that mantle of uniqueness. They do so primarily when they are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes. These functions are often performed on the tribes' reservations. Such traditionally tribal or governmental functions, so located, are less likely than commercial enterprises to involve non-Indians and to substantially affect interstate commerce. . . . Thus, when the Indian tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy. In such circumstances, the Board should afford the tribes more leeway in determining how they conduct their affairs. . . .⁴¹

The Board illustrated the difference between the two types of tribal employment in a supplemental decision, *Yukon Kuskokwim Health Corp.*, which involved organizing efforts at a non-profit hospital funded by the U.S. Government and run by a board elected by members of fifty-eight Alaskan tribes.⁴² The Board determined that although the hospital was not exempt from the NLRA, it would not exercise jurisdiction because the hospital was performing a "unique governmental function" by carrying out the federal government's obligation to provide free health care to Indians.⁴³ The Board weighed the following factors: ninety-five percent of patients were Native Alaskans; although the hospital operated in interstate commerce, it was not competing with other hospitals; it was not located on Indian land, but there are no reservations in Alaska; and although the majority of hospital employees were non-Native, "the makeup of the workforce is likely to change" because a purpose of the federal statutes under which the hospital operated was to increase Native employment.⁴⁴

In affirming the Board's decision in *San Manuel*, the D.C. Circuit focused its discussion on the application of the NLRA to the casino operation and further parsed "governmental function."⁴⁵ The court acknowledged that "it can be argued that 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."⁴⁶ But it took a very narrow view of "governmental" as referring to "traditional acts governments perform," as

41. *Id.* at 1063.

42. *Id.* at 1075.

43. *Id.* at 1076-77.

44. *Id.* at 1076-77. The Board's treatment of the non-Native employee factor is curious because a purpose of other federal statutes promoting Indian economic development activities such as ISDEA is to increase Native employment. *See, e.g.*, 25 U.S.C. § 450e(b)(2) (2000).

45. Although the D.C. Circuit took pains to distinguish its analysis from that of *Tuscarora-Coeur d'Alene*, its analysis actually mirrored the *Tuscarora-Coeur d'Alene* analysis by limiting the applicability of the canons to statutes involving Indians and by limiting the scope of tribal sovereign acts. *See Wildenthal, supra* note 1, at 485-86, 489.

46. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1313 (D.C. Cir. 2007).

opposed to “collateral activities that, though perhaps in some way related to [traditional government acts], lie outside their scope.”⁴⁷

IV. UNCERTAINTY CREATED BY DUAL EMPLOYER STATUS

It is not clear how the distinction will be drawn between tribal activities that are “commercial” and those that are “governmental” or “traditionally tribal.” Factors taken into account are whether the activity takes place in interstate commerce, whether non-Indians are involved as employees or customers, and, to a lesser extent, whether the activity takes place on tribal land.⁴⁸ But the extent to which the first two of these factors influence the determination is not apparent; the lines are not distinct, and various tribal employment activities therefore lie on a spectrum. According to the *San Manuel* decisions, high-income casinos that attract millions of patrons per year and employ hundreds of employees are at the “commercial” end of the spectrum, whereas employment in a tribal court is on the other. According to *Yukon Kuskokwim Health Corp.*, employment by a tribally run hospital might be “governmental,” unless, perhaps, it competes with other hospitals in the area or the percentage of Native employees does not increase with time. One would presume that operating tribal schools is a governmental activity, but, as a result of the *San Manuel* decisions, tribal schools are being targeted by unions, which reportedly could lead to their closure.⁴⁹ The *San Manuel* decisions provide no real certainty to Indian nations that any particular employment activity is immune from federal regulation.

While employment by the various political branches or agencies of tribal government appears to be the limit of “governmental activity” described in both decisions, it is not clear at all what “traditionally tribal” activities entail. The Board’s statement that traditional activities are unique to a tribe’s status as a tribe implies that only “Indian” activities are traditional activities. That raises the question of what is “Indian,” which will be decided by non-Indian decision-makers. These decision-makers will likely be

47. *Id.* As Professor Wildenthal demonstrates, not only is the *Tuscarora-Coeur d’Alene* analysis wrong under principles of federal Indian law, but the distinction between “commercial” and “traditional” or “governmental” activity in both *San Manuel* decisions, as well as in other cases utilizing the *Tuscarora-Coeur d’Alene* analysis, is wrong under federal labor law and federal constitutional law. See Wildenthal, *supra* note 1, at 461-77 (demonstrating the fallacy of the *Tuscarora-Coeur d’Alene* analysis); *Id.* at 524-26 (comparing tribal gaming operations to state lottery operation as a source of revenue); *Id.* at 517-26 (describing the Supreme Court’s acknowledgment of the futility of defining “traditional governmental functions” of state governments).

48. See, e.g., *San Manuel Indian Bingo & Casino*, 475 F.3d at 1314-15.

49. See Rob Capriccioso, *A Union Divides; National Education Association Tests Tribal Sovereignty for a Tribe Deeply Concerned About Casino Unions*, 23 AM. INDIAN REP. 4 (2007).

guided by stereotypical notions of what constitutes “traditional” Indian activities.⁵⁰ As explained by one scholar:

50. Perhaps the following scenarios might help demonstrate the amorphous limits of the *Tuscarora-Coeur d’Alene* analysis and the insinuation of stereotyped views of “traditionally tribal” activities:

Suppose the San Manuel Band owns and operates on its land an exclusive gallery that sells Indian-made artwork, jewelry, blankets, and crafts. Some of these items are made by Band members, but most are made by nonmember Indians. It has a small staff, most of whom are Band members. Its patrons are virtually all non-Indians, however, and most of the purchases are made by credit card and shipped out of state. Revenue from the gallery goes to the Band’s overall operating budget. Is the gallery a commercial or a traditional or a governmental activity?

Next, suppose the San Manuel Band owns and operates on its land a museum similar to the National Museum of the American Indian in Washington, D.C. Its staff is much larger than that of the gallery. Because it is a large population area, and the nearby Indian population is relatively small, the vast majority of museum patrons and staff are not Indians. The museum operates a café and gift shop that sell goods obtained through interstate commerce. Although some of the artwork and crafts sold are made by Band members, most are made by nonmember Indians. Other merchandise is sold that is imported from foreign countries such as China. The museum charges \$10 admission, and its revenues go toward the Band’s overall operating budget. Is the Indian museum a commercial or a traditional or a governmental activity?

Now suppose that the Band erects in the same location as the casino a theme park on the scale of Disneyland. It is advertised as a part of the casino, as a “family-friendly” complex in its entirety. The park complex includes a hotel, whose guests frequent both the park and the casino. The park offers food, entertainment, and attractions such as rides, shows, and exhibits. The theme pervading all of these features, however, relates to American Indians. The purpose of the park, like that of the museum, is to educate about all aspects of American Indian history; culture; and past, present, and future life. Although most of the actors and performers are Indian, the vast majority of its management, service and maintenance staff, and patrons, are not Indian. It charges \$30 admission and attracts a number of tourists from around the world. The park is not as lucrative as the casino, but its annual revenues are in the seven-figure range. Like the gallery and museum revenue, and like the casino revenue, all revenue from the park goes toward the Band’s overall budget. Is the Indian theme park a commercial or a traditional or a governmental activity?

If the San Manuel Band had to predict in each case, it might predict that the gallery and museum would be deemed “traditionally tribal” or “governmental” activities. Indians traditionally have sold their handcrafted goods to nonmembers. Many Indian nations operate cultural museums. Federal, state, and local governments operate them as well, so the museum could be viewed as a “governmental” activity, or perhaps a “traditionally tribal” activity because it focuses on Indian culture. But what about the facts that the majority of patrons of both establishments are non-Indian and most of the employees of the museum are non-Indian? What about the fact that the gallery is a purely commercial operation? Is the fact that both focus on “Indianness” the key? What if the gallery sold artwork by non-Indians as well? What if the museum were a natural history museum that included exhibits on early Native people but otherwise did not focus on people at all?

As for the theme park, the Band might be uncertain about what kind of operation it is and thus whether the NLRA or other federal laws would govern its relationship with the theme park employees. What if the theme park were not advertised as part of the casino? Is the theme park more like the gallery, the museum or the casino?

[I]n common cultural texts like law, Whites and Indians are constructed differently: whites are moving into the future, while Indians remain in the past; whites are assigned the quality of vision, Indians are blinded by tradition; whites are described as deserving . . . Indians are not deserving primarily because, the implication is, they do not hold to rules about efficient and privatized use of land.⁵¹

This attitude is clearly illustrated by the D.C. Circuit's stereotypically backward characterization of sovereignty underlying its decision in *San Manuel*, which trivializes Indian nations' status as governments: "The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices."⁵²

Fundamentally, the *Tuscarora-Coeur d'Alene* analysis rests on such stereotypical views of Indian nations. Its narrow definition of "intramural matters," limited to tribal membership, inheritance, and domestic relations, contemplates tribal authority over a narrow scope of issues that involve predominantly Indians only. Implicit in this view is that issues involving non-Indians should not be subject to Indian authority. Professor Bethany Berger traces the line of U.S. Supreme Court cases concerning tribal jurisdiction over nonmembers and explains that:

[T]he decisions are rooted in the sense that tribal courts will not be fair to nonmembers, and that jurisdiction over nonmembers, except where such jurisdiction is necessary to protect practices perceived as traditionally Indian, has little to do with the legitimacy of legal systems or tribal self-government.⁵³

This view is intimated by a tribal employment case in which the Eighth Circuit held that the ADEA did not apply to an employment relationship between a tribal member and a tribal employer doing business on the tribe's reservation.⁵⁴ The court stated, "[t]he consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions."⁵⁵ However, it also stressed that this holding applied only to the "narrow facts of this case which involve a member of the tribe, the tribe as an employer, and on the reservation employment."⁵⁶ Presumably, the same court would hold that the ADEA would apply to a nonmember employee even though it would not apply to the member employee working beside her.

51. Cramer, *supra* note 6, at 333 (quoting Jo Carillo, *Getting to Survivance: An Essay About the Role of Mythologies in Law*, 25 POL. & LEGAL ANTHROPOLOGY REV. 37, 40 (2002)).

52. *San Manuel Indian Bingo & Casino*, 475 F.3d at 1314.

53. Berger, *supra* note 4, at 1054.

54. *E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 251 (8th Cir. 1993).

55. *Id.* at 249.

56. *Id.* at 251.

Mistrust of tribal authority was reported in the context of recent organizing efforts at a tribal casino. Explaining why his union would not petition for a vote under tribal labor laws, the local United Auto Workers director explained:

“[B]ecause that’s like saying I’m putting the fox in the hen house. The employees would not get the true representation and protection. The judges are all employees of Foxwoods. They’re paid by the tribe. You have somewhat of a commitment to respect and protect your employer, not to say the judges aren’t qualified or don’t have the expertise, but there comes a point where it becomes a problem.”⁵⁷

V. IMPLICATIONS FOR TRIBAL REGULATORY AND ADJUDICATORY AUTHORITY

In addition to the uncertainty created for tribal employers with respect to which employment activities will be covered by federal laws, the general issue of application of federal labor and employment laws to tribal employment activities also impinges on the ability of Indian nations to enact and enforce tribal laws, certainly attributes of sovereignty.⁵⁸ It also exposes the fundamental contradiction between the Tenth Circuit’s pro-sovereignty rulings on the one hand and the other circuits’ narrow rulings on the other. This is illustrated by application of the NLRA.

A. Laws Governing Labor-Management Relations

The NLRA’s definition of “employer” excludes governmental employers,⁵⁹ who may regulate their own employment relations. Under § 14(b)⁶⁰ of the NLRA, “States and Territories” may enact “right-to-work” laws prohibiting union security clauses that are otherwise allowed under § 8(a)(3) of the NLRA.⁶¹ Union security clauses may be negotiated into collective bargaining agreements to require that employees become members

57. Gale Courey Toensing, *Mashantuckets to Challenge NLRB Union Win*, INDIAN COUNTRY TODAY, Dec. 5, 2007, at A1, A3 (statement of Jackson King, Att’y, Mashantucket Pequot Tribal Nation).

58. See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 201-20 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN].

59. 29 U.S.C. § 152(2) (2000). The term “‘employer’ includes any person acting as an agent of an employer . . . but shall not include The United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .” *Id.*

60. *Id.* § 164(b) (“Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”).

61. *Id.* § 158(a)(3).

of the union within thirty days of hire.⁶² The San Juan Pueblo enacted a right-to-work law that was challenged by the NLRB as being preempted by § 8(a)(3) of the NLRA. Applying the canons of construction applicable to Indians and Indian nations, the court reasoned that “silence does not work a divestiture of tribal power.”⁶³ It noted that § 8(a)(3) was not intended by Congress to preempt state right-to-work laws; in other words, Congress did not take away the power of states and territories to legislate and enforce such laws.⁶⁴ Congress’s enactment of § 14(b) “recognized and affirmed their existing authority.”⁶⁵

The court construed § 14(b)’s “States and Territories” language to contemplate a “diversity of legal regimes respecting union security agreements at the level of ‘major policy-making units,’”⁶⁶ and held that the Pueblo acted as a sovereign akin to a state or territory when it enacted laws such as the right-to-work law to govern its economic activities:

Like states and territories, *the Pueblo has a strong interest as a sovereign in regulating economic activity involving its own members* within its own territory, and it therefore may enact laws governing such activity. . . . The legislative enactment of the *Pueblo’s right-to-work ordinance was also clearly an exercise of sovereign authority over economic transactions on the reservation.*⁶⁷

Therefore, just as Congress did not take away the power of states and territories to legislate right to work laws, it did not take away the power of Indian nations to legislate such laws.⁶⁸

The Tenth Circuit specifically stated, however, that *San Juan* did not involve whether the Pueblo was a covered employer under the NLRA.⁶⁹ But that was precisely the issue before the Board in *San Manuel*. The NLRB held Indian nations to be covered employers under the NLRA, regardless of the employment activity in question. It found that Indian nations did not fall within the NLRA’s exemption⁷⁰ of the United States, wholly owned Government corporations, Federal Reserve Banks, States, or political subdivisions of states.⁷¹ It then found nothing in the NLRA’s legislative history or in other legislation indicating that Congress intended the NLRA to apply

62. *Id.*

63. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002).

64. *Id.* at 1198.

65. *Id.*

66. *Id.* at 1197.

67. *Id.* at 1200 (emphasis added).

68. *Id.* at 1198.

69. *Id.* at 1191.

70. 29 U.S.C. § 152(2) (2000).

71. San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1058 (2004).

to Indian nations.⁷² The D.C. Circuit deferred to the Board's determination as a permissible construction of the statute under the *Chevron* analysis.⁷³

If Indian nations are covered by the NLRA, as *San Manuel* holds, they cannot at the same time be exempt from it, as *San Juan* implies. Although *San Juan* did not reach the question of whether Indian nations were covered by the NLRA (conversely, whether they were exempt from its coverage), it found them to be sovereign "policy-making units" analogous to states and territories under § 14(b).⁷⁴ If Indian nations are analogous to governmental entities covered by § 14(b) that possess power to regulate private-sector labor-management relations through right-to-work laws, as *San Juan* holds, it follows that they would be analogous to governmental entities excluded from coverage of the NLRA by § 152(2), which possess power to regulate fully their own labor relations. But if Indian nations are "employers" subject to the NLRA under § 152(2), as *San Manuel* holds, they cannot at the same time enact right-to-work laws regulating labor relations; § 14(b) would not apply to them at all.

Even if Indian nations were considered governmental entities exempt from coverage by the NLRA, any tribal legislation governing private sector (i.e., non-tribal) labor-management relations within tribal land might nevertheless be held to be preempted by the NLRA, except for a "right-to-work" law. Congress intended the NLRA to create a uniform set of rules, remedies, and procedures to govern labor-management relations.⁷⁵ States may not regulate areas involving private-sector labor-management relations that are regulated by the NLRA,⁷⁶ with the exception of "right-to-work" laws permitted under § 14(b) as discussed above.

Again, the pro-sovereignty position of the Tenth Circuit is potentially at odds with that of other circuits. As discussed previously, the Tenth Circuit held in *San Juan* that § 8(a)(3) of the NLRA did not preempt a tribal right-to-work law.⁷⁷ While the court stressed that Congressional silence does not divest a tribe of inherent powers,⁷⁸ the court confined its preemption analysis to the question of whether § 8(a)(3) preempted the Pueblo's right-to-work law. The court found that Congress never intended § 8(a)(3) to be preemptive in the first place.⁷⁹ It did not address the larger issue of

72. *Id.* The Board misapplied the federal Indian law canon of construction requiring a clear expression of congressional intent to apply a statute to Indian nations, rather than an expression of intent *not* to do so. *See supra* note 28.

73. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1316 (2007) (quoting *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984)).

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

75. *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 242-43 (1959).

76. *Id.* at 244.

77. *Pueblo of San Juan*, 276 F.3d at 1197.

78. *Id.* at 1196.

79. *Id.* at 1197.

whether the NLRA would preempt other tribal laws governing the labor-management relationship.

The law is not clear with regard to preemption of tribal laws by federal laws. One case decided that federal law did preempt a tribal ordinance, but the underlying federal statute expressly addressed preemption of tribal law.⁸⁰ The Eighth Circuit discussed preemption in a case in which it held that OSHA applied to a tribal construction company.⁸¹ It reasoned that because Indian nations are not states under OSHA, “OSHA does not preempt tribal safety regulations in the same manner in which it preempts state laws . . . [so tribes are] free to adopt additional regulations . . . consistent with OSHA”⁸² Following this reasoning, one could conclude that a court addressing preemption by the NLRA would hold at the least that tribal legislation governing labor-management relations could not conflict with the NLRA, so therefore tribal laws that prohibit strikes or other rights granted by the NLRA would be preempted.

B. Tribal Employment Rights Ordinances

In addition, application of the NLRA to Indian nations might usurp their ability to legislate and enforce tribal employment rights ordinances. Such ordinances are authorized under various federal laws and are utilized to provide employment opportunity and training.⁸³ Preferential hiring is typically a subject of collective bargaining.⁸⁴

A key to tribal economic development is a qualified workforce and full employment among its citizens. Indians comprise the poorest group in the United States,⁸⁵ and Congress has expressed strong policy throughout Indian legislation to promote training and employment among Indians.⁸⁶ Tribal employment rights ordinances should not be subject to outside interference.

C. Tribal Penalties and Remedies

NLRB Member Schaumber suggested that application of the NLRA to tribal employment might interfere with an Indian nation’s adjudicatory and

80. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460-61 (8th Cir. 1993).

81. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996).

82. *Id.* at 181.

83. *See generally* COHEN, *supra* note 58, at 1301-03.

84. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1067 (2004) (Member Schaumber, dissenting).

85. *See* Indianz.com, *Native Americans Still Poorest in United States*, Aug. 30, 2006, <http://www.indianz.com/News/2006/015687.asp>.

86. *See* COHEN, *supra* note 58, at 1332-34.

enforcement authority. Suppose a tribal adjudicatory body determined that a tribal member should be banished for reasons unrelated to his employment, and, as a result, the member loses his employment. The member/employee could grieve his firing, and an arbitrator could award reinstatement. Or the employee's union could file an unfair labor practice charge on his behalf due to the firing. The NLRB could determine the firing to be an unfair labor practice and order reinstatement of the employee. It is not clear which interest would be paramount, that of the NLRA or that of the tribal justice system.⁸⁷

Another conflict between tribal sovereignty and the application of federal labor and employment laws to Indian nations arises in the context of sovereign immunity.⁸⁸ As individuals sue for relief under the labor and employment statutes, Indian nations will respond that neither they nor Congress has waived their immunity from suits by individuals for money damages. The distinction between application of a federal statute and immunity from individuals' suits for damages is illustrated by *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*.⁸⁹ Applying the *Tuscarora-Coeur d'Alene* analysis, the court determined that Title III of the Americans with Disabilities Act,⁹⁰ which requires that public accommodations be accessible to the disabled, applied to the Miccosukee Tribe's casino.⁹¹ However, because there was no "definitive language" in Title III indicating intent to waive the Tribe's sovereign immunity from suits for money damages, it could only be subject to suit by the United States Attorney General to compel compliance.⁹²

The U.S. Supreme Court has repeatedly held that waivers of tribal sovereign immunity must be "express and unequivocal,"⁹³ and, importantly, it has refused to distinguish between employment in tribal commercial activities and tribal governmental activities when applying the doctrine.⁹⁴ In the latest case, however, the Court criticized the doctrine in light of "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs."⁹⁵ Although the Court deferred to Congress to change the doctrine, its

87. *San Manuel*, 341 N.L.R.B. at 1068 n.32 (Member Schaumber, dissenting).

88. *Id.* at 1068.

89. 166 F.3d 1126 (11th Cir. 1999).

90. 42 U.S.C. §§ 12181-12189 (2000).

91. *Fla. Paraplegic Ass'n*, 166 F.3d at 1129.

92. *Id.* at 1134-35. *See also* *Chayoon v. Chao*, 355 F.3d 141 (2d Cir. 2004) (holding that the Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000), did not waive tribal immunity from suit).

93. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

94. *Citizen Band*, 498 U.S. at 510; *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

95. *Kiowa Tribe of Okla.*, 523 U.S. at 757-58.

words, “enterprises extending well beyond traditional tribal customs,” reflect stereotyping and provide little comfort in the present context.

As held in *Florida Paralegic Ass’n*, silence in the federal labor and employment statutes should not be sufficient to effect such a waiver of tribal sovereign immunity, despite a finding that the statutes apply to Indian nations. Board Member Schaumber, however, surmised that application of federal labor and employment statutes might work a “forced waiver of sovereign immunity” on Indian nations.⁹⁶

If Member Schaumber is correct, federal procedures and remedies will supplant procedures and remedies developed by Indian nations that are most appropriate to the nations’ particular economic, cultural, and social circumstances. The “one-size-fits all” assimilationist approach to regulation of tribal employment activity is simply not appropriate when “sizes” are not the same.

VI. CONGRESSIONAL ADOPTION OF THE *TUSCARORA/COEUR D’ALENE* ANALYSIS

Finally, it is doubtful that Congress will act favorably to remedy problems created by Indian nations’ dual “commercial” and “governmental/traditionally tribal” employer status under federal labor and employment laws, as the *Tuscarora/Coeur d’Alene* analysis has already found its way into legislation. In the Pension Protection Act,⁹⁷ effective January 1, 2007, Congress amended the “government plan” exclusion in ERISA and the Internal Revenue Code to include Indian tribes, but only with respect to plans covering employees performing “essential government functions” and not those performing “commercial activities”:

a plan which is established and maintained by an Indian tribal government . . . a subdivision of an Indian tribal government . . . or an agency or instrumentality of either . . . and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).⁹⁸

The statute defines neither “essential government functions” nor “commercial activities.”

96. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1068 (2004) (Member Schaumber, dissenting).

97. Pension Protection Act of 2006, 29 U.S.C. § 1002(32) (2006).

98. *Id.*

VII. IMPLICATIONS FOR TRIBAL EMPLOYMENT PRACTICES

It may be very difficult to convince Congress that the *Tuscarora-Coeur d' Alene* analysis is incorrect and infringes upon tribal sovereignty in light of its action in the Pension Protection Act. If the labor and employment statutes will be applied to tribal employers, these employers must take additional steps to assure fair treatment of their employees in order to make unions or lawsuits seem less desirable. Among other scholars advocating that Indian nations should take affirmative steps to assure fairness in the workplace,⁹⁹ Professor Wenona Singel suggests that employees be apprised of the costs and benefits of their choices and that Indian nations offer less costly alternatives for protection of employee rights in the form of tribal procedures and remedies that assure fair treatment. Employees should be given a choice of means of improving the terms and conditions of employment in lieu of union membership or suits under federal statutes, and tribes should make it desirable and more cost-efficient to choose tribal remedies.¹⁰⁰

CONCLUSION

Bifurcation of tribal employment and differentiation between rules that apply to each leave Indian nations in a state of confusion, not knowing which of their activities will trigger federal regulation and oversight, and not knowing precisely what factors will be used to make this determination. Moreover, the determination of whether activities trigger regulation will always be made by federal courts or agencies. Sorting this out through litigation, as the Board suggests, would be a prolonged nightmare for Indian nations, not to mention a drain on their treasuries. But the fact of the matter is that neither “governmental” nor “traditionally tribal” activity will generate revenue sufficient to fund an Indian nation; commercial activity is necessary to bring sufficient revenue into the nation to fund its political, social, cultural, and economic infrastructures.¹⁰¹

“Commercial activity” is thus truly “governmental” activity; the only alternative funding source for Indian nations is the U.S. Government. Retreat to federal control of tribal governments and services is antithetical to the interests of Indian nations and people, Congressional policy expressed in

99. See also Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273 (2005).

100. Wenona T. Singel, Remarks at Association of American Law Schools Annual Meeting (Jan. 5, 2008) (author's notes).

101. See *San Manuel*, 341 N.L.R.B. at 1074 (Member Schaumber, dissenting).

laws such as ISDEA¹⁰² and IGRA,¹⁰³ and the interests of the United States itself. Federal regulation of tribal employment relations under the misguided principles of the *Tuscarora/Coeur d'Alene* and *San Manuel* decisions, however, signals a return to U.S.-Indian relations tainted by paternalism and assimilationism. Indian nations must be able to define, create and sustain productive, mutually beneficial employment relationships through development of sound policies consistent with those nations' particular and varied needs.

102. “[T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities . . . and has denied to the Indian people an effective voice in the planning and implementation of programs . . . which are responsive to the true needs of Indian communities.” 25 U.S.C. § 450(a)(1) (2000).

103. “[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . .” 25 U.S.C. § 2701(4) (2000).