A CALL TO RECONSIDER *CHEVRON*: OVEREXTENSION OF THE NATIONAL LABOR RELATIONS ACT TO TRIBAL GAMING IN *PAUMA V. NLRB*

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INTRODUCTION

The relationship between tribal businesses and the federal government is a turbulent one, featuring a constant fight for Native American tribes to have their status as independent nations recognized and for tribes to achieve the economic sufficiency that allows for successful governance.[1] Yet, over time, the fight for tribal independence has been both supported and hindered by the federal government, depending on the prominent political culture and governing economic policy of the time.[2]

1. M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 336–37 (2018) ("Embedded in the Constitution and its scant references to Indian tribes is an uneasy and awkward orientation. Indian tribes do not fit nicely into the constitutional structure and the settler history of the United States. The reason they do not fit has everything to do with the two fundamental concepts examined herein: congressional power over Indian affairs and inherent tribal sovereignty.").

2. *Historical Tribal Sovereignty & Relations*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/historical-sovereignty-relations/ (last visited Aug. 27, 2022).

One common theme in Native American law for nearly 200 years, however, is the refrain that tribes enjoy sovereign status, as recognized by the Supreme Court and the federal government.[3] It is clear that tribal sovereignty has an immeasurable effect on the independence of tribes. Tribal sovereignty grants tribes the authority "to regulate conduct in their jurisdiction according to their own laws and principles and to adjudicate regulatory disputes in their own forums" without federal interference unless specifically authorized by Congress.[4] Without unnecessary federal involvement, tribes can perform traditional government functions such as determining their form of government, passing and enforcing laws, establishing a court system, excluding non-Native members, and determining qualifications for membership.[5]

The federal government has shown some support for tribal governance in these areas over the past two centuries, such as the deeding of reservation land to Native Americans in the 1880s[6] and the passage of fundamental federal laws that promote tribal sovereignty from the 1960s to the 1990s.[7] However, "[e]ven at its most supportive of" tribes, "federal . . . policies demand concessions from tribal governments."[8]

The federal government demands more when tribes have greater resources to offer. Exercising tribal sovereignty requires that tribes possess sufficient economic resources to fund traditional government services.[9] Yet, it is this exercise of economic power that leads the federal government to push back against tribal sovereignty, requiring tribes to "engage in this balancing act[,] . . . protecting their tribal sovereignty while being active, influential actors in the American

3. Regina Gerhardt, Note, *Tribal Sovereignty and Gaming: A Proposal to Amend the National Labor Relations Act*, 39 CARDOZO L. REV. 377, 381 (2017).

4. *Historical Tribal Sovereignty & Relations*, *supra* note 2 (explaining that research shows that tribal sovereignty allows tribes to "reverse the legacy of poverty and economic suppression to which they have historically been subjected").

5. Riley Plumer, Note, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in* Soaring Eagle Casino and Resort v. National Labor Relations Board, 35 LAW & INEQ. 131, 139 (2017).

6. *Historical Tribal Sovereignty & Relations*, *supra* note 2.

7. These cornerstone laws include the Indian Reorganization Act, the Indian Civil Rights Act of 1968, the Indian Self-Determination and Education Act of 1975, the Indian Gaming Regulatory Act of 1988, and the Indian Tribal Justice Act of 1993. *Id.*

8. Theodor P. Gordon, *Tribal Casino Labor Relations and Settler Colonialism*, 2 CRITICAL GAMBLING STUD. 151, 151 (2021).

9. *Id.*

body politic."[10] In recent decades, tribes have discovered that investing in tribal gaming is their most powerful economic tool to promote sovereignty without federal support.[11]

Despite the troubled relationship between tribes and the federal government, tribes have steadily grown in power over the past three decades by investing in tribal gaming.[12] Formally beginning with the passage of the Indian Gaming Regulatory Act in 1988, tribal gaming is a modern "success story," aiming to reduce tribal poverty, stimulate job growth, and improve the quality of life for Native Americans.[13] While some tribes have seen minimal economic improvements, many tribes have achieved complete financial independence from the federal government through their gaming revenue—a radical sign of support for the tribal sovereignty movement.[14] The impacts of tribal gaming were properly summarized by Kevin Washburn, the former Assistant Secretary of Indian Affairs at the US Department of the

10. *Id.*; Hilary C. Tompkins, *Domestic Nations in the Age of "Tribalism*,*"* 52 ARIZ. ST. L.J. 580, 582 (2020).

11. Vicki J. Limas, *The Tribal Labor Sovereignty Act: Do Indian Tribes Finally Hold a Trump Card?*, 41 AM. INDIAN L. REV. 345, 359 (2017). The economic function of tribal gaming is particularly important given that tribes may not collect taxes from their citizens to generate revenue. *Id.*

12. Gordon, *supra* note 8, at 151 (explaining that "experiences of colonization gave Native activists the knowledge necessary to effectively challenge colonial policies and substantially revitalize their sovereignty, most visibly through the tribal casino movement").

13. For example, revenue in Native American gaming facilities reached $34.6 billion in the 2019 fiscal year, as compared with revenue of $26.5 billion in the 2010 fiscal year. *Gross Gaming Revenue Reports*, NAT'L INDIAN GAMING COMM'N, https://www.nigc.gov/images/uploads/GGRTrendingFYOOFY20.pdf. This increase in revenue quantifies as a growth rate of 0.30. *See id.* This massive financial growth has increased the quality of life for many Native Americans living in tribal communities as "[g]aming dollars have appreciably improved the basic health and education on reservations" and "succeeded where other federal programs have failed." JAMES IKE SCHAPP & ANGEL F. GONZALEZ, THE GROWTH OF THE NATIVE AMERICAN GAMING INDUSTRY: AN UPDATE 13, 16 (2022), https://www.subr.edu/assets/subr/COBJournal/Native-American-Study110820Final1896.pdf (providing a descriptive review of the tribal gaming industry's growth and its modern and future impacts).

14. Randall K. Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, J. ECON. PERSPS. 185, 185–86 (2015). "After centuries of turmoil, oppression, attempted subjugation, and economic deprivation, the Indian nations have asserted their rights and identities, have built and rebuilt political systems in order to implement self-rule and have begun to overcome what once seemed to be insurmountable problems of poverty and social disarray." Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Laws and Economics of Indian Self-Rule*, 1 (Harv. Univ. Native Am. Program, Paper No. 3, 2004).

Interior: "Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of American Indian reservations."[15]

Despite this increase in tribal sovereignty, "one would [correctly] expect [that] the spaces where tribes make the greatest gains would become the sites where the federal government pushes back the strongest."[16] Undoubtedly, the rise of tribal gaming has raised new tensions between tribes and the federal government. The federal government continues to increase regulatory programming aimed at tribal gaming facilities.[17] Therefore, federal regulation of tribal gaming is the key battleground in the modern fight to protect or dismantle tribal sovereignty.[18]

The newfound applicability of the National Labor Relations Act ("NLRA") to tribal governments exemplifies this ongoing tension. Although tribal governments have not been subject to the NLRA for seventy years and the NLRA definition of "employer" is silent regarding tribes,[19] "insert [tribal gaming] into the picture and the [NLRB] flipped the law on its head so it could similarly flip its own precedent."[20] Most notably, the Ninth Circuit held in 2018 in *Pauma v. NLRB*[21] that the NLRA did cover tribal gaming facilities, exacerbating the existing circuit split on the issue.[22]

This Note will begin by discussing how the increased hiring of non-Native employees at tribal gaming facilities has created labor conflicts and a newfound application of the NLRA to tribes. Next, it will consider the existing circuit split before the Ninth Circuit's opinion in *Pauma v. NLRB* and the impacts of *Pauma* on the current state of the law. Then, it will explain why a plain-meaning approach to *Chevron* deference is inappropriate in the tribal sovereignty context and propose two alternatives. First, it will consider possible congressional intervention through the Tribal Labor Sovereignty Act

15. Akee et al., *supra* note 14, at 196.

16. Gordon, *supra* note 8, at 151.

17. *See* Jonathan Guss, *Gaming Sovereignty? A Plea for Protecting Worker's Rights While Preserving Tribal Sovereignty*, 102 CALIF. L. REV. 1623, 1636 (2014).

18. *Id.* at 1623.

19. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, INDIANZ.COM (May 4, 2018), https://www.indianz.com/IndianGaming/2018/05/04/tribes-and-sovereignty-still-dont-mix-wh.asp; 29 U.S.C. § 152(2).

20. Petition for Writ of Certiorari at 4, Pauma v. NLRB, 139 S. Ct. 2614 (2019) (No. 18-873). The newfound applicability of the NLRA has applied to tribes nationwide, and the only judicial exemption existing thus far is for the Chickasaw Nation and its treaty-based exemption. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19.

21. 888 F.3d 1066, 1073 (9th Cir. 2018).

22. *Id.*

and explain how political tension makes this possibility unlikely. Second, it will propose that courts should use a purposive approach to *Chevron* deference to consider the underlying purpose of the NLRA, the exemption for state governments, and the ability for tribes to pass labor laws and adjudicate labor issues. Ultimately, it will argue that the application of a purposive approach suggests that the NLRA should not apply to tribal businesses.

I. BACKGROUND

A. The Relationship Between Native American Tribes and Organized Labor

The boom of tribal gaming in recent decades has required gaming facilities to hire more non-Native employees to keep up with the demand.[23] The most successful gaming facilities are now primarily staffed by non-Native employees who commute to the reservations for work, [24] leading to unprecedented contact between non-Native individuals and tribal gaming facilities.[25]

Since tribal gaming facilities are governed by tribal law, non-Native employees do not have the same labor rights as state and federal government employees, including the right to petition tribes for labor legislation, the right to unionize absent tribal legislation providing otherwise, [26] and the right to negotiate a collective bargaining agreement to protect against discrimination and harassment in the absence of Title VII protections.[27] Therefore, the rise in non-Native employees in gaming facilities, the inability for those employees to unionize, and the NLRA's stated mission serve as convenient reasoning for the NLRB to apply the NLRA to tribal businesses.[28]

Admittedly, compelling arguments exist in favor of granting stronger labor protections to non-Native employees. For example, one study indicates that unionization at tribal gaming facilities can lead

23. Guss, *supra* note 17, at 1625.

24. Gordon, *supra* note 8, at 152.

25. Guss, *supra* note 17, at 1625.

26. Bobby Scott, *Fact Sheet*, COMM. ON EDUC. & THE WORKFORCE DEMOCRATS, https://edlabor.house.gov/imo/media/doc/2018-01-08%20Tribal%20Labor%20Sovereignty%20Act%20Fact%20Sheet.pdf (last visited Nov. 18, 2022).

27. *Id.*

28. The NLRA was passed in 1935 to "eliminate . . . substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred" through collective bargaining and "freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151.

to "low-wage service workers' wages [increasing], health care costs [declining], and fewer workers and their children [requiring] government assistance with health care costs." [29] Non-Native employees often do not have other employment options since tribal gaming facilities may be the primary employer in a given area.[30] A 2020 study also reveals that 65 percent of the American public continues to approve of labor unions,[31] particularly due to the popular understanding that unions offer "protection for workers who exercise basic civil rights, in particular the rights of speech, association, and petition."[32] However, these pro-union arguments are undermined by statistics demonstrating that union power, despite its undeniably positive benefits, has steadily declined for over three decades while tribal gaming has steadily grown.[33] Hence, it is necessary to consider how NLRA coverage harms the biggest vehicle of economic growth for Native American tribes—tribal gaming facilities.[34]

While arguments in favor of granting more protections to non-Native employees may seem appealing at first glance, the practical impact leads to another tale where "the rights of non-Indians, many of whom voluntarily enter[] the reservation, [take] precedence over tribes." [35] Many seemingly innocuous arguments against tribal sovereignty often harbor hidden animosities against tribes. Hilary Tompkins, the former US Secretary of the Interior, "witnessed concerns about gaming employees being exposed to tribal labor laws . . . , that non-Indian businesses would have to resolve disputes in tribal court, and that the existence of historic reservation boundaries would disrupt the 'settled expectations' of the non-native population."[36] It is crucial to understand the practical consequences

29. Scott, *supra* note 26.

30. Gerhardt, *supra* note 3, at 407.

31. Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, GALLUP (Sept. 3, 2020), https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx.

32. *Collective Bargaining and Civil Liberties*, ACLU, https://www.aclu.org/other/collective-bargaining-and-civil-liberties (last visited Sept. 4, 2022).

33. "While the tribal gaming industry has been growing steadily for the past thirty years, union membership and labor power in this country have been steadily declining." Gerhardt, *supra* note 3, at 392. A summary by the Bureau of Labor Statistics reveals that union membership for 2021 was 10.3 percent, and union membership in 1983 (the first recorded year) was 20.1 percent. *Union Members Summary*, U.S. BUREAU LAB. STAT. (2021), https://www.bls.gov/news.release/pdf/union2.pdf. For statistics on the growth of tribal gaming, see *supra* note 13 and accompanying text.

34. SCHAAP & GONZALEZ, *supra* note 13, at 5.

35. Tompkins, *supra* note 10, at 585–86.

36. *Id.*

of these arguments on tribal businesses, as evidenced through the impacts of the NLRA.

On a daily basis, application of the NLRA forces tribes to alter their employment practices.[37] Changing daily practices requires tribes to begin drafting additional labor laws with the hope that "[f]ederal agencies and federal courts will be less likely to apply federal law to a tribe that has regularly enacted, implemented, and enforced tribal law because the application of federal law would infringe upon the exercise of a tribe's sovereign authority."[38]

Further, the aforementioned economic success of tribal gaming facilities[39] and their positive effects on tribes may be jeopardized by NLRA application. While tribes "are generally immune" from "private suits[,]"the "NLRA provides a federal agency forum for private suits by various charging parties—including unions and individuals."[40] Thus, NLRA application opens the door to a surge in labor disputes, which will require the use of tribal funds to combat.[41] These resources "consequently will not be available for essential tribal government services to children, elders, and the community."[42]

NLRA application can also place tribes at risk of materially breaching prior compacts. For example, California tribes, including the Pauma tribe, raised concerns that NLRA application "displaces the negotiated agreement between California tribes and organized labor and creates untenable uncertainty as to the binding and exclusive effect of the [Tribal Labor Relations Ordinance] as a matter of Indian law."[43] These existing compacts between tribes and organized labor show that there was a working relationship between these parties prior to NLRA application. In effect, NLRA application displaces previous successful attempts between tribal gaming and organized labor to accommodate the interests of all parties on labor

37. *See* Chloe Moyer, *An Oklahoma Tribal Employer's Guide to Conducting Business in the Tenth Circuit*, 45 OKLA. CITY U. L. REV. 215, 246 (2021).

38. *Id.* at 256.

39. SCHAAP & GONZALEZ, *supra* note 13, at 8.

40. Judd H. Lees, *Federal Labor Law Held Applicable to Tribal Casinos*,15 INDIAN L. NEWSL. 7, 18 (2007).

41. Chloe Thompson, *New NLRB Rule Presents an Unwelcome Choice for Tribal Businesses*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://indiancountrytoday.com/archive/new-nlrb-rule-presents-an-unwelcome-choice-for-tribal-businesses.

42. *Id.*

43. Brief of Amici Curiae Cal. Nations Indian Gaming Ass'n et al. in Support of Casino Pauma, Pauma v. NLRB, 888 F.3d 1066, 1066 (2018) (Nos. 16–70397 & 16–70656).

issues,[44] while factoring in local realities that a broadly applied federal statute simply cannot take into account.

Moreover, NLRA application to tribal businesses differs from NLRA application to other businesses due to the unique role of tribal sovereignty. If a tribe accepts NLRA application, this decision "could be viewed as conceding the NLRB's authority over it" or "prompt employees to file NLRB charges against a tribal business that they would not otherwise have filed"—"[e]ach such charge constitutes a challenge to tribal sovereignty."[45] By posing a threat to the legitimacy of tribal sovereignty, to the accessibility of tribal funds for traditional government purposes, and to the workability of preexisting compacts with organized labor, the NLRA challenges the very structure of tribal governance,[46] making the resolution of this circuit split essential to the future of tribes.

B. The Standing Circuit Split Before Pauma v. NLRB

Since the NLRA's passage, it has been historically understood that the NLRA did not apply to Native American tribes.[47] The past twenty years, however, have featured judicial reconsideration of the issue.[48] Most recently, the Ninth Circuit determined in *Pauma v. NLRB* that by applying *Chevron* deference to the NLRB's interpretation of the NLRA, the NLRA *did* apply to tribal gaming facilities as "employers."[49] Yet, the state of the law prior to *Pauma* demonstrates how the Ninth Circuit muddied the waters in an already opaque area of the law.

Prior to discussing the differing analyses of these circuits, one must understand the controlling, yet controversial, law the circuits are applying: *Chevron* deference.[50] When considering if an administrative agency's interpretation of a federal statute is reasonable, *Chevron* instructs a court to undertake a two-step inquiry.[51] First, a court must ask whether the statute is ambiguous

44. Steve Biddle & Jeremy Wood, *Preemption's Silver Lining: The NLRA Offers California Tribes a Shield Against State Labor Protections*, LITTLER (Mar. 3, 2020), https://www.littler.com/publication-press/publication/preemptions-silver-lining-nlra-offers-california-tribes-shield-against.

45. Thompson, *supra* note 41.

46. *Id.*

47. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19.

48. *See* Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, FED. LAW., Sept. 2015, at 66.

49. Pauma v. NLRB, 888 F.3d 1066, 1075 (9th Cir. 2018).

50. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837 (1984).

51. *Id.* at 845.

or if Congress has spoken to the precise question at issue.[52] If the statute is clear as to Congress's intent, the court must honor that intent.[53] However, if the statute is silent or ambiguous on the challenged issue, the court must move to step two of the inquiry, asking whether the agency's interpretation of the statute is reasonable.[54]

On the issue of whether the NLRA covers tribes, *Chevron* deference applies because the NLRA is silent on whether tribes fall under the general definition of "employer."[55] The NLRA empowers the NLRB to "prevent any person from engaging in any unfair labor practice . . . affecting commerce."[56] The NLRB's authority to prevent unfair labor practices extends to employers, defined to "include[] any person acting as an agent of an employer, directly or indirectly, but shall not include the United States[.]"[57] Accordingly, a circuit split exists due to the courts' varying application of the *Chevron* doctrine.[58]

To begin, the existing circuit split can be seen as a consequence of Supreme Court dictum contained in *Federal Power Commission v. Tuscarora Indian Nation*.[59] In *Tuscarora*, the Supreme Court appeared to depart from the principle that a statute of general applicability that is silent on tribes does not apply absent clear congressional intent to the contrary, instead prioritizing Congress's recognized plenary powers over tribes.[60] The Court stated that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests:"[61] a stark departure from its prior precedent.[62] Yet, the Court has never relied upon this dictum in subsequent cases and continues to require clear congressional intent to regulate tribes for a statute of general applicability to cover them.[63] This stray remark in *Tuscarora* can instead be understood to cover "the rights of individual Indians, *not* the sovereign rights of tribes," meaning the requirement of clear congressional intent remains.[64]

52. VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER (2017).

53. *Id.*

54. *Id.*

55. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19; 29 U.S.C. § 152(2).

56. 29 U.S.C. § 160(a).

57. 29 U.S.C. § 152(2).

58. *See* Petition for Writ of Certiorari, *supra* note 20, at 21.

59. 362 U.S. 99 (1960).

60. Intermill, *supra* note 48, at 66.

61. *Tuscarora*, 362 U.S. at 116.

62. Petition for Writ of Certiorari, *supra* note 20, at 4.

63. Intermill, *supra* note 48, at 67.

64. *Id.*

Several circuits disagree with this explanation, however, and believe that *Tuscarora* announced the proper framework for analyzing the issue. In *Donovan v. Coeur d'Alene Tribal Farm*,[65] the Ninth Circuit embraced the dictum in *Tuscarora*,[66] leading to a competing analysis. The Ninth Circuit held in *Coeur d'Alene* "that statutory silence regarding Native nations in the Occupational Safety and Health Act (OSHA) presumptively indicated congressional intent to regulate tribes."[67] The *Tuscarora-Coeur d'Alene* approach was subsequently adopted by the Second, Sixth, and Eleventh circuits, and demonstrates the pervasiveness of this analytical approach to statutory silence regarding tribes.[68] Therefore, the standing circuit split can be understood as a dichotomy between circuits who follow the *Tuscarora-Coeur d'Alene* approach and circuits who follow standing Supreme Court precedent requiring clear congressional intent.[69]

Following the start of this jurisprudential debate, the first case to raise this issue under the NLRA was brought before the Tenth Circuit in *NLRB v. Pueblo of San Juan*[70] in 2002. The NLRB challenged a right-to-work ordinance enacted by a casino that the Pueblo of San Juan operated, arguing the ordinance violated the NLRA's protection for employees entering into union security agreements.[71] Ultimately, the court held that the Pueblo "retains the sovereign power to enact its right-to-work ordinance . . . because Congress has not made a clear retrenchment of such tribal power as is required to do so validly."[72] Determining mere statutory silence was not enough, the court noted that Congress possesses plenary powers over Native American affairs, but it reasoned that a competing doctrine was stronger—a federal statute does not "work[] as a divestment of tribal sovereignty unless Congress has clearly expressed an intent to do so."[73] In its application of *Chevron* deference, the court first considered the plain language of the NLRA, but it continued on to analyze the underlying purpose of the statute by reviewing the legislative history.[74] The court commanded that "in

65. 751 F.2d 1113 (9th Cir. 1985).

66. *See id.* at 1115.

67. Note, *Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty*, 134 HARV. L. REV. 1162, 1166 (2021).

68. Intermill, *supra* note 48, at 70.

69. *Id.*

70. 276 F.3d 1186 (10th Cir. 2002).

71. *Id.* at 1190.

72. *Id.* at 1191.

73. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 692 (2004).

74. Plumer, *supra* note 5, at 145.

the absence of clear indications of legislative intent" to abrogate tribal sovereignty, courts should "tread lightly."[75]

Next, the Sixth Circuit authored two cases in 2015, which blurred the divisive line between Supreme Court precedent and the *Tuscarora-Coeur d'Alene* framework.[76] First, the Sixth Circuit held in *NLRB v. Little River Band*[77] that tribes fell within the definition of an "employer," despite the statutory silence, [78] because NLRA application "did not implicate [the tribe's] inherent right of self-governance" and "did not undermine [the tribe's] ability to generate revenue through the casino's operation and fund its government."[79] The court held that the principles of tribal sovereignty did not justify finding that statutes of general applicability exclude tribes where the affected "tribal regulation is not 'necessary to protect tribal self-government.'"[80]

Immediately after the opinion in *Little River Band*, the Sixth Circuit held in *Soaring Eagle Casino & Resort v. NLRB*[81] that the Saginaw Chippewa Native American tribe's application of a no-solicitation policy to its employees violated the NLRA.[82] The court reasoned that its decision was based on precedent as set in *Little River Band*, even though several members of the court believed the holding to be a violation of standing Supreme Court precedent, an incorrect adoption of the *Tuscarora-Coeur d'Alene* approach, and a misguided analysis on tribal sovereignty.[83]

In sum, the state of the law prior to the Ninth Circuit's entry in *Pauma* was already muddled. Professor Wenona T. Singel rightly captures how a circuit's choice of applicable law on the question of

75. *Pueblo of San Juan*, 276 F.3d at 1195 (internal quotation marks omitted) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

76. Petition for Writ of Certiorari, *supra* note 20, at 21 ("The truly disjointed state of the law on this issue comes to light upon considering the approach of the Sixth Circuit, which abandoned statutory interpretation and applied the NLRA to Indian tribes using a federal-Indian-law test from the Ninth Circuit—one that was not even the basis for the Ninth Circuit's own decision and which four of the six Sixth Circuit judges to hear the issue in two nearly simultaneous cases thought violated Supreme Court precedent.").

77. 788 F.3d 537 (6th Cir. 2015).

78. *Id.* at 550. The opinion, however, was not unanimous, with Judge David McKeague making the following scathing comment—the majority test is "a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card." *Id.* at 557–58 (McKeague, J., dissenting).

79. Plumer, *supra* note 5, at 154.

80. *Little River Band*, 788 F.3d at 550 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

81. 791 F.3d 648 (6th Cir. 2015).

82. *Id.* at 651.

83. Plumer, *supra* note 5, at 153.

whether the NLRA applies to tribal businesses reflects underlying values on tribal sovereignty:

> The difference in these competing modes of analysis represents a fundamental conflict in how the courts construe tribal sovereignty. For some, the hallmark of sovereignty is its inherent nature, and any diminishment of sovereignty or abrogation of tribal sovereign immunity requires an explicit expression of Congress, with ambiguities construed against the backdrop of the Indian canon of construction. For others, the hallmark of sovereignty is the doctrine of implicit divestiture. From this approach, the courts are untethered from the foundational principles of federal Indian law and Congressional statements on Indian sovereignty and are free to make their own assessments of whether sovereignty is consistent with particularized circumstances.[84]

As Singel explains, circuits are wrestling with fundamental, yet competing, values without congressional or Supreme Court guidance.[85] Accordingly, *Pauma* represented another circuit stepping in to alter the landscape of the current battleground over tribal sovereignty and tipping the scales in favor of the NLRA and against tribes.

II. *PAUMA V. NLRB*

A. Factual Background and Procedural History of Pauma v. NLRB

Casino Pauma is owned by the Pauma Band of Mission Indians and located in Pauma Valley, California.[86] In 2013, the union Unite Here initiated "an organizing drive" at the casino to promote union efforts.[87] A group of employees passed out union leaflets to entering customers, and another employee handed out union flyers to fellow workers near the time clock.[88] These actions violated the "No Solicitation or Distribution Policy" contained in the employee handbook.[89]

NLRB General Counsel filed multiple complaints against Casino Pauma, consolidated for trial before an Administrative Law Judge

84. Singel, *supra* note 73, at 692.

85. Little River Band v. NLRB, 788 F.2d 537 (6th Cir. 2016), *cert. denied*, 136 S. Ct. 2508 (2016); Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648 (6th Cir. 2016), *cert. denied*, 136 S. Ct. 2509 (2016).

86. Pauma v. NLRB, 888 F.3d 1066, 1070 (9th Cir. 2018).

87. *Id.*

88. *Id.* at 1070–71.

89. Casino Pauma & Unite Here Int'l Union, 363 N.L.R.B. 536 (2015).

("ALJ").[90] The ALJ held that the casino violated the NLRA by stopping "union literature distribution in guest areas at the casino's front entrance and in non-working areas near its employees' time clock."[91] The ALJ's determination was affirmed by an NLRB panel.[92]

B. The Ninth Circuit's Analysis in Pauma v. NLRB

Upon hearing the case, the Ninth Circuit presented the issue as "whether the National Labor Relations Board . . . may regulate the relationship between employees working in commercial gaming establishments on tribal land and the tribal governments that own and manage those establishments."[93] Under step one of *Chevron*, the court took a plain-meaning approach and quickly found that the statutory silence of the NLRA on the definition of "employer" was ambiguous.[94] The court then focused on step two of the analysis to determine whether the NLRB's interpretation of the NLRA was reasonable.[95] In its analysis, the court applied the *Tuscarora-Coeur d'Alene* framework and found that "federal Indian law does not preclude the Board's application of the NLRA to Casino Pauma."[96] The court reasoned that tribes do not enjoy immunity from suit from "an agency of the United States" when acting as "a business entity that *happens* to be run by a tribe," rather than as a "provider of a governmental service."[97]

C. Petition for Writ of Certiorari in Pauma v. NLRB

Although the Supreme Court declined to hear the case, it is Casino Pauma's Petition for Writ of Certiorari that makes this case noteworthy.[98] In the petition, Casino Pauma asserts that this case is the prime example of why *Chevron* deference should be rejected, stating one question presented as follows: "Should this Court reconsider *Chevron*?"[99] The Petition "shows both the dangers and devolution of the deference rule in *Chevron*[,] . . . one that helped protect administrative functionality in 1984 but has become a vehicle for the wholesale abdication of the judicial function in 2018," at the

90. *Pauma*, 888 F.3d at 1071.
91. *Id.*
92. *Id.*
93. *Id.* at 1070.
94. *Id.* at 1073.
95. *Id.*
96. *Id.* at 1077.
97. *Id.* (emphasis added) (quoting EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080 (9th Cir. 2001)).
98. Petition for Writ of Certiorari, *supra* note 20.
99. *Id.* at i.

expense of tribal gaming facilities.[100] As exemplified by the Ninth Circuit's overly deferential view of step two of *Chevron*, the Pauma tribe argues that *Chevron* allows courts to summarily find for administrative agencies without deeper analysis of whether statutory ambiguity exists in the first place.[101]

D. State of the Law Following Pauma v. NLRB

After *Pauma*, the law on whether the NLRA covers tribes under the definition of an "employer" stands in an uncertain place. At the moment, federal circuits have created three different approaches and reached three different results—"pseudo-statutory interpretation under *Chevron*, statutory interpretation under the guise of federal Indian law, and straight federal Indian law . . . with these results spanning the spectrum and creating splits not only *between* circuits but *within* them as well."[102] Further, this summary merely captures where the circuits that have thus far addressed the issue stand, leaving the possibility that other circuits may hear this issue in the future with no clear Supreme Court guidance. Accordingly, it is necessary to create a workable approach to the issue that considers what jurisprudential patterns are currently harming tribes, identifies what an ideal solution would entail, and proposes a realistic answer that better balances the competing interests of tribal gaming and organized labor.

III. REJECTION OF A PLAIN-MEANING APPROACH TO *CHEVRON* DEFERENCE

Ultimately, the existing circuit split demonstrates why a plain-meaning approach to *Chevron* deference is inappropriate in the context of tribal sovereignty. To understand why this approach is harmful when applied to tribes, it is necessary to evaluate what a plain-meaning approach involves.

100. *Id.* at 3.

101. The tribe recognizes that *Chevron* step two requires some deference to the NLRB but explains that "*Chevron* is not some get-out-of-jail-free card whereby a court can punt an issue it would rather not address and assume a more secondary role where it just reviews whether the latest interpretation offered by a non-Article III tribunal falls within an expansive and often subjective range of reasonableness," particularly one that "is either opportunistic or gives short shrift to the express language of the statute." *Id.* at 24.

102. *Id.* at 23. For the intra-circuit split, the Petition refers to the Sixth Circuit because the court "1342traddle[es] the fence by saying [the NLRA does apply to tribes] even though a supermajority of six deciding judges in two near-simultaneous cases believe [their] decision violate[s] Supreme Court precedent." *Id.* at 5.

When a court uses a plain-meaning approach to *Chevron* deference, it determines whether the statute contains an ambiguity at step one, *strictly* looking at the plain meaning of the statutory language.[103] When applying this approach, courts try to "plac[e] resolution of statutory ambiguities in politically accountable agencies, rather than unelected Article III courts."[104] Although this approach offers the benefit of agency expertise, it can result in courts summarily deferring to the agency without exercising their supervisory role, as seen most palpably in *Pauma*.[105]

In addition to courts failing to exercise their Article III powers, applying a plain-meaning approach in the tribal sovereignty context violates traditional canons of construction regarding tribes. These canons of construction echo two fundamental themes: (1) "[S]tatutes . . . must be liberally construed with ambiguities resolved in favor of tribes," and (2) "[T]ribal sovereignty . . . must be upheld unless there is explicit congressional intent to the contrary."[106] Although these canons have been inconsistently applied by the Supreme Court over the years,[107] they stand as the governing law for tribes, and the circuits do not have the discretion to ignore clear canons of construction.[108]

A plain-meaning approach also fails to account for specific Supreme Court precedent on tribes. The Supreme Court has repeatedly stated and reinforced since *Tuscarora*[109] that Congress must be explicit for a statute of general applicability to regulate tribes.[110] Because the clear statement rule remains good law, the NLRB's decision to expansively interpret "employer" to cover tribes violates this precedent, and it fails to account for the similarities between public employers and tribal employers.[111] As a former Solicitor of the U.S. Department of the Interior, Hilary Tompkins noted:

> The National Labor Relations Act (NLRA) expressly treats public and private employers differently, exempting state and federal governments from federal labor law requirements. The NLRA is silent with regard to tribes, creating an ambiguity, but the courts allowed the NLRB to hide behind *Chevron* deference

103. BRANNON & COLE, *supra* note 52, at 14.
104. *Id.* at 22.
105. *See supra* Part II.B.
106. Gerhardt, *supra* note 3, at 386.
107. *Id.* at 386–87.
108. Arangure v. Whitaker, 911 F.3d 333, 336 (6th Cir. 2018).
109. Note, *supra* note 67, at 1170.
110. Bryan R. Lynch, *Silence Is Anything but Golden: Laws of General Applicability in Indian Country*, 42 AM. INDIAN L. REV. 207, 216 (2017).
111. *See infra* notes 123–25 and accompanying text.

> to an unsupportable degree. The circuit courts gave little weight to important factors, such as the fact that the NLRB had previously ruled that it lacked enforcement authority against the tribes; that the NLRB definition of "state" includes territories, which the NLRB has concluded enjoy the exemption from enforcement; that the NLRB disregarded the self-governance purpose of the Indian Gaming Regulatory Act; and the questionable, arbitrary line drawing between tribal government functions versus tribal commercial activity involving non-Indians, which the NLRB did not similarly do for state-owned gaming enterprises. At the core in these cases was simple hand-wringing about exposing non-Indian employees to tribal authority. Indeed, a common theme coming from the courts is the embrace of implied divestitures of tribal authority to avoid impacts to non-tribal members, as the dominant culture is deeply troubled with exposure of Americans to foreign, tribal authority.[112]

Next, from a sociological perspective, the application of plain-meaning *Chevron* deference may be seen as a mere extension of colonialism. Despite prior efforts to encourage tribal independence, the federal government quickly altered a seventy-year position on NLRA application when tribal gaming facilities experienced massive economic growth.[113] By "reinterpret[ing] a longstanding legal precedent to diminish the sovereignty of tribal governments," an opinion applying a plain-meaning approach directly "advance[s] settler colonialism."[114] In effect, settler colonialism is "at work when federal and state laws supplant tribal laws on tribal land, especially when these regulatory changes stem directly from tribal governments' achievements, like casino development."[115]

Despite these disadvantages of applying *Chevron* deference to this issue, the Supreme Court is highly unlikely to abandon the doctrine.[116] Instead, given that "it is quite possible the Court will

112. Tompkins, *supra* note 10, at 586–87 (highlighting the value of incorporating tribal perspectives in decision-making as explained by a former federal official during the Obama administration).

113. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19; Julian Brave NoiseCat, *Labor Rights and Tribal Sovereignty Collide at Indian Casinos*, HUFFPOST (June 15, 2015), https://www.huffpost.com/entry/native-americans-labor-unions_n_7573322.

114. Gordon, *supra* note 8, at 154; *see* Tompkins, *supra* note 10, at 587 ("This question, in my view, invites themes of 'us' and 'them,' depiction of tribal courts as lawless enclaves, and lack of legitimacy in the eyes of the dominant authority.").

115. Gordon, *supra* note 8, at 157.

116. Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 115 (2018).

attempt to narrow *Chevron*'s domain," it is more practical to consider solutions that stem from congressional resolution or a holistic approach to *Chevron* deference, which considers more than mere plain language.[117]

IV. THE TRIBAL LABOR SOVEREIGNTY ACT

Although it is possible for the courts to address NLRA application as new cases arise, Congress can expressly intervene by passing a statutory solution.[118] The Tribal Labor Sovereignty Act ("TLSA") was initially introduced in 2007,[119] and its passage would create a brief amendment to the NLRA that lists tribes as an exempt category.[120] In effect, the statute would "give teeth to tribal governments[,] . . . allowing tribal laws to govern labor relations with

117. *Id.* at 115–17. During its last term, the Supreme Court decided *West Virginia v. EPA*, which considered whether a provision of the Clean Air Act authorized the Environmental Protection Agency to create an Obama-era Clean Power Plan. 142 S. Ct. 2587, 2599–2600 (2022); *see supra* notes 51–54 and accompanying text (explaining why *Chevron* deference would ordinarily apply in this situation). In its reasoning, the Court declined to mention *Chevron* deference and instead applied its major questions doctrine. *Id.* at 20; David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. L. SCH. BLOGS (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/. Although the Court's holding weakened *Chevron* deference for future cases, *Chevron* is still the relevant law in deciding whether the NLRA applies to tribal gaming facilities. While *West Virginia v. EPA* may signal the abandonment of *Chevron* in future terms, which would likely benefit tribes, the Court's holding does not affect the current need to reconsider whether *Chevron* is appropriate in the tribal sovereignty context.

118. BRANNON & COLE, *supra* note 52, at 25 ("*Chevron* is a judicially created doctrine that rests, in part, upon an assumption made by courts about congressional intent: that where a statute is silent or ambiguous, Congress would have wanted an agency, rather than a court, to fill in the gap. Accordingly, Congress can determine whether a court will apply *Chevron* review to an agency interpretation . . . . Thus, Congress can legislate with *Chevron* as a background presumption, using ambiguity to delegate interpretive authority to agencies or writing clearly to withhold that authority.").

119. H.R. 3413, 110th Cong. (2007); Limas, *supra* note 11, at 345.

120. The amendment would state: "[T]he National Labor Relations Act to provide that any Indian tribe or any enterprise or institution owned and operated by an Indian tribe and located on its lands is not considered an employer (thus excluding Indian tribes and such enterprises or institutions from coverage by the Act)." Gordon, *supra* note 8, at 155; Jefferson Keel & Ernie Stevens, *Editorial: Support Tribal Sovereignty and Pass the Tribal Labor Sovereignty Act*, NAT'L CONG. OF AM. INDIANS (Apr. 16, 2018), https://www.ncai.org/news/articles/2018/04/16/editorial-support-tribal-sovereignty-and-pass-the-tribal-labor-sovereignty-act.

tribal employees on tribal land," without explicitly disallowing unionization of tribal employees.[121]

Due to the status of tribes as sovereign nations, the issue of NLRA application to tribes is best handled under the TLSA. It is an inappropriate question to leave to the judiciary because it results in varying answers regarding tribal sovereignty.[122] Thus, it would be more appropriate for Congress to consider its relationship with tribes as foreign nations and reclaim the authority to interpret a federal statute by passing a simple amendment that would clarify the ambiguous language.

Further, *Chevron* deference makes the most sense in situations where the circuits may comfortably delegate a question of statutory interpretation to agencies as the experts of their fields.[123] Yet, while only three of thirteen circuits have thus far heard an appeal on NLRA application to tribes, all three of those circuits have reached different results and applied different analyses.[124] Therefore, this matter is not as simple as Congress stepping back and letting the *Chevron* doctrine play out. When three circuits are in stark disagreement regarding statutory language, it is a prime moment for Congress to speak and clarify the existing confusion—resolving the conflict either for the tribes' reading or the NLRB's reading of the NLRA.

Although congressional action has historically harmed tribes,[125] Congress could take this opportunity to hear the concerns of tribes and step in for their benefit. Congress has previously utilized federal legislation to promote tribal sovereignty as a means to strengthen the relationship between the federal government and tribes.[126] Given the recent tribal push for federal action on this matter, countless tribes are actively seeking a chance to be heard as to why NLRA application is a mistake.[127] Congress thus has the ideal chance to provide tribes with clearer guidance on the relationship between tribes and federal administrative agencies.

With clearer guidance, tribes would have the tools to better strategize labor relations and to intentionally allocate their resources.

121. Gordon, *supra* note 8, at 155.

122. *See* Petition for Writ of Certiorari, *supra* note 20, at 17 (discussing the circuit split and lack of consensus among jurisdictions).

123. BRANNON & COLE, *supra* note 52, at 3, 7.

124. Petition for Writ of Certiorari, *supra* note 20, at 23.

125. *See* Melody L. McCoy, *Federal Indian Law and Policy Affecting American Indian and Alaska Native Education*, THE NATIVE AM. RTS. FUND (Oct. 2000), https://www.narf.org/wordpress/wp-content/uploads/2015/01/purple.pdf.

126. Gerhardt, *supra* note 3, at 410–11.

127. *Best Practices for Tribes When Faced with Union Organizing Activity*, VARNUM LLP (Nov. 17, 2016), https://www.varnumlaw.com/insights/best-practices-for-tribes-when-faced-with-union-organizing-activity/.

Through congressional action, tribes could benefit by receiving assurance "that their ability to enact and enforce their labor relations laws would not be interfered with by the federal government or outside parties."[128]

The benefits of the TLSA, however, are overshadowed by a grim political reality. Given that the TLSA has been proposed in every congressional term since 2007, the likelihood of its passage in the near future is slim.[129] The repeated failure of the TLSA to gain any congressional traction stems from a concern for undermining union rights.[130] For example, the Democratic Party has consistently advocated for organized labor.[131] It maintains that passing the TLSA would be an unnecessary measure because the NLRB already works to balance tribal sovereignty with workers' rights.[132] It further argues that passing the TLSA would adversely impact tribal employees, most notably by taking away an employee's opportunity to raise a Title VII claim before the Equal Employment Opportunity Commission or a federal court.[133]

Federal legislation, particularly the TLSA, would be the ideal solution to ensure tribes are protected against NLRA application. The ideal solution, however, is frankly improbable. Members of Congress may face political pressure from advocates of organized labor,[134] and few politicians want the label of being "anti-union." Further, even if popular opinion sways toward protecting tribes, an absence of majority congressional support, historically from the Republican Party,[135] makes it unlikely that the legislature could

128. Limas, *supra* note 11, at 359.

129. *Id.* at 345. In her article, Limas notes each time the TLSA was introduced from 2007 to 2017, when her article was published. *Id.* Since 2017, the TLSA has been introduced in the 116th Congress, H.R. 779, 116th Cong. (2019), and the 117th Congress, S. 2867, 117th Cong. (2021). Neither bill has moved past committee. *H.R. 779*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/779 (last visited Oct. 23, 2022); *S. 2867*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/2867 (last visited Oct. 23, 2022).

130. Scott, *supra* note 26.

131. *Id.*

132. *Id.*

133. *Id.*

134. For example, the AFL-CIO maintains that tribal sovereignty cannot be employed to "repudiate fundamental rights that belong to every worker in every nation." William Samuels, *Letter to Representatives Opposing an Act That Would Deny Protections for Workers Employed on Indian Land*, AFL-CIO (Jan. 9, 2018), https://aflcio.org/about/advocacy/legislative-alerts/letter-representatives-opposing-act-would-deny-protections?link_id=0&can_id=ab0184786856562d7.

135. Limas, *supra* note 11, at 345 (explaining that Republican lawmakers have introduced the TLSA in numerous congressional sessions).

reach a consensus. This unlikelihood is blatant given that Republicans had the chance to pass the TLSA in 2017, but did not, despite having a Republican president and a Republican majority in the House of Representatives and the Senate.[136] Accordingly, as "long as Congress remains divided, such legislation may remain elusive. The NLRA is, for better or worse, the law of the land for tribal employers."[137]

While legislation would best serve tribal gaming facilities, tribes need any solution that could reduce the current dangers they face, and tribes deserve a remedy that will preserve tribal sovereignty: the key component to effective tribal governance. Without a congressional solution, the onus is upon the courts to reconsider why a plain-meaning *Chevron* analysis continually disadvantages tribes and to conduct a deeper analysis into the purposes of the NLRA.

V. A PURPOSIVE APPROACH TO *CHEVRON* DEFERENCE

As demonstrated by Casino Pauma's Petition for Writ of Certiorari, tribal frustration with *Chevron* deference is growing.[138] Without a reconfiguration of *Chevron*, tension between tribes and the federal government will continue. Therefore, it is essential that the odds of judicial success between tribes and administrative agencies begin to balance. This goal is ultimately achievable if courts strip away the strongest factor in favor of agencies—a plain-meaning approach to *Chevron* deference. Instead, through a purposive approach, tribes could present additional factors during *Chevron* step one that account for their unique nature in our constitutional scheme, leveling the playing field.[139]

By proposing a purposive approach, the question of NLRA applicability is still left with the courts.[140] Although congressional action would provide the most clarity to tribes, a judicial approach prevents tribes from spending excessive funds on lobbying when those funds could serve other tribal interests, while endlessly waiting for unlikely congressional action. Further, it allows courts to access more tools of statutory interpretation to better address the question of whether Congress intended the definition of "employer" to cover tribes.[141]

As shown in *Pauma*, a strict plain-meaning approach to *Chevron* deference ignores many tools of statutory interpretation that are

136. *Id.* at 359.
137. Biddle & Wood, *supra* note 44.
138. *See generally* Petition for Writ of Certiorari, *supra* note 20.
139. *See infra* notes 144–45 and accompanying text.
140. Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551 (2009).
141. BRANNON & COLE, *supra* note 52, at 14–16.

available to the court.[142] Under a purposive approach, a court still starts the inquiry with the statutory language, but a court may also rely on other tools that demonstrate congressional intent during drafting.[143] Judges may expand their inquiry to consider textual canons of statutory interpretation, "normative or substantive canons of statutory interpretation," legislative history, "past agency practice," and "agency interpretations that were advanced prior to the dispute before the court."[144]

When applying a purposive approach, the court must engage in a deeper inquiry than mere plain language. Going beyond plain language prevents the complaint raised in Casino Pauma's Petition for Writ of Certiorari from occurring—that courts are skipping any meaningful analysis at step one when asking if the statutory language is ambiguous.[145] Once a court has reached step two, the *Chevron* doctrine only requires the administrative agency's interpretation to be reasonable, an exceedingly low threshold for an agency to meet.[146] For tribes, it is crucial that courts engage in a full analysis during step one to consider the broader purposes of the NLRA, or tribes will continue to summarily lose at step two. If courts instead employ a purposive approach, such as the Tenth Circuit did in *NLRB v. Pueblo of San Juan*, a number of previously discounted considerations would come into play.[147]

First, a court utilizing a purposive approach would still consider the plain language of the NLRA definition of "employer."[148] The text is silent regarding tribes.[149] However, the definition features an exemption for state employees on the basis that states are sovereign entities unsuited for regulation by a federal administrative agency.[150] Courts would then consider this justification with the fact that courts "recognize[] the unique nature of Indian tribes, and do[] not view tribes as private, voluntary organizations."[151]

The organizational similarities of tribes and state governments make tribes more akin to public employers. Both tribes and state governments "employ hundreds of thousands of workers in

142. *See supra* notes 93–97 and accompanying text.
143. BRANNON & COLE, *supra* note 52, at 14.
144. *Id.* at 14–15.
145. Petition for Writ of Certiorari, *supra* note 20, at 17.
146. BRANNON & COLE, *supra* note 52, at 3.
147. *See supra* notes 70–75 and accompanying text.
148. BRANNON & COLE, *supra* note 52, at 14.
149. 29 U.S.C. § 152(2).
150. *Id.*; *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19.
151. Plumer, *supra* note 5, at 133 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

government-owned enterprises, including . . . state casinos." [152] Despite tribal governments often being financially supported by gaming revenue rather than tax dollars, the facets of traditional governance show that "tribal enterprises more closely resemble government subdivisions than private companies."[153] The compelling logic that follows is that if both tribes and state governments behave similarly and neither are named in the definition of "employer," then both should be exempted from NLRA application.

Second, a purposive approach would allow a court to consider the legislative purpose underlying the NLRA.[154] By considering the congressional basis for passing the NLRA, a court may better evaluate whether Congress intended tribal businesses to be covered. The enactment of the NLRA did not occur at a time when Congress was considering labor relations on tribal lands.[155] Rather, the NLRA was passed out of growing concerns about the "labor relations crisis in industrial America," which explains why "no reference was ever made in the NLRA's legislative history to tribes[.]"[156] Additionally, the Indian Reorganization Act, "the single-most comprehensive piece of legislation ever passed on the subject of Indian tribes," was passed one year before the NLRA.[157] It is reasonable to conclude that since "Congress so recently and comprehensively spoke[] on the subject of Indian tribes," the failure to name tribes within the term "employer" means "Congress never intended the NLRA to apply."[158]

Next, a court may consider how the intended purposes of the NLRA are incompatible with the realities of tribal governance. Although the NLRA is intended to "eliminate . . . substantial obstructions to the free flow of commerce," [159] tribal commercial development is necessarily hindered by NLRA application.[160] The NLRA "subjects tribes to litigation, damages, administrative proceedings, and fines[,]" which "necessarily thwart[] the goals of tribal self-determination and economic development, and, therefore, abrogate[] sovereign rights of Native American tribes."[161]

152. Keel & Stevens, *supra* note 120.

153. *Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty*, *supra* note 67, at 1175.

154. BRANNON & COLE, *supra* note 52, at 14.

155. Singel, *supra* note 73, at 721.

156. *Id.* at 721–22.

157. *Id.* at 724.

158. *Id.* at 724–25.

159. 29 U.S.C. § 151.

160. Vicki Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 746 (1994).

161. *Id.*

In addition to economic harm, Congress likely did not intend the NLRA to apply to tribal gaming given the operational structure of these facilities. To comply with NLRA requirements, tribes would have to allow organized labor efforts both inside gaming facilities—including the ability to access "highly regulated" sections used for "regulating conduct on the gaming floor and mak[ing] certain that criminal activities do not occur"—and outside gaming facilities on other parts of tribal lands.[162] This broad level of access could "substantially increase regulatory costs for the tribes" without federal support to cover the added costs of law enforcement.[163] Courts may note that the NLRA will "strip tribal governments of their long-recognized sovereign authority to limit who may enter their reservations," allowing access "far beyond the actual premises upon which tribal gaming is conducted."[164]

Moreover, the NLRA's goal of promoting "freedom of association, self-organization, and designation of representatives of [the employees'] own choosing" will ultimately be harmed as tribes learn to preemptively thwart union organization.[165] For example, as unions start expanding their efforts in tribal gaming facilities, tribes will "be prepared to respond to union organizing efforts accordingly."[166] Tribal gaming facilities could begin training supervisors to detect union efforts or institute policies that ban employees from distributing union literature during working hours.[167] Tribes are also likely to pass right-to-work laws to "minimize the threat of unionization" and "exercise some degree of self-governance over labor relations," which is not a remedy available to private employers.[168] Courts should therefore consider that NLRA

162. Brief for Cal. Nations Indian Gaming Ass'n et al., *supra* note 43, at 20.

163. *Id.* at 21. "Compelling access to tribal lands . . . usurps each Tribe's [Tribal Labor Relations Ordinance ["TLRO"]] without any consideration for the associated additional costs of law enforcement." *Id.* at 22. Notably, "California tribes do not qualify for federal law enforcement funding," so "most Tribes have no actual police forces, and thus must rely on law enforcement agencies of surrounding non-Tribal communities—assistance that is often not readily available." *Id.* NLRA application thus "disrupts the delicate funding balance crafted in the comprehensive [TLROs]," without "providing any additional funding for tribes to regulate expanded and costly union activities." *Id.*

164. *Id.* at 22–23.

165. 29 U.S.C. § 151.

166. *Best Practices for Tribes When Faced with Union Organizing Activity*, *supra* note 127.

167. *Id.*

168. Singel, *supra* note 73, at 727–28; *see also* Guss, *supra* note 17, at 1657. In *NLRB v. Pueblo of San Juan*, the Tenth Circuit recognized that a tribe "is not preempted . . . from enacting a right-to-work law for business conducted in its reservation." 276 F.3d 1186, 1197 (10th Cir. 2002).

application does not help workers in practice because tribes will find alternative methods to preserve their sovereignty.

Last, NLRA application fails to account for the reality that tribal governments craft their own labor laws. By considering the similarities between tribes and public employers, a court may note that tribes can adequately handle labor disputes through tribal legislation and tribal courts. Labor issues may be "funnel[ed] . . . through tribal courts . . . [,] benefit[ing] workers by creating a strong internal tribal authority to protect labor and employment rights and by fostering opportunities for tribes to settle disputes through traditional or culturally based dispute resolution practices."[169]

Tribal labor codes can more effectively account for local concerns.[170] Some Native American compacts with organized labor go beyond the coverage provided under the NLRA, but this extended coverage is preempted by the NLRA.[171] Tribal labor codes often arise due to negotiations with organized labor groups following a union push.[172] These "negotiations over jurisdiction, sovereignty, and worker power" allow for a labor system "that better support[s] workers."[173] Thus, NLRA intervention only "thwart[s] the ability of tribes to develop more progressive and comprehensive labor policies that satisfy the specific needs of tribal communities."[174] Since tribes can be more accountable to their constituents in crafting labor laws, a court may feel comfortable leaving governance to tribes, weakening the argument that unions are inadequately protected without federal oversight.[175]

169. Guss, *supra* note 17, at 1624.

170. Noam Schreiber, *Senate Bill to Curtail Labor Rights on Tribal Land Falls Short*, N.Y. TIMES (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/business/economy/senate-tribal-labor.html.

171. Biddle & Wood, *supra* note 44 ("[M]ost of the TLRO's provisions overlap the NLRA and are thus preempted. More significantly, preemption would invalidate those provisions of the TLRO that surpass federal law. For example, the TLRO permits and protects secondary boycotts, while section 8(b)(4) expressly prohibits them. The TLRO, as later amended, requires that tribal employers stay neutral in a unionizing campaign. The United States Supreme Court has held that the NLRA preempts just such requirement, when attempted before by California.").

172. *Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty*, *supra* note 67, at 1180.

173. *Id.*

174. Singel, *supra* note 73, at 728.

175. *Tribal Sovereignty and Labor Relations: Disappointments in 2018 and Looking Ahead*, NAT'L NATIVE AM. HUM. RES. ASS'N (Mar. 1, 2019),

Moreover, if concerns arise about tribes failing to legislate on labor issues, a court may note that Congress always has the plenary power to intervene and pass legislation requiring tribes to legislate.[176] Such legislation would not dictate how tribes would legislate, merely that tribes must conduct discussions with labor unions to reach agreeable tribal legislation.[177]

These considerations that may be included under a purposive approach are not exhaustive. Rather, they demonstrate that when a court uses more tools of statutory interpretation, the result differs. For instance, the application of a purposive approach rather than a plain-meaning approach in *Pauma* would have entirely changed the Ninth Circuit's analysis, if not its outcome. It is not guaranteed that the Ninth Circuit would have found the statutory language was unambiguous at step one if it used a purposive approach. The court would have, however, conducted a deeper analysis beyond stating that the text alone created an ambiguity in its brief two-page summary.

Ultimately, NLRA application fails to account for the true nature of the issue at hand. Although it is compelling to frame the dispute as a fight between tribes and organized labor, tribes do not seek to disadvantage workers for financial gain as in a "typical labor versus management struggle."[178] The matter at hand centers on a need for clarity, a desire to preserve the framework of tribal governance, and a right to shape tribal labor laws without federal interference. Pitting labor unions against tribes misunderstands the demonstrated ability for these groups to work together for the betterment of both,[179] and it

https://nnahra.org/dummond-woodsum-tribal-sovereignty-and-labor-relations-disappointments-in-2018-and-looking-ahead/ ("[M]ore and more tribes are enacting their own laws to govern labor and employment relations within their territories. In doing so, they are exercising tribal sovereignty. This exercise of tribal sovereignty can allow tribes to resolve disputes internally before external forces like the NLRA intrude. If faced with such an intrusion, the Eighth and the Tenth Circuits, and other federal courts that might follow them, likely would find sympathy with tribal nations that have exercised such sovereign authority.").

176. Gerhardt, *supra* note 3, at 411.

177. *Id.*

178. In fact, "many Native nations have long histories of supporting organized labor." Gordon, *supra* note 8, at 157 ("To be clear, tribal governments' opposition to [NLRA application] are by no means a typical labor versus management struggle, wherein an employer seeks to undermine employee attempts to organize . . . . The challenges posed by tribal casino labor relations is not a question of whether tribal casino operators want to stop their employees from organizing—many of them have actively encouraged it since the earliest days of tribal gaming . . . —the challenge is which labor relations laws should apply.").

179. *Id.*

fails to capture the real dispute: whether tribes or the federal government get to govern on tribal lands.[180]

Admittedly, even by applying a purposive approach, courts have a difficult task before them. Balancing the right to work with the right to govern requires a meaningful consideration of consequences against two vulnerable populations. But given the unlikelihood that Congress will step in to resolve the conflict,[181] courts have the responsibility to balance the chances of judicial success between unions and tribes by engaging in a richer statutory analysis. A purposive approach does not guarantee tribal success, and tribal gaming facilities may still need to incorporate management training on NLRA compliance. Yet, a purposive approach ensures that fundamental notions of fairness and an opportunity to be heard are upheld and prevents the systematic erosion of tribal life as it exists today.

CONCLUSION

Ultimately, the need for uniformity requires Congress or the courts to create a clear, standardized approach. With more clarity, tribes could better approach upcoming labor issues, and non-Native workers would better understand their labor rights and where to take potential disputes.[182]

A failure to address whether the NLRA covers tribal gaming could result in the end of an "era of Indian policy."[183] Notably, one week before the Ninth Circuit heard *Pauma*, tribal representatives were working with members of Congress, "eager to resolve the ambiguity in the NLRA and score a win for self-determination in the process."[184] Native American attempts to work with congressional representatives were promptly rewarded with the unfavorable decision of *Pauma*.

Further, the recent extension of federal statutes to tribal businesses is not limited to the NLRA. An expansive definition of "employer" that is similarly disconnected from statutory language now allows the Occupational Safety and Health Act, the Family and Medical Leave Act, and the Employee Retirement Income Security

180. *Id.*

181. *See* Gerhardt, *supra* note 3, at 408–09.

182. *See id.* at 394.

183. This "era of Indian policy" may be seen through the Indian Reorganization Act of 1934 and subsequent efforts to spur economic growth on tribal lands. *Tribes and Sovereignty Still Don't Mix When It Comes to Labor Laws*, *supra* note 19.

184. *Id.*

Act to cover tribes.[185] Therefore, *Pauma* merely represents a single danger that tribes face. Without stricter judicial oversight and deeper statutory analysis, courts allow federal administrative agencies to demote tribes from the status of independent nations to mere private employers.

Ill-considered judicial approaches could defeat promising attempts for tribes and members of Congress to work together and could lead to tribes being treated as private employers. Consequently, the future of tribal relations with the federal government and organized labor hangs in the balance, and the future of tribal sovereignty remains at stake.

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185. Moyer, *supra* note 34, at 264; Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 440–64.

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