

# THE INSTITUTIONAL ECONOMICS OF TRIBAL LABOR RELATIONS

Wenona T. Singel\*

2008 MICH. ST. L. REV. 487

## TABLE OF CONTENTS

I. APPLYING LAW AND ECONOMICS TO INDIAN LAW .....	489
II. PATH DEPENDENCE AND THE NEW INSTITUTIONAL ECONOMICS .....	491
III. PATH DEPENDENCE AND LABOR LAW IN INDIAN COUNTRY .....	494
IV. RETHINKING RELIANCE ON FEDERAL LAW .....	495
A. Inefficiencies of Reliance on Federal Law .....	495
1. <i>The Modern Decline of Labor Unions</i> .....	495
2. <i>The NLRB as an Archaic and Inefficient Enforcement             Mechanism</i> .....	496
3. <i>The NLRB Not Suited to Indian Country Labor Regulation</i> .....	497
B. Efficiencies of Reliance on Federal Law .....	498
1. <i>Board Perceived as a Neutral Party</i> .....	498
2. <i>Familiarity</i> .....	498
3. <i>Predictability</i> .....	498
V. CONSIDERING RELIANCE ON APPLICATION OF TRIBAL LABOR LAWS .....	498
A. Efficiencies of Reliance on Tribal Labor Laws .....	498
1. <i>Fairness to Tribal Employees</i> .....	498
2. <i>Better Working Conditions</i> .....	499
3. <i>Cultural Match</i> .....	499
4. <i>More Efficient Adjudication in Tribal Court</i> .....	499
B. Inefficiencies of Reliance on Tribal Labor Laws .....	500
1. <i>Underdeveloped Tribal Law</i> .....	500
2. <i>Perceived Unfairness</i> .....	500
VI. TRIBAL STRATEGIES TO ENCOURAGE THE USE AND APPLICATION OF TRIBAL LABOR LAWS .....	501
CONCLUSION .....	503

---

\* Assistant Professor, Michigan State University College of Law; Associate Director, Indigenous Law and Policy Center; Chief Justice and Enrolled Member, Little Traverse Bay Bands of Odawa Indians. This Article was prepared for a program of the Indian Nations and Indigenous Peoples Section of the Annual Meeting of the American Association of Law Schools on January 5, 2008.

There are several ways of thinking about and trying to understand the application of labor laws in Indian country. One approach is to analyze this legal development from a doctrinal perspective by examining how the principal decisions in the field<sup>1</sup> part ways with important Indian law precedents, incorrectly apply the decision of *Federal Power Commission v. Tuscarora Indian Nation*,<sup>2</sup> and perpetuate a faulty paradigm under *Donovan v. Coeur d'Alene Tribal Farm*.<sup>3</sup>

Another approach examines the issue from a pro-sovereignty perspective.<sup>4</sup> This approach emphasizes the legislation and policy-making tools available to tribes to protect tribal interests in the face of the *San Manuel Indian Bingo & Casino v. NLRB* decision.<sup>5</sup> It also looks at what impacts the *San Manuel* decision is likely to have on the exercise and preservation of sovereignty.<sup>6</sup>

A third useful way of thinking about the application of labor law in Indian country is one rooted in an economic analysis of law. This Article takes up a law and economics approach to understanding why tribes encounter difficulty when they attempt to govern labor relations using tribal laws and methods of dispute resolution. The law and economics approach is particularly helpful because its emphasis on microeconomics sheds light on the dynamics of the choices that employees and union organizers make as they decide how to proceed to protect labor interests in Indian country.

The principal law and economics tool that this Article uses to analyze the application of labor law in Indian country is the concept of path dependence and its application to the development of legal institutions. Part I of this Article will describe path dependence and identify its core properties, including self-reinforcing patterns of development, lock-in, and the potential for inefficient outcomes. Part II will then describe path dependence in the context of institutional economics. This Part will explain how the concept of path dependence can serve as a valuable tool for explaining the dy-

---

1. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007); *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (May 28, 2004); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)

2. 362 U.S. 99 (1960).

3. 751 F.2d at 1113. See Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004) (critically evaluating the decision in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. at 1055); Brian H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007).

4. I also recognize that the doctrinal analysis is pro-sovereignty.

5. Kaighn R. Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations Within the Reservation*, 2008 MICH. ST. L. REV. 505.

6. *Id.* at 540-42.

namics of institutional development and legal development in general. Part III will then apply the concept of path dependence to the specific case of labor laws and their application in Indian country. This Part will describe why employees and labor organizers are predisposed to rely on federal labor law remedies to protect labor interests without relying on available tribal law remedies. Part IV evaluates the relative efficiencies of continued reliance on federal law to determine labor relations in Indian country. Part V offers the first serious analysis of the relative efficiencies of turning to tribal law as a replacement, and it examines ways tribes can enact and develop a labor relations body of law.

### I. APPLYING LAW AND ECONOMICS TO INDIAN LAW

Although there is great diversity of scholarship in the field of Indian law, the law and economics approach to exploring Indian law is distinctly marginalized.<sup>7</sup> Instead, much of Indian law scholarship focuses on arguments based on the core attributes of tribal sovereignty, other doctrinal arguments, federalism, history, principles of statutory and treaty interpretation, and morality-based claims. These approaches are often shaped by the perspectives of Legal Realism, Critical Legal Studies, Critical Race Theory, and Legal Process.<sup>8</sup> These are all valid and essential approaches to under-

---

7. Scholarship that takes up a law and economics approach to Indian law questions includes Terry Anderson & Dominic Parker, *The Wealth of Indian Nations: Economic Performance and Institutions on Reservations*, in SELF DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 159 (Terry L. Anderson et. al. eds., 2006); Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245 (2005); Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000); Douglas W. Allen, *Homesteading and Property Rights; or, "How the West Was Really Won"*, 34 J.L. & ECON. 1 (1991); Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, 19 J. LEGAL STUD. 297 (1990); Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J.L. & ECON. 177 (1990). Other examples include Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263 (1999); Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2005); Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 3 (John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, Paper No. RWP04-016, 2004), available at <http://ssrn.com/abstract=529084>.

8. Legal Realism example: Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Legal Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006). Critical Legal Studies examples: RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980); Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor*, 28 LAW & SOC'Y REV. 1181 (1994). Critical Race Theory examples: Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian County*, 73 FORDHAM L. REV. 2133 (2005);

standing legal developments in Indian law, and, in addition to their explanatory power, they shed light on strategies that may prove to be effective methods of protecting Indian rights.

At the same time, however, the approaches described above also need to be supplemented with analyses that reflect the fact that economic efficiency is a central concern in much of legal analysis, especially in the arena of commercial law.<sup>9</sup> Economic efficiency influences the jurisprudence of a substantial portion of the federal judiciary, and it informs lawmakers in Congress, as well as the execution and enforcement of the law by government administration.<sup>10</sup> To neglect to consider how considerations of economic efficiency apply in the field of Indian law, then, is to risk failing to address a core concern of each of the three branches of government. The result of this failure can lead to a missed opportunity to engage in an open, intellectual dialogue on these core concerns, and the result may be that false assumptions go unchallenged, and, perhaps more dangerously, faulty conclusions go unchecked.

Of course, Law and Economics is not a homogenous body of scholarship with universally-accepted modes of analysis. The field of law and economics includes great diversity, as reflected in the approaches employed by the Chicago School,<sup>11</sup> Public Choice Theory,<sup>12</sup> Institutional and New Institutional Law and Economics,<sup>13</sup> the New Haven School, Modern Civic Republicanism, and Critical Legal Studies.<sup>14</sup> Although each approach represents a unique focus and methodology, each also shares the following trait in common: they all use tools of economic analysis—particularly microeconomics and welfare economics—to examine the dynamics and structure of law and legal institutions.<sup>15</sup> In this Article, I apply the New Institutional Law and

---

Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. Legal Process example: Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1978 (1996).

9. See generally Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233 (2003).

10. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* Pt. 2 (7th ed. 2007).

11. See generally JOHAN VAN OVERTVELDT, *THE CHICAGO SCHOOL: HOW THE UNIVERSITY OF CHICAGO ASSEMBLED THINKERS WHO REVOLUTIONIZED ECONOMICS AND BUSINESS* (2007).

12. See generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

13. See generally Douglass North, *Institutions, Transaction Costs and Economic Growth*, 25 ECON. INQUIRY 419 (1987); Douglass C. North, *The New Institutional Economics*, 142 J. INSTITUTIONAL & THEORETICAL ECON. 230 (1986).

14. NICOLAS MERCURO & STEVEN J. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 3 (2d ed. 1997).

15. *Id.*

Economics approach to study the dynamics of the development, application, and enforcement of labor law in Indian country.

The school of New Institutional Law and Economics is particularly relevant to explore developments in labor law because unions, collective organizing, labor negotiations, and labor law are each fundamentally shaped and influenced by the structure of institutions and the dynamics of institutional change. In the Part that follows, I will describe the key concepts of the New Institutional Law and Economics to lay the foundation for a discussion of how these concepts can enhance our understanding of labor law in Indian country.

## II. PATH DEPENDENCE AND THE NEW INSTITUTIONAL ECONOMICS

The field of New Institutional Economics and the concept of path dependence that it applies can help us to understand why tribes encounter great difficulty when they attempt to regulate labor relations within their jurisdictions. In this Part, I will begin by defining path dependence. I will then identify some of the factors that can create path dependence, and I will describe some of the effects of path dependent systems. In the next Part, I will show how the theory of path dependence applies to federal labor laws being used in Indian country.

First, what is path dependence? In very broad terms, path dependence affirms the principle that “history matters.”<sup>16</sup> In other words, it means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to such an outcome or decision.<sup>17</sup> Path dependence means more than just “history matters,” however. The theory of path dependence also explains how early events or decisions can establish paths that are “locked-in” or resistant to change.<sup>18</sup>

In general terms, path dependence theory holds that institutions are inherently self-reinforcing, and that through history, institutions establish well-worn paths in which decisions initially taken are reinforced through repetition. Path dependence theory is a form of economic analysis of the law because it recognizes that legal institutions develop and perpetuate short-sighted efficiencies through the creation and maintenance of these paths.<sup>19</sup>

---

16. Paul A. David, *Path Dependence: A Foundational Concept for Historical Social Science*, 1 *CLIMETRICA*, *J. HIST. ECON. & ECONOMETRIC HIST.* 91, 92 (2007).

17. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *IOWA L. REV.* 601, 603-04 (2001).

18. See *id.* at 605.

19. DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 95 (1990).

Oona Hathaway identifies three strands of path dependence theory. They include increasing returns path dependence, evolutionary path dependence (evolution is directly constrained by history), and sequencing path dependence (the order in which decisions are made and choices are made can decisively determine an outcome).<sup>20</sup> Of the three, this Article focuses on increasing returns path dependence to shed light on labor relations in Indian country.

Increasing returns path dependence, which grows out of the economics literature, arises where there are economies of increasing returns.<sup>21</sup> In law, once certain legal steps are made, it becomes less costly to continue taking steps in the same direction; once institutions are established, it becomes less costly to continue to work within those existing institutions than to change or replace them.<sup>22</sup>

Brian Arthur explains that increasing returns can arise where certain conditions are present<sup>23</sup>:

(a) *Large set-up or fixed costs.* Where institutional structures and operations require large set up costs, there is a greater incentive to identify and stick with a single option rather than experiment with new alternatives.

(b) *Learning effects.* When individuals use complex systems repeatedly, their knowledge and ability to operate effectively and efficiently increases. These experiences are then likely to spur greater innovations and improvements in the existing system and its related elements.

(c) *Coordination effects.* These occur when the benefits an individual receives from taking a particular action increases as others take similar or complementary actions. If an institutional regime is adopted and applied by a network of individual actors, then further actions within the regime will become more attractive to other individuals.

(d) *Self-reinforcing or adaptive expectations.* These are expectations that lead actors to react to current conditions in ways that enhance the likelihood that similar conditions will persist in the future. For example, if a large number of individuals anticipate that a particular institutional regime will be widely used in the future, these individuals are likely to act in accordance with the anticipated institutional regime. Consequently, there will be an increase in the likelihood that it will be broadly used in the future.<sup>24</sup>

Where these conditions are present, “a step in one direction decreases the cost (or increases the benefit) of an additional step in the same direction,

---

20. See Hathaway, *supra* note 17, at 606-22.

21. NORTH, *supra* note 19, at 94-97.

22. See Hathaway, *supra* note 17, at 608-13.

23. W. BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 112 (1994).

24. See Hathaway, *supra* note 17, at 608-13.

creating a powerful cycle of self-reinforcing activity or positive feedback.”<sup>25</sup> This can result in lock-in or inflexibility. Examples described in economics include the rise of the QWERTY typewriter keyboard, the pattern of geographic location of various industries, and institutional emergence and change.<sup>26</sup> In each example, the same general observation is made, that “[w]here a process of change exhibits increasing returns dynamics, each step in one direction makes additional steps in that same direction more likely. This characteristic leads to predictable results. . . .”<sup>27</sup>

Douglass North, who won the Nobel Prize in Economics in 1993,<sup>28</sup> has applied increasing returns path dependence to explain institutional emergence and change.<sup>29</sup> According to North, institutional path dependence exists because “the individuals and organizations with bargaining power as a result of the institutional framework have a crucial stake in perpetuating the system.”<sup>30</sup> Paths can get reversed, but reversal is a difficult process about which we know little.

North also writes about what he calls the certain essential characteristics of institutional change: (a) that institutions and organizations interact amidst scarcity and competition and that competition is the key to institutional change; (b) that competition leads to a constant need to invest in learning to acquire skills and knowledge, and that the resulting learning shapes perceptions about opportunities and choices; (c) that the institutional framework dictates the kind of skills and knowledge perceived to produce the maximum pay-off; and (d) that economies of scope, complementarities, and network externalities of an institutional matrix make institutional change overwhelmingly incremental and path dependent. Overall, since the organizations owe their existence to the institutional matrix, there will always be interest groups that will work to assure the perpetuation of that institutional structure, thus assuring path dependence.<sup>31</sup>

North also identifies several remedies for institutional reform that defeat path dependence. They include the creation and support of organizations that have an interest in succeeding under new institutional regimes; the

---

25. *Id.* at 609.

26. *See id.* at 611.

27. *Id.* at 613.

28. *See* Nobelprize.org, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1993, [http://nobelprize.org/nobel\\_prizes/economics/laureates/1993/](http://nobelprize.org/nobel_prizes/economics/laureates/1993/) (last visited Apr. 21, 2008).

29. NORTH, *supra* note 19; Douglass C. North, *The Historical Evolution of Politics* (1994), available at <http://www.inomics.com/cgi/repec?handle=RePEc:wpa:wuwpoh:9411007>; Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355 (1990).

30. Douglass C. North, *Institutions and Economic Theory*, 36 AM. ECONOMIST 3 (1992).

31. *See id.* at 6.

education of individuals to encourage the adaptation of their knowledge, skills, and belief systems to the new institutional regime; and the encouragement of informal constraints (the second key ingredient of institutions)—such as norms of behavior, conventions, and codes of conduct—that support the new institutional regime.<sup>32</sup>

### III. PATH DEPENDENCE AND LABOR LAW IN INDIAN COUNTRY

In the case of labor within tribal economies, the institutions involved are the National Labor Relations Act (NLRA or “Act”),<sup>33</sup> the relevant federal law interpreting and applying the Act, and emerging tribal law. Institutions are also understood to be in a constant state of interaction with organizations—both political and economic. In the case of labor in Indian country, the organizations include unions, the National Labor Relations Board (NLRB or Board), tribal councils, and other bodies of employees and labor policy-makers.<sup>34</sup>

When we see employees resorting to union organizing in Indian country under the NLRA and unions resorting to the NLRB to resolve tribal labor disputes, what we are also seeing is the use of well-worn institutions that have become adept over many years at using institutionalized remedies for the protection of employee rights.<sup>35</sup> It is simply assumed that reliance on the NLRA and the NLRB as the primary enforcement agency for labor rights is the most efficient means of protecting labor interests. This is partly due to the fact that the mindset of employees has been shaped by their familiarity with the existing institutional structure of labor organizing under federal law. Not only are employees’ perceptions of their opportunities and choices limited by their familiarity with the existing labor law regime outside of Indian country, but unions also have a vested interest in maintaining the status quo of working within the established NLRA system, based on years of developing the skills and knowledge that provide the ingredients for success in the current regime of labor relations. Thus, the unions that have sought to organize in Indian country are deeply invested in the protection of employee rights under the rubric of the NLRA, so continuing to re-

---

32. See *id.* at 7-8.

33. 29 U.S.C. § 151 (2000).

34. For a recent update on how labor unions operate in Indian country, 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 (2007).

35. Paul Grimaldi, *UAW Betting on Casinos*, PROVIDENCE J., Mar. 25, 2008, available at [http://www.projo.com/news/content/BZ\\_UAW\\_CASINOS\\_03-25-08\\_LD9E8H6\\_v22.2a4e7d4.html](http://www.projo.com/news/content/BZ_UAW_CASINOS_03-25-08_LD9E8H6_v22.2a4e7d4.html).

sort to federal remedies for the protection of employee interests becomes both reflexive and preferred.

The literature on path dependence theory also points out, however, that path dependence can produce significant inefficiencies.<sup>36</sup> Even though an alternative outcome might be more efficient, institutional reform or replacement of an institution with an alternative model is unlikely because of the short-sided perception of the positive feedback loop of perceived increasing returns for decreasing outputs for each unit of production.<sup>37</sup> In other words, the pressure to continue taking steps down the same path effectively thwarts attempts to begin a new path that will involve significant new start-up costs, a renewed high learning curve, and a need for new investment in gaining the skills and knowledge necessary for the accomplishment of goals under the new regime.

The next Part will reexamine the utility of continued reliance on federal law from an institutional economics perspective.

#### IV. RETHINKING RELIANCE ON FEDERAL LAW

Indian tribes should examine the choices available to an individual employee of a tribal gaming operation seeking to improve his or her working conditions, wages, or benefits. If we look at the costs and benefits that attach to each of the choices available to that employee, we can also develop a deeper understanding of why employees might choose the avenues for protecting their rights that they ultimately adopt. An examination of these costs and benefits might also help tribes to influence employee decisions through the adjustment of these costs and benefits where such adjustments are possible. More specifically, although there are inherent efficiencies in relying on the well-worn remedies of union organizing and NLRB enforcement of federal labor laws, if tribes can offer less costly alternatives for the protection of employee rights using tribal legal remedies, they may be able to encourage more employees to choose to rely on tribal remedies over NLRB enforcement.

##### A. Inefficiencies of Reliance on Federal Law

###### 1. *The Modern Decline of Labor Unions*

Unions have experienced a substantial and continuous decline in the United States since 1960. This decline can be measured by changes in union density over time. Union density refers to the percentage of wage and

---

36. See generally S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205 (1995).

37. See Hathaway, *supra* note 17, at 608 n.20.

salary employees in the workforce who are members of unions. Between 1970 and 2001, private sector union density fell from 29.1% to 9.0%.<sup>38</sup> This is a 69% decline in union density over thirty-one years.

## 2. *The NLRB as an Archaic and Inefficient Enforcement Mechanism*

The NLRB's enforcement of labor law has been subject to scathing critiques on a variety of fronts. First, the Board has been criticized by scholars as being isolated.<sup>39</sup> James Brudney argues that the NLRB's autonomy has isolated it, diminishing its relevance and applicability to the contemporary employment context.<sup>40</sup> Brudney points to union decisions to rely on direct negotiations with employers for neutrality agreements and voluntary card check registration as evidence that unions increasingly view the NLRB and its Board-supervised elections process as irrelevant.<sup>41</sup> Brudney also cites several other factors that illustrate and contribute to the Board's growing isolation. These include Congress's inaction in the arena of collective organizing law since the passage of the NLRA in 1935,<sup>42</sup> the Act's restrictive right of access to the federal courts,<sup>43</sup> the Board's use of adjudication rather than rule-making as its nearly exclusive means of acting,<sup>44</sup> and the Board's pattern of frequently refusing to acquiesce to decisions of the federal courts.<sup>45</sup>

Apart from the Board's increasing isolation, Brudney also makes the case that the Board has become increasingly politicized, and that this politi-

---

38. See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y. J. 221, 253 (2004) (citing SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, *THE PARADOX OF AMERICAN UNIONISM* 52 (2004)).

39. See *id.*; Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 571 (2007).

40. See Brudney, *supra* note 38, at 253.

41. *Id.* at 251. See also, e.g., Remarks by AFL-CIO President John J. Sweeney to ABA Labor and Employment Law Section, Daily Lab. Rep. (BNA), at E-44 (July 12, 2000); Eric Lekus, *Card Check, Neutrality Accords, Best Way for Unions to Organize, UNITE's Raynor Says*, Daily Lab. Rep. (BNA), at C-1 (June 4, 2004); Michelle Amber, *Special Report: SEIU Sees Record Growth: 64,000 New Members Organized in 1998*, Lab. Rel. Week (BNA), at 1419-21 (Dec. 23, 1999) (reporting that of 64,000 workers in newly SEIU-organized bargaining units, less than 15,000 came through Board elections).

42. Cf. generally Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 903-04 (2007).

43. Brudney, *supra* note 38, at 231-34.

44. See Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 982 (1980) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974)).

45. See Donald L. Dotson & Charles M. Williamson, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987).

cization has weakened its ability to serve its purpose.<sup>46</sup> The problem is that the members of the NLRB have come to represent a polarized group of partisans rather than a collection of neutral and impartial decision-makers. Although this partisanship is inconsistent with Congress's purpose in establishing the make-up of the Board in the NLRA, the political nature of the appointments process has resulted in a Board whose members are selected for their allegiance to interest groups that explicitly espouse pro-management or pro-labor policies. As a result of this politicization, both management and labor have shown less respect for Board decisions.<sup>47</sup>

### 3. *The NLRB Not Suited to Indian Country Labor Regulation*

The NLRB is also new to tribal labor regulation. A variety of issues unique to Indian tribes has never been resolved. An example is the issue of whether the NLRB can enter a tribal business to hold elections to certify a union. Jason Cotter, NLRB Regional Director involved in the Foxwoods Resort Casino union election,<sup>48</sup> stated:

How many cases has the board had where we deal with Indian casinos? It's not your classic case involving your factory someplace. We don't have a whole lot of history dealing with Indian casinos. We're relying entirely on the prior San Manuel case, but that's only one prior case. It's not like General Motors, where we have 10,000 prior cases. It's purely speculative on my part, but I can't be sure whether the board wants to re-evaluate or what.<sup>49</sup>

As a result, the NLRB's new effort to exercise jurisdiction over tribal gaming facilities is likely to raise a variety of new legal issues that will require litigation before they are fully resolved. This process of case-by-case resolution of legal issues diminishes legal certainty and delays employees' abilities to realize the full benefits of the Act.

---

46. Brudney, *supra* note 38, at 243-52.

47. *See id.* at 250 (citing Kenneth R. Dolin, *Estreicher Urges Reforms to Address NLRB "Policy Oscillation"*, A.B.A. SEC. LAB. & EMP. L. 2 (Spring 2005)).

48. In November 2007, an election was held at Foxwoods Resort Casino in which poker dealers voted 1282-852 to join the United Auto Workers Union. The Casino allowed NLRB oversight of the election, but it reserved the right to challenge the Board's jurisdiction in the appeals process.

49. Gale Courey Toensing, *Federal Labor Board OKs Union Vote at Mashantucket*, INDIAN COUNTRY TODAY, Nov. 7, 2007, at 2, available at <http://www.indiancountry.com/content.cfm?id=1096416045> (quoting Jason Cotter, NLRB Regional Director).

## B. Efficiencies of Reliance on Federal Law

### 1. *Board Perceived as a Neutral Party*

The NLRB is perceived as “neutral” compared to tribal agencies developed to oversee labor relations.

Employees of tribal employers have made many statements to the press indicating that they do not trust tribal governmental created to hear labor disputes.<sup>50</sup> The NLRB has a distinct advantage over tribal agencies in that it has no relationship to the tribe and is therefore more likely to be perceived as a neutral party that is not beholden to the tribe’s business interests.

### 2. *Familiarity*

Since the NLRA and NLRB are familiar institutions, employees are likely to be more comfortable using those institutions to protect their interests. The familiarity is even stronger between unions and the NLRA and Board, despite the axiom that familiarity breeds contempt.

### 3. *Predictability*

Aside from the novel questions that will be specific to labor relations in Indian country, employees and unions utilizing the NLRA and the Board will benefit from a large body of precedents. These precedents clarify the meaning of the law. They also establish commonly recognized standards for important concepts. For example, precedents reveal what constitutes an unfair labor practice and which actions a union may or may not take to gain greater leverage during labor negotiations.

## V. CONSIDERING RELIANCE ON APPLICATION OF TRIBAL LABOR LAWS

### A. Efficiencies of Reliance on Tribal Labor Laws

#### 1. *Fairness to Tribal Employees*

Many tribal courts have held that employees of tribal businesses are entitled to procedural due process when they are terminated from employment, adopting the federal precedent requiring that government employees receive due process before they are discharged.<sup>51</sup>

---

50. See, e.g., Tim Giago, *New Gaming Culture Rises in Indian Country*, GRAND FORKS HERALD, June 30, 2004.

51. See Matthew L.M. Fletcher, *Tribal Courts, the Indian Civil Rights Act, and Customary Law: Preliminary Data* 14-16 (Michigan State University College of Law Legal

## 2. *Better Working Conditions*

Tribal councils are more likely to be sympathetic to labor interests. Whereas the members of the NLRB are typically lawyers with expertise in labor law and who have never personally held membership in a union or worked in the kinds of conditions that casino employees experience, many members of tribal councils have either been members of unions or have family members who have been members, and many come from working-class backgrounds that allow them to sympathize and relate to the concerns of tribal employees.

This respect often translates to better working conditions and better fringe benefits for tribal employees, as evidenced by the benefits made available to employees of the Turtle Creek Casino, owned by the Grand Traverse Band of Ottawa and Chippewa Indians.<sup>52</sup>

## 3. *Cultural Match*

Research has also shown that tribal communities are more likely to experience economic success if the political institutions and legal system operating with the community form a match with the tribe's culture, including its values, belief system, and traditions.<sup>53</sup> This principle supports the notion that tribal protection of labor interests is more likely to be effective if the processes, remedies, and legal standards that apply to labor issues possess a cultural match with the tribe. As a result, tribal labor policies and laws may be more likely to effectively address labor concerns than the laws and procedures set forth by the NLRA.

## 4. *More Efficient Adjudication in Tribal Court*

In many cases, both native and non-native litigants prefer to resolve their disputes in tribal court rather than state court. This preference stems from a growing recognition that tribal courts are fair, efficient forums for conflict resolution. Greater reliance on tribal court adjudication of labor disputes would promote faster, less costly resolution of disputes. Furthermore, if parties rely upon the traditional forms of peacemaking that many tribal courts offer, they may find that the process of dispute resolution actu-

---

Studies Research Paper Series, Research Paper No. 06-05, Mar. 6, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474).

52. See *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002) ("The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans.").

53. Miriam Jorgenson, ed., *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* (2008).

ally improves and strengthens relationships. Such effects would be a significant improvement over the adversarial method of dispute resolution, which often exacerbates the sense of alienation and oppositional entrenchment that the parties bring to a dispute.

## B. Inefficiencies of Reliance on Tribal Labor Laws

### 1. *Underdeveloped Tribal Law*

A substantial cost associated with reliance on tribal legal remedies for the resolution of employment concerns is the fact that many tribes do not have a large body of positive labor and employment law. Although the recent San Manuel decision has certainly triggered a rise in the number of tribal labor law enactments,<sup>54</sup> many tribes still have no labor law enactments, little labor-related case law, and few fully implemented administrative bodies with the power to deal with employment issues. For example, both the Mashantucket Pequot Nation and the Saginaw Chippewa Indian Tribe attempted to enact tribal labor laws either immediately following or in tandem with attempts by unions to organize their casino employees.<sup>55</sup> Tribal labor law is therefore an emerging body of law, rather than a well-established comprehensive legal regime. With any emerging body of law, there is a degree of uncertainty associated with how the law will be interpreted, applied, and enforced. Also, as with any new legal regime, the persons affected by the law must invest in gaining the skills and knowledge necessary to effectively understand and apply the law.

### 2. *Perceived Unfairness*

Another cost associated with reliance on tribal labor laws is the fact that many tribal employees are non-Indian. Non-Indians lack the right to vote in tribal elections, and they lack the right to hold office in tribal law-making bodies. Deprived of the right to vote, these non-Indian employees are deprived of a fundamental mechanism for influencing tribal policy-making.

On the other hand, non-Indians are not completely excluded from the opportunity to participate in tribal politics. Non-Indians can influence tribal policies that affect the rights and working conditions of employees by lob-

---

54. See, e.g., 5 GRAND TRAVERSE BAND CODE § 801 (2004), available at <http://www.narf.org/nill/Codes/gtcode/5.pdf>.

55. See MASHANTUCKET PEQUOT TRIBAL LAWS tit. XXXI (Supp. 2007), available at <http://www.mptnlaw.com/laws/2007%20Supplement.pdf>; Gail Courey Toensing, *Saginaw Chippewa Fights Federal Unions with Ban, Education*, INDIAN COUNTRY TODAY, Mar. 7, 2008, available at <http://www.indiancountry.com/content.cfm?id=1096416768>.

bying tribal leaders, providing information to tribal leaders in the form of testimony during legislative hearings, and even serving on tribal committees, boards, and other public entities that allow for non-Indian participation. Throughout Indian country, there are a large number of tribes that allow non-Indians to hold public office. For example, it is very common for non-Indians to serve as judges on tribal courts.<sup>56</sup> Many non-Indians also are permitted to serve on tribal commissions, boards, and committees, including tribal gaming commissions and tribal economic development committees.<sup>57</sup> Membership on these boards and committees allows non-Indian members of Indian communities to have an influence on tribal policy-making. For non-Indian employees of tribal enterprises, such membership can serve as a means of influencing tribal employment policies and practices.

#### VI. TRIBAL STRATEGIES TO ENCOURAGE THE USE AND APPLICATION OF TRIBAL LABOR LAWS

To encourage employees to use tribal labor law remedies, tribes can adopt a variety of strategies. One of the most important strategies should be the completion of steps designed to counteract the path dependent pattern of reflexive resort to federal labor law remedies over alternatives provided by tribal law. The prescriptions offered by Douglass North for defeating path dependent patterns in institutional development can be adapted for tribal use.

For example, North recommends the creation and support of organizations that have an interest in succeeding under a new legal system or institutional regime.<sup>58</sup> A tribe hoping to encourage reliance on tribal labor law remedies could support the formation of employee organizations that have legally recognized rights under tribal law. To the extent that tribal law formally recognizes the status and rights of such labor organizations, these groups will have an interest in resorting to tribal remedies to vindicate their rights.

North also recommends the education of individuals to promote their ability to adapt to the knowledge, skills, and belief systems of the new institutional regime. Tribes can adapt this strategy to the labor law context by offering employees training sessions on tribal legal systems that allow em-

---

56. *E.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 28, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, \_\_ U.S. \_\_ (2008) (No. 07-411), available at [http://www.narf.org/sct/plainsvlong/merits/amicus\\_of\\_us\\_for\\_respondents.pdf](http://www.narf.org/sct/plainsvlong/merits/amicus_of_us_for_respondents.pdf) (noting that three of the four tribal court judges for the Cheyenne River Sioux Tribe that heard the tribal court case at the trial and appellate court level were non-Indians).

57. *See, e.g.*, ST. REGIS MOHAWK TRIBE, GAMING ORDINANCE art. XII, ¶ C (1992).

58. Douglass C. North, *The New Institutional Economics and Development* 7 (Econ. Dep't of Wash. Univ., Working Paper No. 9309002, 1993), available at <http://129.3.20.41/eps/eh/papers/9309/9309002.pdf>.

ployees to learn about the tribe's political history, its form of government, its principal governing documents, and the labor and employment laws of the tribe. Such training would extend beyond the cultural training workshops that many tribes already offer.<sup>59</sup>

In addition, employees will be more invested in a tribe's labor law regime if they can gain familiarity with the underlying values that inform tribal law and policy. The adaptation of individuals to new belief systems and values is a tremendously difficult and slow process, however. Although there is no silver bullet that can alter the deeply-held belief systems of tribal employees, tribal employers can at least take steps to actively teach employees about tribal culture and values and attempt, wherever appropriate, to include employees in the cultural life of the tribe.

North's third recommendation for promoting institutional change in the face of path dependent resistance is the encouragement of norms of behavior and codes of conduct that support the new institutional regime.<sup>60</sup> One way that tribes could encourage such norms of behavior is to adopt methods of formally honoring and respecting tribal employees whose actions exemplify the norms of behavior that support tribal labor and employment institutions. For example, tribal employees who are actively involved in tribal civic life and tribal labor organizations recognized under tribal law could be publicly honored and rewarded.<sup>61</sup>

Finally, tribes can also encourage employees' greater adaptation to tribal legal institutions by emphasizing the ways in which tribal labor laws are similar to their federal and state counterparts. To the extent that tribes enact labor protections and remedies that align with the NLRA, for example, tribes can reduce the amount of learning and skill building that employees will need to develop to be able to take advantage of the Act's protections. The deeply-rooted beliefs and norms that are integral to the effective use of institutions will also require less adaptation if tribal laws offer similarities to key aspects of the NLRA.

In addition to the suggestions above, some strategies are best avoided. These include failing to do anything at all and enacting labor laws that pro-

---

59. *E.g.*, Kristina Hughes, *Tribe Works to Ensure Language's Future*, PETOSKEY NEWS-REV., Mar. 23, 2007, available at [http://www.petoskeynews.com/articles/2007/03/24/news/more\\_local/news02.txt](http://www.petoskeynews.com/articles/2007/03/24/news/more_local/news02.txt).

60. *See* North, *supra* note 58.

61. In general, the civic engagement of tribal employees in tribal political and social life may be the most important tool to encourage greater adaptation to the forms of knowledge, skills, and belief systems that underlie tribal legal institutions. Even without enrollment in a tribe, nonmember and even non-Indian tribal employees often have a variety of opportunities to engage in tribal civic life. As tribes consider strategies for encouraging employee use of tribal labor remedies, they might also consider providing more opportunities for such civic involvement.

hibit the election of a union.<sup>62</sup> Failing to act can lead employees and outside labor interests to conclude that the only available remedies for the protection of labor are those derived from the NLRA. If tribes fail to adopt their own policies, they lose the opportunity to proactively exercise tribal sovereignty over promoting tribal welfare. Silence, therefore, can lead to greater dependence on federal policies and a weakened assertion of self-determination. Similarly, the enactment of a labor law regime that is more restrictive than the NLRA or other labor laws that apply to the public sector can be seriously damaging. Not only are such laws likely to lead to greater dissatisfaction and unrest among employees, but they could also potentially serve as national symbols of injustice in the news media and within the legal system.

#### CONCLUSION

There are a number of proposals that stem from this consideration of an economic analysis of labor relations in Indian country. If tribes want to encourage employee reliance on tribal law remedies for employment concerns, they will need to invest in steps that will break down some of the barriers to institutional reform that path dependence theory identifies. This can include the promotion and support of new, alternative organizations of employees that will allow for collective representation and that will allow for their existence within the rubric of tribal law. These organizations must have a stake in looking to tribal law to address labor concerns. It can also include investment in developing the skills and knowledge of employees to ensure that they learn about tribal law remedies for employee concerns and learn how to go about obtaining these remedies. It could even include actively working to shape the informal norms and belief systems of individuals who work in Indian country to encourage the development of employee mindsets that value tribal legal remedies and that adopt a code of conduct that presumes working directly with the tribe to address labor issues.

In addition, tribes can also work to decrease the costs and increase the benefits of resorting to tribal legal remedies for the resolution of employee concerns. Creating opportunities for direct communication between employers and employees; simplifying procedural requirements for resolution of disputes; encouraging speedy resolution of disputes; protecting employees who raise concerns about employment issues; and providing for payment of penalties and attorneys' fees for employers found to have violated tribal law are several possible strategies.

---

62. Toensing, *supra* note 55. On September 17, 2008, shortly before this article went to press, the Saginaw Chippewa Indian Tribe repealed its Tribal Ordinance prohibiting union organizing.

I contend that attention to economic analysis of the law is a useful analytical tool for developing strategies that will promote the successful enactment and enforcement of tribal laws and policies that will encourage tribal economic development and the exercise and strengthening of tribal sovereignty. This is particularly true given the fact that judges often appear to use inductive rather than deductive forms of reasoning. In other words, judges often reach their desired legal outcome first, and then work backwards to find a rationale that supports that outcome, rather than using a more formalist approach that applies fundamental principles and upholds the outcome favored by those principles. In many contexts, the outcomes that appear to be favored include those that promote economic efficiency. Given this trend, the use of lessons imparted by the economic analysis of the law and institutional economics will assist tribal efforts to protect and strengthen tribal sovereignty.