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Application of the National Labor Relations Act to Indian Tribes: Preserving Indian Self-Government and Economic Security

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APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO INDIAN TRIBES: PRESERVING INDIAN SELF-GOVERNMENT AND ECONOMIC SECURITY

Julie Thompson[*]

TABLE OF CONTENTS

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I. INTRODUCTION

Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,50 . . . . [I]t is critically important that the federal government support and encourage efforts which help Indians develop their own economic infrastructure.[1]

In the last thirty years, Congress has committed itself to a policy of promoting tribal self-determination and economic development.[2] As a result, a significant number of Indian tribes have begun to break the cycle of poverty and dependency that has plagued them for years.[3] In pursuit of economic development, tribal councils have endeavored to generate

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[1] Felix S. Cohen, *Handbook of Federal Indian Law* § G 1(a), 718 (2d. ed Michie Bobbs-Merrill 1982) (citing *President of the United States, Recommendations for Indian Policy*, H.R. Doc. 363, 91st Cong., 2d Sess. § 7 (1970)). More recently, President Bill Clinton expressed that federal policy should support improvement on Indian reservations in his State of the Union address on January 27, 2000. The President stated "[we] should begin this new century by honoring our historic responsibility to empower the first Americans. And I want to thank tonight the leaders and the members from both parties who've expressed to me an interest in working with us on these [budget] efforts [to improve Native American reservations.] They are profoundly important." President William J. Clinton, *Address Before a Joint Session of the Congress on the State of the Union*, 36 Wkly. Comp. Pres. Docs. 160, 166 (Jan. 27, 2000).

[2] *See infra* nn. 157-160 and accompanying text (providing congressional acts promoting self-determination and economic development). *See* Pub. L. No. 93-638, § 3(b), 88 Stat. 2203, 2204 (1975) ("[Congress declared its] commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."). The Supreme Court has also recognized that congressional policy supports tribal self-determination. *See e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("[A] number of congressional enactments demonstrat[e] a firm federal policy of promoting tribal self-sufficiency and economic development."); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (The Supreme Court recognized that "Congress is committed to a policy of supporting tribal self-government and self-determination."). *Id.*

[3] Joseph P. Kalt, Testimony, *Economic Development on Reservations*, at 3 (Wash. D.C., Sept. 17, 1996) (1996 WL 525969 (F.D.C.H.)).

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revenue and provide employment for tribal members by creating Indian owned businesses and by leasing land to non-Indians to do business on the reservation.[4] Recently, in an attempt to create an environment that would encourage non-Indian companies to conduct business on the reservation, the Pueblo of San Juan enacted a right-to-work ordinance, which affords all employees on tribal lands the freedom of choice regarding union membership.[5] On its face, however, the ordinance would appear to run afoul of federal law. The National Labor Relations Act (NLRA) states that "nothing . . . shall preclude an employer from making an agreement with a labor organization to require [membership] as a condition of employment."[6] The Pueblo of San Juans' right-to-work ordinance does just that: it precludes an employer on an Indian reservation from requiring membership in a union as a condition of employment.[7]

Is the Pueblo of San Juans' right-to-work ordinance, or any other tribal right-to-work ordinance, preempted by the NLRA? The NLRA never expressly mentions its applicability to Indians. It fails to include or exclude Indian tribes. In fact, there are several federal statutes that regulate many aspects of the employment relationship, (the Occupational Safety and Health Act,[8] the Age Discrimination in Employment Act[9] and the Employment Retirement Income Security Act[10]) which do not expressly exclude or include Indians within the ambit of the statute.[11] Does, and more importantly, should the NLRA govern in Indian country or are Indian tribes free to develop their own laws regulating the employment relationship?

This Comment argues that the NLRA does not preempt a tribal right-to-work ordinance. When a federal statute neither includes Indian tribes nor excludes them from the ambit of the statute, courts are and should be reluctant to apply the statute to Indian tribes.[12] If application of the statute to Indian tribes would infringe upon their right to self-government, courts should require express language indicating congressional intent to include Indian tribes.[13] When a labor and employment statute is silent as to its applicability to Indians, courts should interpret the statute against the

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[4] *Id.*

[5] *National Labor Relations Board v. Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *3 (10th Cir. Jan. 11, 2002) (en banc).

[6] *The National Labor Relations Act*, 29 U.S.C. § 158(a)(3) (1952).

[7] *Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *4.

[8] *Occupational Safety and Health Act*, 29 U.S.C. § 651 (1994 & Supp. 1996).

[9] *Age Discrimination and Employment Act*, 29 U.S.C. § 621-634 (1994 & Supp. 1996).

[10] *Employment Retirement Income Security Act*, 29 U.S.C. § 1001 *et seq.* (1994 & Supp. 1996).

[11] Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L. J. 681, 710 (1994).

[12] *See infra* nn. 65-68 and accompanying text.

[13] *See infra* nn. 65-68 and accompanying text.

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backdrop of congressional policy supporting tribal self-government, self-determination and economic development.[14]

Part II of this Comment provides the applicable portions of the NLRA and an example of a tribal right-to-work ordinance.[15] This section then provides a brief overview of tribal sovereignty and the federal-tribal relationship.[16] It explains how tribes have begun to break the cycle of poverty and dependency through congressional acts that promote economic development, tribal sovereignty and self-determination.[17] Part III argues, using appropriate tools of statutory interpretation, that the NLRA does not preempt a tribal council from enacting a right-to-work ordinance. Specifically, the NLRA does not expressly preempt Indian right-to-work ordinances,[18] nor can or should it be interpreted to impliedly preempt such ordinances by creating a comprehensive federal program.[19] In addition, when one considers Indian sovereignty as a backdrop against which to interpret the NLRA, including such things as congressional respect for sovereignty in other labor and employment acts[20] and tribal sovereignty in other sections of the NLRA,[21] it becomes clear that Congress has not intended to preempt Indian ordinances that preclude employers from requiring membership in a union as a condition of employment. Furthermore, tribal regulation of non-Indians who enter consensual relationships with the tribes or its members has been upheld by the Supreme Court as an inherent right of self-government.[22] Additionally, tribal right-to-work laws are consistent with federal policy supporting tribal economic development. As such, the NLRA does not preempt Indian tribal councils from enacting a right-to-work ordinance; and the enactment of such an ordinance is within their authority over non-Indians.

II. BACKGROUND

Indian Law is founded in the political relationship between the United States and Indian tribes.[23] A necessary prerequisite to understanding any issue regarding Indian tribes is to recognize the historical treatment of

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[14] *See infra* nn. 95-98, 154-168 and accompanying text. In *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, the Supreme Court recognized that "Congress is committed to a policy of supporting tribal self-government and self-determination." 471 U.S. 845, 856 (1985).

[15] *See infra* nn. 29-39 and accompanying text.

[16] *See infra* nn. 47-57 and accompanying text.

[17] *See infra* nn. 47-57 and accompanying text.

[18] *See infra* nn. 58-81 and accompanying text.

[19] *See infra* nn. 82-94 and accompanying text.

[20] *See infra* nn. 101-126 and accompanying text.

[21] *See infra* nn. 127-144 and accompanying text.

[22] *See infra* nn. 145-153 and accompanying text.

[23] Cohen, *supra* n. 1, at 1.

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Indians and the current federal policy regarding Indians.[24] Although tribes are sovereign, the federal government has the power to limit the authority of a tribe.[25] Current federal policy regarding Indians favors a more hands-off approach.[26] In an effort to promote economic development, Congress has passed legislation giving tribes more decision-making authority.[27] Additionally, current federal policy supports self-determination by Indian tribes.[28]

A. The National Labor Relations Act and a Tribal Right-To-Work Ordinance

In an attempt to equalize the relationship between employers, unions, and employees, Congress enacted the NLRA. Its purpose is

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[29]

One way to encourage collective bargaining is to allow union security agreements. These agreements are federally sanctioned contracts between a labor union and an employer whereby the employer agrees to require his employees, as a condition of their employment, to affiliate with the union in some way.[30] Section 8(a)(3) of the NLRA protects the right of a union and employer to enter into a union security agreement. Section 8(a)(3) provides:

> [N]othing in this subchapter, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization to require as a condition of employment

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[24] Cohen, *supra* n. 1, at 2.
[25] *See infra* n. 51 and accompanying text.
[26] *See infra* nn. 2 and 158-60 and accompanying text.
[27] *See infra* nn. 2 and 158-60 and accompanying text.
[28] *See infra* nn. 2 and 158-60 and accompanying text.
[29] 49 Stat. 449 (1935), codified as 29 U.S.C. § 151 (1952).
[30] Thomas R. Haggard, *Compulsory Unionism, The NRLB, and the Courts* 4 (U. Pa. 1977).

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> membership therein . . . .[31]

However, section 14(b) of the NLRA acknowledges the ability of states and territories to outlaw all forms of union security agreements. Section 14(b) provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.[32]

Section 14(b) authorizes any state or territory to outlaw all forms of union security agreements through legislation known as "right-to-work" laws. The term "right-to-work" refers to the right of an individual to have a job free from the requirement that she or he become a member of, or is affiliated with, a labor organization.[33] By leaving it to the states to decide the issue of compulsory unionism, Congress recognized that each state would develop its own policy regarding compulsory unionism based upon its "mores, traditions, and economic conditions."[34] The current economic conditions of a state are important because generally, employers favor right-to-work laws and states with right-to-work laws have lower unemployment rates.[35] Currently, twenty-one states have decided that their traditions and economic conditions support freedom of choice regarding union membership and have passed right-to-work laws.[36]

Just as states are concerned about compulsory unionism, so too are Indian tribal councils. In an attempt to promote the reservation's economic

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[31] 49 Stat. 452 (1935), codified as 29 U.S.C. § 158(a)(3) (1994).

[32] 49 Stat. 457 (1935), codified as 29 U.S.C. § 164(b) (1994).

[33] Haggard, *supra* n. 30, at 5.

[34] Haggard, *supra* n. 30, at 284.

> The mores, traditions, and economic conditions of each state determine how the people of that state are going to respond to the question of compulsory unionism. Going against those feelings, . . . can only produce social upheaval and employment unrest. It is for this reason that Congress [by enacting section 14(b)] wisely chose to allow each state to determine its own policy in this regard.

Haggard, *supra* n. 30, at 284.

[35] Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and its Implications for Public Policy*, 70 U. Colo. L. Rev. 871, 902-03, 934 (1999).

[36] Currently twenty-one states have right-to-work laws: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming. *See* NRWLDF, *Right to Work States* <http://www.nrtw.org/rtws.htm> (accessed Sept. 18, 2001) (listing the states with right to work laws and the state laws).

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development goals and to encourage non-Indian businesses to conduct their business on the reservation, the Pueblo of San Juan enacted Labor Organization Ordinance No. 96-63 ("Ordinance"), a right-to-work law. The Ordinance afforded all Indian and non-Indian employees on tribal land the freedom of choice regarding union membership.[37] In *National Labor Relations Board v. Pueblo of San Juan*, the National Labor Relations Board argued that the tribe was preempted by the NLRA from adopting such a right-to-work ordinance.[38] The Tenth Circuit, in an en banc hearing, held that the tribe was not preempted by the NLRA.[39]

While the NLRA expressly allows for states and territories to enact a right-to-work ordinance, it does not contain language permitting tribes to enact such ordinances. Thus, the question remains, are Indian tribes within the general preemptive provision of section 8(a)(3) which precludes laws that forbid union security agreements or are they within section 14(b) which allows states and territories to enact right-to-work laws? The legislative history of the NLRA provides no evidence that Congress even contemplated Indians when enacting the NLRA. Thus, courts are confronted with the issue of whether an Indian tribe is preempted by the NLRA from enacting a right-to-work ordinance.

B. The General Law of Federal Preemption

General federal preemption law is founded in Article VI of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land."[40] There are two kinds of federal preemption: express and implied.[41] Express preemption occurs when Congress enacts a statute that explicitly preempts an area of state or tribal

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[37] *Pueblo of San Juan*, 2002 U.S.App. LEXIS 587 at *3-4. Section 6(a) of the Pueblo San Juan ordinance provides:

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

Id. at *4.

[38] *Id.* at *5.

[39] *Id.* at *40-41.

[40] U.S. Const. art. VI, § 2.

[41] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

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law.[42] Congress explicitly preempts an area of state law when it addresses the issue of preemption within the text of the statute.[43] Implied federal preemption results when, either, state law actually conflicts with federal law or the federal law so thoroughly occupies the legislative field as to make reasonable the inference that Congress left no room for state regulation in that legislative field.[44]

Preemption analysis in the field of Indian Law does not end with express or implied field preemption.[45] Rather, because of the unique status of Indian tribes, federal statutes must be read against the "backdrop" of Indian sovereignty.[46] Indian or Tribal sovereignty is reflected in current federal policy supporting tribal independence and in judicial and administrative treatment of Indians in other labor and employment statutes.

C. Tribal Sovereignty and the Federal Tribal Relationship

"The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"[47] The inherent sovereign powers of Indian tribes include the right of self-government, i.e. the right to make their own laws and be ruled by them.[48] The Supreme Court's earliest recognition of Indian sovereignty was in *Worcester v. Georgia* whereby the Court declared that "Indian nations [have] always been considered . . . distinct, independent political communities, retaining their original natural rights."[49] In *Cherokee Nation v. Georgia*, however, the Supreme Court described Indians as "domestic dependent nations" whose relationship to the United States resembles that of a ward to his guardian.[50] Thus, the federal government has the power to limit tribal self-government.[51] Although the federal government can limit tribal self-

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *McClanahan v. Ariz. St. Tax Commn.*, 411 U.S. 164, 172 (1973).

[46] *Id. Pueblo of San Juan*, 2000 U.S.App. LEXIS 587 at *22.

[47] *U. S. v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 122 (Five Rings Press 1986)).

[48] *Williams v. Lee*, 358 U.S. 217, 220-23 (1959) (finding that the state lacked jurisdiction over a claim between a non-Indian and an Indian arising out of a transaction in Indian country because it would infringe on the inherent self-governing right of Indians to make their own laws and to be ruled by them).

[49] 31 U.S. 515, 559 (1832).

[50] 30 U.S. 1, 17 (1831).

[51] *See U. S. v. Kagama*, 118 U.S. 375, 384-85 (1886) (espousing the notion that Congress' power over Indians is plenary. Although the federal government can limit self-government, courts require an express declaration by Congress.) *See infra* nn. 65-68 and accompanying text. Current federal policy favors tribal sovereignty and self-determination.. *See infra* nn. 157-160 and accompanying text (providing congressional acts promoting self-determination and economic development).

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government, Indian tribes still retain sovereign powers that have not been explicitly divested by treaty or statute[52] or by implication as a result of their dependant status.[53]

Some of the inherent rights tribes retain include: the power to determine their own form of government, to levy taxes, to regulate property within the jurisdiction, to manage domestic affairs, to enact laws, to establish a judiciary, to claim immunity from suit and to administer justice.[54] In addition, "tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation. . . . A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members . . . ."[55] Recent federal policy has returned additional governing power to the tribes in an effort to promote self-determination and sovereignty.[56] This additional power has been an essential factor in recent Indian economic development.[57]

III. ANALYSIS

Indian tribes are not preempted by the NLRA from enacting a right-to-work ordinance that affords all employees on tribal lands the freedom of choice regarding union membership for three reasons. First, the NLRA does not expressly preempt Indians from enacting a right-to-work ordinance. Second, the NLRA is not such a materially comprehensive program that courts should conclude that Congress has impliedly

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[52] This idea is known as the reserved rights doctrine. The doctrine states that treaties "[are] not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *See U. S. v. Winans*, 198 U.S. 371, 381 (1905) (finding that the treaty reserved hunting and fishing rights that the tribe already possessed, it did not grant the right to them).

[53] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that the exercise of criminal jurisdiction over non-Indians is inconsistent with their domestic dependant status).

[54] *See* Felix S. Cohen, *Handbook of Federal Indian Law* 122 (Five Rings Press 1986). *See* Limas, *supra* n. 11, at 685-86.

[55] *Mont. v. U. S.*, 450 U.S. 544, 565 (1981).

[56] *See infra* nn. 157-160 and accompanying text (providing Congressional acts promoting self-determination and economic development). In addition, an executive order issued in November 2000 stated that the "United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Exec. Or. 13,175, 65 Fed. Reg. 67, 249 (2000).

[57] *See* Kalt, Testimony, *supra* n. 3 ("The relatively successful tribes in the U.S. all have three indisputable ingredients in common. These are (1) sovereignty, (2) capable governments, and (3) a match between the type of government a tribe has and that tribe's cultural norms regarding legitimate political power."). The Harvard Project on Indian Economic Development could not find a single case of economic development where "the tribe is not in the driver's seat." *Id. See* Stephen Cornell and Joseph P. Kalt, *Reloading the Dice: Improving The Chances for Economic Development on American Indian Reservations* in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* 14 (Stephen Cornell and Joseph P. Kalt eds., Los Angeles: University Of California, 1992). (discussing the role of sovereignty in Indian economic development).

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preempted a tribal right-to-work ordinance. When one considers Indian sovereignty as a backdrop against which to interpret the NLRA, including congressional respect for sovereignty in Title VII of the 1964 Civil Rights Act and Title II of the American with Disabilities Act and a recognition of tribal sovereignty in other sections of the NLRA, it becomes clear that Congress did not intend to preempt tribal right-to-work laws. Furthermore, absent preemption, the regulation of non-Indians through a right-to-work law is consistent with federal policies recognizing tribal authority over non-Indians and federal polices designed to promote economic development on Indian reservations.

A. The NLRA Does Not Expressly Preempt a Tribal Government From Enacting a Right-To-Work Ordinance

Express preemption occurs when Congress clearly states its intent in the statute to preempt a field of law.[58] It is a basic principle of Indian law that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which [have] never been extinguished."[59] The right to self-government is one of these inherent powers.[60] Indian self-government includes "the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing. . . to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice."[61] Tribal self-government also "encompasses an [Indian] tribe's ability to make at least certain employment decisions without interference from other sovereigns."[62] While Congress does have plenary power[63] to limit the powers of tribal self-government through legislation, this power is not absolute.[64] Therefore, when a Congressional act limits inherent tribal

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[58] *P. Gas & Elec. Co. v. St. Energy Resources Conservation & Dev. Commn.*, 461 U.S. 190, 203-204 (1983).

[59] Cohen, *supra* n. 54, at 122.

[60] Cohen, *supra* n. 1, at 232.

[61] Cohen, *supra* n. 54, at 122.

[62] *Equal Empl. Opportunity Commn. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1081 (9th Cir. 2001).

[63] The concept of a plenary power was developed in *U. S. v. Kagama*, 118 U.S. 375, 383-85 (1886). The Court saw Indians as dependent upon the federal government for protection. *Id.* at 384. This duty to protect also conferred the power. *Id.* The doctrine derives from the guardian-ward relationship between the federal government and the Indians whereby Indian tribes are "domestic dependant nations... [whose relationship] to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831). *See* Blake Watson, *The Thrust and Parry of Federal Indian Law*, 23 Dayton L. Rev. 437, 452-57 (1998).

[64] Cohen, *supra* n. 1, at 217. "Not absolute" means that the federal government is still subject to constitutional limitations and judicial review. Cohen, *supra* n. 1, at 217.

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rights to self-government, courts have been reluctant to apply a federal statute to Indian tribes absent express language.[65]

For example, in *Donovan v. Navajo Forest Products Inds.*, the Tenth Circuit stated that Congressional intent to place "[l]imitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from the surrounding circumstances or the legislative history."[66] In *Bryan v. Itasca County*, the Supreme Court held that Public Law 280 does not extend the states' general civil regulatory powers over reservation Indians because, if Congress intended to confer such powers, "it would have expressly said so."[67] Requiring express language ensures that inherent tribal rights are not lightly divested.[68]

These cases make it clear that if a federal statute is to limit tribal self-government, Congress must expressly state its intent to do so. Applying the general preemption provision in section 8(a)(3) would limit tribal powers of self-government. Tribes have an interest in making their own laws and being ruled by them.[69] The Pueblo of San Juan's right-to-work ordinance is an example of a tribe's interest in making a law and being ruled by it. Just as employers prefer right-to-work states, so to will employers prefer a right-to-work reservation.[70] Thus, the ordinance increases the probability that non-Indians will bring their businesses onto the reservation. This in turn will provide jobs for the Indians as well as revenue for the tribe.[71] The NLRA would limit the tribal council's ability

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[65] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian Civil Rights Act of 1968 construed not to permit judicial review for declaratory and injunctive relief because only habeas corpus relief is expressly provided for in the statute.); *U. S. v. Dion*, 476 U.S. 734, 739 (citing and quoting *Menominee Tribe v. U. S.*, 391 U.S. 404, 412-13 (1968)) (stating "[w]e decline to construe the Termination Act as a backhanded way," in the absence of an explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."); *Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *19; *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 712 (10th Cir. 1982) (finding that Congress may manifest its intent to apply a federal statute to Indian tribes by including language in the statute specifically indicating that the statute is intended to apply to Indian tribes). In addition, courts require that Congress' intention to abrogate Indian treaty rights be clear and plain. *See U. S. v. Dion*, 476 U.S. 734, 739 (1986) quoting *Wash. v. Wash. Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979) (finding that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"). *Id.*

[66] 692 F.2d 709, 712 (10th Cir. 1982).

[67] 426 U.S. 373, 390 (1976).

[68] Charles F. Willkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Cal. L. Rev. 601, 655-59 (1975).

[69] *See Williams v. Lee*, 358 U.S. 217, 220 (1959).

[70] Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and its Implications for Public Policy*, 70 U. Colo. L. Rev. 871, 934 (1999) "Employers do appear to respond positively to right to work laws in their firm location decisions." *Id.*

[71] *Id.* (stating "states with right to work laws have lower unemployment rates and higher rates of industrial growth").

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to pass laws that create an environment that encourages non-Indian businesses to conduct business on the reservation. Because the NLRA would infringe upon tribal self-government, Congressional intent to preempt Indians power must be expressly stated.

The NLRA, however, provides no express language in the statute or its legislative history regarding its applicability to Indian tribes.[72] The absence of clear language in both the NLRA and its legislative history compels the conclusion that the inherent right to self-government should not be limited. Thus, the NLRA does not expressly preempt any tribal right-to-work ordinance.

Although Congress did not expressly state that tribal councils are preempted from enacting right-to-work laws, one could argue that, by negative inference, tribal right-to-work ordinances are indeed preempted. The argument is that by failing to include tribal councils within the section 14(b) exception, which allows states and territories to enact right-to-work laws, Indians are included within section 8(a)(3), which forbids right-to-work laws.[73] Such an argument fails to consider the impact of accepted canons of construction that govern the interpretation of statutes regularly applicable to Indian tribes.

These canons were first developed to aid courts when determining Indian rights under a treaty. They were premised on the notion that Indians had unequal bargaining power when negotiating treaties.[74] Because Congress is exercising a trust responsibility when dealing with Indians,[75] courts presume that Congress' intent toward them is benevolent and developed the canons so that treaties would be interpreted to protect Indian rights.[76] In recent years, the same canons that were originally applied to treaties have been applied to statutes to determine the scope of Indian rights.[77] Three primary canons have developed: (1) ambiguous expressions must be resolved in favor of the Indian parties concerned,[78] (2) Indian treaties must be interpreted as Indians would have understood them[79] and

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[72] *Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *25 (all parties agree that neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes).

[73] *See* Appellant's Supplemental Brief for Rehearing en banc for Local Union No. 1385, *NLRB v. Pueblo of San Juan*, at 22-29 (Feb. 8, 2001).

[74] Watson, *supra* n. 63, at 457 (quoting *Hagen v. Utah*, 510 U.S. 399, 422 n.1 (1994)).

[75] In *Cherokee Nation v. Georgia*, the Supreme Court recognized the concept of a federal trust responsibility to the Indians. 30 U.S. 1 (1831). The Court characterized Indians as "domestic dependent nations . . . [whose relationship] to the United States resembles that of a ward to his guardian." *Id.* at 17.

[76] Cohen, *supra* n. 1, at 221.

[77] *Mont. v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

[78] *See e.g. McClanahan*, 411 U.S. at 174; *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. U. S.*, 207 U.S. 564, 576-77 (1908).

[79] *See e.g. Choctaw Nation v. Okla.*, 397 U.S. 620, 631 (1970); *U. S .v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

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(3) Indian treaties must be liberally construed in favor of the Indians.[80] Only the first canon is applicable here.

Applying this canon to the NLRA confirms that a tribal government should not be preempted by the NLRA. The NLRA is silent on the issue of whether Congress, by excluding states and territories from section 14(b), also intended to exclude Indian tribes.[81] This silence should be interpreted to favor Indian sovereignty. Such an interpretation favors Indians because it allows them to make their own laws unrestricted by the NLRA. It allows a tribal council to determine for itself whether compulsory unionism is a policy that it wants to incorporate into tribal law instead of being required to do so by federal law. The Supreme Court has made it clear that if a federal statute is going to limit tribal self-government, then Congress must expressly state its intent toward Indians. Permitting a blanket restriction on tribal authority by means of a negative inference argument is inconsistent with this requirement.

B. The NLRA Is Not a Comprehensive Labor Program So Pervasive That Congress Impliedly Intended to Preempt Completely the Field of Union Security Agreements

Implied field preemption arises when there is a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . ."[82] Although courts have made it clear that tribal self-government should not be limited absent express language, some courts allow for implied preemption when the regulatory scheme is pervasive.[83] Thus, in the absence of express language indicating Congressional intent to preempt a tribal government from enacting a right-to-work ordinance, Congressional intent can be implied from the legislative history or from a statutory plan so comprehensive that it has left no room for tribes to act.[84] While the legislative history of the NLRA provides no indication that Congress even thought about Indians,[85] it does however, provide guidance as to

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[80] *See e.g. County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Choctaw Nation v. U. S.*, 318 U.S. 423, 431-32 (1943); *Tulee v. Wash.*, 315 U.S. 681, 684-85 (1942); *U. S. v. Walker River Irrigation. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

[81] *See supra* n. 32 and accompanying text for text of this sections.

[82] *P. Gas*, 461 U.S. at 203-04.

[83] *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 151 n. 15 (1980).

[84] *See e.g. Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 553-58 (10th Cir. 1986) (holding that the Safe Drinking Water Act applied to Indians, even though it did not expressly state so, because it was a comprehensive federal statute).

[85] *Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *25 (stating "all parties agree that neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes.").

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legislative history of the NLRA provides no indication that Congress even thought about Indians,[85] it does however, provide guidance as to Congressional intent with regard to the pervasiveness of the NLRA.[86]

To determine if Congress intended to preempt the field of union security agreements when enacting the NLRA, it is necessary to examine the legislative history of sections (8)(a)(3) and 14(b) of the NLRA because these sections determine whether Indians can enact a right-to-work ordinance. In *Algoma Plywood and Veneer Co. v. Wis. Employment Relations Bd.*[87] and *Retail Clerks Intl. Assn. v. Schrmerhorn*, the Supreme Court analyzed the legislative history of section 14(b) to determine whether Congress so heavily regulated union security agreements as to completely occupy this field of labor law.[88] The Supreme Court concluded that section 14(b) was "included to forestall the inference that federal policy was to be exclusive"[89] and that the legislative history of section 14(b) reveals that Congress' "clear and unambiguous" purpose was not to preempt the field.[90] The conference committee report on section 14(b) supports the Supreme Court's conclusions. It states that "it was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism."[91]

Algoma and *Retail Clerks* show that by enacting section 14(b), allowing states and territories to outlaw union security agreements, Congress was aware of the strong state and territorial interest in preventing compulsory unionism, if contrary to the states' policy. Section 14(b), along with its legislative history, acknowledges that compulsory unionism may be against the public interest.[92] Therefore, states were "free to outlaw union security agreements in the interest of a perceived policy of keeping industrial relations more individualistic, open and free."[93] It is this concern that shows Congressional intent towards a broad hands-off policy rather than a comprehensive program in which the federal government regulates all

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[85] *Pueblo of San Juan*, 2000 U.S. App. LEXIS 23754 at *8 (both the Majority and Dissenting opinion stated that the legislative history of the National Labor Relations Act is silent as to whether its provisions apply to Indians).

[86] *See infra* nn. 87-94 and accompanying text.

[87] 336 U.S. 301, 314 (1949). In *Algoma*, an employee was fired for refusing to join a union. *Id.* at 303. The issue was whether the state or federal board had jurisdiction. *Id.* at 304. The Supreme Court held that under § 8(3) federal law was not preemptive. *Id.* at 314. Although this is not an Indian case, the Supreme Court's examination of the legislative history of § 14(b) provides guidance on the preemption issue.

[88] 375 U.S. 96, 101 (1963). The issue in *Retail Clerks* was whether the state court or the NLRB had jurisdiction to enforce a state right-to-work law. The Court held that states have jurisdiction.

[89] *Algoma*, 336 U.S. at 313.

[90] *Retail Clerks*, 375 U.S. at 101.

[91] *Id.* at 101 n. 9, (citing and quoting H.R. 106-510 at 60 (1947)).

[92] *Oil, Chem. & Atomic Workers Intl. Union v. Mobil Oil Corp.*, 426 U.S. 407, 426 (1976).

[93] *Id.* at 429-30.

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union security agreements.[94] Thus, the legislative history of the NLRA does not show a comprehensive program so pervasive that Congress intended to occupy the field of union security agreements, thereby preempting tribal sovereignty.

C. The Tribes Right to Regulate Employment Relationships Free From Federal Interference Is Supported by Judicial and Administrative Interpretations of Other Similar Federal Employment Statutes and Other Sections of the NLRA

Indian law preemption analysis does not end with express and implied field preemption. Rather, preemption analysis in Indian law requires that treaties and federal statutes be read against the backdrop of Indian sovereignty.[95] While Indian sovereignty encompasses several principles,[96] for purposes of this article, it will be limited to sovereignty issues involving tribal rights under other labor and employment acts[97] and other sections of the NLRA.[98] Reading sections 14(b) and 8(a)(3) of the NLRA against this backdrop reflects a federal policy not to intrude upon tribal self-government in the area of employment matters on a reservation.

1. Congressional Respect For Tribal Sovereignty In Other Labor and Employment Statutes

Treatment of tribal sovereignty in other labor and employment statutes provides a backdrop against which to interpret the NLRA.[99] The NLRA relates to the employer-employee relationship and specifically governs the collective bargaining aspect of that relationship. But there are other labor

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[94] Haggard, *supra* n. 30, at 146.

[95] *McClanahan*, 411 U.S. at 172. *See e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (recognizing that "[t]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must be measured.") *Id.* at 143. "[W]e have repeatedly recognized, [that the] tradition [of Indian sovereignty] is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *Id.*

[96] For examples of inherent sovereign powers of Indian tribes, *see supra* notes 48 and 54 and accompanying text.

[97] *See infra* nn. 99-126 and accompanying text (discussing other labor and employment acts).

[98] *See infra* nn. 127-144 and accompanying text (discussing other sections of the NLRA).

[99] Federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes and the Supreme Court has held that this 'tradition of sovereignty' is the 'backdrop against which applicable treaties and statutes must be read.'" Cohen, *Handbook of Federal Indian Law* at 273.

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and employment statutes that also govern the employer-employee relationship and an overall Congressional purpose not to infringe upon tribal self-government is reflected in these other labor and employment statutes.[100]

a. Title VII of the Civil Rights Act of 1964 and Title II of the Americans With Disabilities Act

Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employers from discriminating on the basis of race, color, religion, sex and national origin, specifically excludes Indian tribes from the definition of employer.[101] In addition, Title II of the Americans with Disabilities Act, which prohibits an employer from discriminating on the basis of physical or mental disability, expressly excludes Indians from the definition of an employer.[102] The legislative history of Title VII reveals that Congress excluded Indian tribes from the Act's definition of employer to recognize their self-governing status.[103] Senator Mundt stated that excluding Indian tribes provides "American Indian tribes in their capacity as a political entity [the ability] *to conduct their own affairs* and economic activities without consideration of the provisions of the bill."[104] The effect of excluding Indians from the definition of "employer," "assure[s] . . . Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs . . . ."[105] The Supreme Court found that Title VII's exclusion of tribes as employers provides "a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment."[106]

These statutes show a Congressional purpose to allow tribes sovereignty in matters concerning on reservation employment. If Indian tribes are not an employer under the Acts, then they can conduct their own affairs without consideration of the provisions of the bill. Similarly, a right-to-work ordinance allows Indian tribes to conduct their own affairs on matters concerning reservation employment because it applies to reservation employers. If the same policy supporting Title VII and Title II is used as a backdrop against which to interpret the NLRA, then the same respect for the ability to make their own laws in matters concerning employment, leads to the conclusion that Indian tribes should not be preempted by the NLRA

[100] *See infra* nn. 101-26 and accompanying text.
[101] 42 U.S.C. § 2000e-2 (1988 & Supp. IV 1992).
[102] 42 U.S.C. §§ 12101-12213.
[103] *See* Limas, *supra* n. 11, at 715.
[104] *See* Limas, *supra* n. 11, at 715-16. (Emphasis added).
[105] *See* Limas, *supra* n. 11, at 716.
[106] *See Morton v. Mancari*, 417 U.S. 535, 548 (1988).

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from enacting right-to-work ordinances.

b. The Occupational Safety and Health Act and the Age Discrimination In Employment Act

There is, however, another class of statutes regulating the employer-employee relationship that, similar to the NLRA, are silent as to their applicability to Indians; The Age Discrimination and Employment Act (ADEA)[107] and the Occupational Safety and Health Act (OSHA).[108]

Both the Tenth and Eighth Circuits have addressed the ADEA's applicability to Indian tribes and both have held that the ADEA does not apply to Indian tribes.[109] In *EEOC v. Cherokee Nation*, the Tenth Circuit held that the ADEA did not authorize the EEOC to investigate a charge of age discrimination against the Cherokee Nation's Director of Health and Human Services because the ADEA does not apply to Indian Tribes.[110] In *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, the Eighth Circuit held that consideration of a tribe member's age by a tribal employer should be allowed to be restricted by the tribe in accordance with its culture and traditions, anything else dilutes the sovereignty of the tribe.[111]

The applicability of OSHA to Indian tribes has not been as uniform. While the Tenth Circuit held that OSHA does not apply to Indian tribes,[112] the Ninth Circuit has held that it does.[113] In *Donovan v. Navajo Forest Prods. Indus.*, the Tenth Circuit held that OSHA did not apply to a tribal business enterprise owned and operated by the Navajo Tribe on the Navajo Reservation.[114] Because the court could not find clear Congressional intent to include Indians within the ambit of the statute, it concluded that

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[107] 29 U.S.C. § 1001 *et seq.*

[108] 29 U.S.C. § 621-34.

[109] *EEOC v. Fond Du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989). *See generally* William Buffalo and Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Mem. L. Rev. 1365 (1995). *See also* Steve Biddle, *Indian Law Theme Issue: Labor and Employment Issues for Tribal Employers*, 34 Ariz. Atty. 16 (1998).

[110] *Cherokee Nation*, 871 F.2d at 939.

[111] *Fond du lac.*, 986 F.2d at 249.

[112] *Navajo Forest Products Ind.*, 692 F.2d 709, 712 (10th Cir. 1989).

[113] *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *See Reich v. Mashantucket Sand*, 95 F.3d 174 (2nd Cir. 1996).

[114] 692 F.2d at 714. The Tenth Circuit's opinion relied upon two principles of Indian law. First, the court recognized that Indian tribes retain all aspects of tribal sovereignty not specifically withdrawn by federal legislation or treaties. *Id.* at 712. Second, they recognized that limitations on tribal self-government must be expressly stated or otherwise made clear from surrounding circumstances and legislative history. *Id.*; *see also* William Buffalo and Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Mem. L. Rev. 1365, 1378 (1995).

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application of OSHA to Indian tribal businesses would "dilute the principles of tribal sovereignty and self-government recognized in the [Navajo] treaty."[115]

In contrast, in *Donovan v. Coeur d'Alene Tribal Farm*, the Ninth Circuit held that OSHA did apply to a farm owned and operated by the Coeur d'Alene Tribe.[116] In reaching this decision, the court relied upon *FPC v. Tuscarora Indian Nation.*[117] In *Tuscarora*, the court held that "a general statute in terms applying to all persons includes Indians and their property interests."[118] The court found that OSHA was a general statute because the Act's coverage was comprehensive.[119] Therefore, the court concluded that OSHA's broad definition of employer should be read to include the tribe.[120]

The *Tuscarora* doctrine should not control a determination of whether the NLRA preempts Indian tribes from enacting a right-to-work ordinance.[121] The doctrine has not been applied in the situation where the issue is whether federal law preempts a tribal law. In *Reich v. Mashantuckett Sand and Gravel*, the court was confronted with two issues: (1) whether a tribally-owned company fell within the OSHA definition of employer and (2) whether OSHA preempted the tribe from enacting its own safety regulations.[122] The court only applied the *Tuscarora* doctrine to the first issue and found that the Tribe was within the definition of "employer."[123] However, the court did not use the *Tuscarora* doctrine to determine the preemption issue.[124] The court held that OSHA did not preempt the power of a tribe to enact tribal safety regulations.

This same respect for tribal sovereignty found in judicial interpretations of the Civil Rights Act, OSHA and the ADEA should be used to interpret the NLRA. Courts have a duty to construe labor and employment statutes

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[115] *Donovan v. Navajo Forest Products Inds.*, 692 U.S. 709, 712 (10th.Cir. 1982).

[116] 751 F.2d 1113, 1114 (9th Cir. 1985). *See U.S. Department of Labor v. Occupation Safety & Health Review Commn.*, 935 F.2d 182 (9th Cir. 1991); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2nd Cir. 1996).

[117] 362 U.S. 99, 120 (1960).

[118] *Donovan*, 751 F.2d at 1115. When applying this rule, courts look to the definition section of the statute. *See e.g. Lumber Ind. Pension Fund v. Warm Springs Forest Products Ind.*, 939 F.2d 683, 685 (9th Cir. 1991) (holding that ERISA was a statute of general applicability because ERISA has a broad definition of employer).

[119] *Coeur d'Alene Tribal Farm*, 751 U.S. at 1115. The Ninth Circuit went on to create three exceptions to the *Tuscarora* rule but held that none of them applied to the Coeur d'Alene Tribe. *Id.* at 1116.

[120] *Id.*

[121] The validity of this rule is beyond the scope of this Comment, but relying on a definitional section to infringe upon tribal self-government is at odds with federal policy requiring Congress to be clear when it intends to limit sovereignty. *See infra* nn. 65-68 and accompanying text. In addition, it is inconsistent with the basis principle of Indian law that those powers that are not expressly delegated away by the Indians are retained. Cohen, *supra* n. 1, at 212.

[122] 95 F.3d 174, 177, 181 (2nd Cir. 1996).

[123] *Id.* at 177.

[124] *Id.* at 181.

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harmoniously when it can reasonably be done.[125] Indian tribal councils have been expressly excluded from the definition of "employer" in two very important employment statutes and courts should interpret the NLRA in a way that is compatible with these other labor and employment statutes.[126] Because the Civil Rights Act, OSHA and the ADEA have been interpreted in a way that respects tribal self-government, this should be the overall basis by which labor and employment statutes are interpreted. Furthermore, such an interpretation is consistent with the requirement that Congress expressly state its intent to limit tribal self-government. Thus, the NLRA should be construed with similar statutes such as Title VII of the Civil Rights Act, OSHA, and the ADEA with an eye towards tribal sovereignty and/or tribal self-government.

2. Recognizing Indians' Sovereignty Through Treatment of Indians In Other Sections of the NLRA

If tribal sovereignty is preserved in one section of the NLRA, then other sections should be interpreted against this backdrop. The familiar whole act canon provides that each statutory provision should be read by reference to the whole act.[127] Two sections within the same act should be interpreted consistently because "a legislature passes judgment upon the act as an entity . . . ."[128] Therefore, consideration of one section while interpreting another will avoid distorting the legislative intent.[129] The treatment of tribal sovereignty in section 2(2) of the NLRA supports the conclusion that a tribal government is not preempted by the NLRA from enacting a right-to-work ordinance.

Section 2(2) of the NLRA defines "employer" as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, . . . or any State or political subdivision."[130] In *Fort Apache Timber Co.*, the NLRB was presented with the question of whether an Indian tribal governing council is an "employer" within the meaning of section 2(2) of the

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[125] *Hammontree v. N.L.R.B.*, 925 F.2d 1486 (D.C. Cir. 1991); *Hyrup v. Kleppe*, 406 F. Supp. 214 (D. Colo. 1976); *Lacey v. C.S.P. Solano Med. Staff*, 990 F. Supp. 1199 (E.D. Cal. 1997).

[126] *See supra* nn. 99-126 and accompanying text (discussing other labor employment statutes).

[127] *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 235, 241-42 (1989); *Mass. v. Morash*, 490 U.S. 107 (1989). *See* William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation, Statutes and the Creation of Public Policy* 644 (2nd ed. West 1995) ("all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions and features of the whole statute.").

[128] 2A Sutherland, *Statutes and Statutory Construction*, § 47.02, at 139.

[129] *Id.*

[130] 29 U.S.C. § 152(2) (1952).

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NLRA.[131] To determine this issue, the NLRB used tribal sovereignty as a backdrop against which to interpret section 2(2).[132]

In resolving the issue, the NLRB stated that "it must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own government."[133] When determining if an action infringes on the independent status of Indians on a reservation "the question has always been whether the action 'infringed on the right of reservation Indians to make their own laws and be ruled by them.'"[134] The NLRB also recognized that although Indians' "external sovereignty has been extinguished, their internal sovereignty is preserved"[135] and Indians on reservations are "generally free from state or even, in most instances, Federal intervention, unless Congress has specifically provided to the contrary."[136] Based upon these principles, the NLRB held that a tribal governing council was not an employer within the meaning of the word as used in section 2(2). The NLRB's holding recognizes tribal sovereignty because if a tribe is considered an employer within the meaning of section 2(2), then the NLRA applies to the tribe anytime employer is used. If a tribe is not an employer within the meaning of the NLRA, then the tribe should not be bound by any of the NLRA's requirements regarding employers, including the NLRA's provisions on whether employers must accept compulsory union membership.[137]

Excluding tribes from the definition of employer also recognizes sovereignty insofar as the NLRB has acknowledged the similarity of Indian tribes to states. In section 2(2), the definition of employer expressly excludes "any State" but it does not expressly exclude Indian tribes. The NLRB stated, however, that "it would be possible to conclude that the [Tribal] Council is the equivalent of a State and, as such, *specifically*

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[131] *Fort Apache Timber Co. v. Constructing Bldg. Materials*, Local 83, 226 NLRB 1976 N.L.R.B. LEXIS 176, *8 (1976). Fort Apache Timber Company is an entrepreneurial enterprise owned and operated by the White Mountain Apache Tribe. *Id.* at *2. On December 24, 1975, the Regional Director for Region 28 issued a decision ordering an election among certain employees of the Fort Apache Timber Company. *Id.* at *1. Thereafter, Fort Apache Timber Company filed a request for review of this decision arguing that the Board lacked statutory jurisdiction over them. *Id.* The determination of this question required the Board to determine whether the Apache Tribe was an *employer* within the meaning of the NLRA. *Id.* at *8.

[132] *Id.* at **10-14.

[133] Id. at *12.

[134] *Id.* at *12 (quoting *McClanahan*, 411 U.S. at 181).

[135] *Id.* at *15. In the same paragraph the Board stated "we note that Indian tribes have been described, *inter alia*, as the equivalent of a State, or of a territory, as more than a State or territory, as independent or dependent nations, as a distinct political entity." *Id.*

[136] *Id.*

[137] For example, § 158(a) of the NLRA states that "[i]t shall be an unfair labor practice for an employer - to dominate or interfere with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2) (1952).

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excluded from the section (2)2 definition of employer.[138] Nevertheless, it is not necessary to make that finding because the Tribal Council is *implicitly* exempt as an employer due to sovereignty.[139] Although the NLRA does not expressly exclude Tribal Councils from the definition of an employer, the NLRB has held that, to be consistent with the sovereign self-governing status of Indians, they are excluded from the NLRA.[140] The NLRB's conclusions acknowledge that, similar to states, the sovereignty of Indian tribes should not be infringed upon by a broad interpretation of section 2(2).

If states and Tribal Councils are treated the same in section 2(2) of the NLRA, they should be treated the same in other parts of the statute as well.[141] The backdrop against which section 2(2) was interpreted—tribal sovereignty—should be used to determine whether a tribal government is preempted by the NLRA under sections 14(b) and 8(a)(3). Thus, if in section (2)2 Congress did not specifically exclude tribes but they are implicitly excluded, then in sections 14(b) and 8(a)(3) they should also be implicitly excluded to effectuate tribal sovereignty. Section 2(2) expressly excludes states from the definition of employer but not Indian tribes.[142] The NLRB, however, has held that Indian tribes are excluded from the definition of employer because of their sovereign status.[143] Similarly, section 14(b) expressly allows states to outlaw union security agreements but not Indian tribes.[144] To be consistent, Indian tribes should also be allowed to outlaw union security agreements because of their sovereign status. The NLRB's decision to protect Indian sovereignty in section 2(2) implicitly protects Indian sovereignty in sections 14(b) and 8(a)(3) as well. Therefore, a tribal government should not be preempted by the NLRA from enacting a right-to-work ordinance.

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[138] *Fort Apache Timber Co.*, 1976 N.L.R.B. LEXIS at *16 (1976).

[139] *Id.* at *17. (Emphasis added).

[140] *Id.*

[141] For a discussion of the courts treatment of states and tribal councils in § 2(2) of NLRA see *supra* notes 133-38 and accompanying text.

[142] 29 U.S.C. § 152(2) (1952).

[143] *Fort Apache Timber Co.*, 1976 N.L.R.B. at *8 (1976).

[144] 29 U.S.C. § 164(b) (1994).

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D. Tribal Right-to-Work Laws Are Consistent With Federal Policies Recognizing Tribal Authority Over Non-Indians and Federal Policies Designed to Promote Economic Development on Indian Reservations

1. Tribal Authority to Regulate Non-Indian Employers Who Enter Consensual Relationships With the Tribe or Its Members

Even though a tribe is not preempted by the NLRA from enacting a right-to-work ordinance, it must come within their limited authority over non-Indians. The extent of Indian sovereignty over non-Indians was defined in *Montana v. United States*.[145] The issue in *Montana* was whether a tribe could regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.[146] The Court stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation. . . ."[147] First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements."[148] Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, *the economic security*, or the health and welfare of the tribe."[149] This power has been limited to circumstances where it is necessary to protect tribal self-government and to preserve the right of reservation Indians to make their own laws and be ruled by them.[150]

Under the first type of activity that tribes can regulate there are two requirements for a right-to-work ordinance to be valid. First, the tribe must be regulating through taxation, licensing or other means the conduct of non-Indians.[151] Here, the "other means" is an ordinance, specifically a right-to-work ordinance, which regulates the activities of non-Indians who conduct business on the reservation. Second, the non-Indians must have entered a consensual relationship with the tribe or its members through commercial dealings, contracts, leases or other arrangements. If a non-Indian business decides to lease land from Indians to conduct its business,

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[145] 450 U.S. 544, 547 (1981).
[146] *Id.*
[147] *Id.* at 565.
[148] *Id.*
[149] *Id.* at 566. (Emphasis added).
[150] *Strate v. A-1 Contractors*, 570 U.S. 438, 459 (1997) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).
[151] *Montana*, 450 U.S. at 565.

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they are entering into such a consensual relationship with the Indians and can be subjected to a tribal right-to-work ordinance. For example, in *NLRB v. Pueblo of San Juan*, the Pueblos leased land to a non-Indian company, Idaho Timber.[152] Thus, they would meet the first requirement. Leasing land, however, is not a requirement. If the non-Indian owns the land but has contracted or made any other arrangement with the tribe or its members, they have entered a consensual relationship.

The second kind of non-Indian activity that tribes can regulate, activity that effects the economic security of the tribe and its right to make its own laws and be ruled by them, would also include other non-Indians conducting business on the reservation. Non-Indians conducting business on a reservation can affect the economic security of the tribe. If an employer forces an Indian employee to join a union and pay a fee, the Indian may not want to work for the company or may not be able to afford to pay the union fee. In addition, fewer employers may conduct business on reservations without right-to-work laws because employers generally prefer right-to-work laws.[153] This results in fewer opportunities for employment and a smaller revenue stream for the tribe. Allowing a tribe to enact a right-to-work ordinance thus preserves the tribes' right to make its own laws and be ruled by them. Enacting an ordinance is an example of a tribe making its own law and the ordinance governs activity on the reservation. Therefore, members of the tribe are being ruled by the ordinance.

Because non-Indians doing business on a reservation have usually entered a consensual relationship with the tribe and their activity affects the tribes' economic security, a right-to-work ordinance is a valid exercise of the tribe's authority over non-Indians. Thus, the NLRA should not be interpreted to preempt Indians from enacting a right-to-work ordinance when such ordinance benefits the tribe economically and is consistent with tribal authority over non-Indians.

2. Federal Policy Promoting Tribal Economic Development

"American Indians are the most impoverished minority in the United States."[154] Indian economies, however, are growing and, in some instances,

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[152] *Pueblo of San Juan*, 2002 U.S. App. LEXIS 587 at *3.

[153] *See supra* n. 35 and accompanying text.

[154] *See* Stephen Cornell and Joseph P. Kalt, *The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development* 1 (unpublished discussion paper, Energy and Envtl. Poly. Center, John F. Kennedy Sch. of Gov't, Harv. U., 1987) (copy on file with Harvard University). In 1989, forty percent of adult Indians looking for employment were unable to find it. Cornell and Kalt, *supra* n. 57, at 4. In 1994, forty-seven percent of Indian

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without the aid of federal money.[155] This is the result of a direct effort by both the United States Government and Tribal Governments to reduce tribal dependency on federal money.

In response to concerns about tribal economies, Congress has taken pervasive action designed to expand tribal economies and promote tribal self-determination in an effort to decrease poverty.[156] A number of programs promote economic development for Indians by giving tribes more decision-making power. For example, Public Law 638 established a Congressional commitment to transition federal control of programs and services for Indians to tribes by allowing tribes to plan, conduct and administer such programs.[157] Congress also passed the Indian Employment, Training and Related Services Act of 1992 to help Indian tribal governments "integrate the employment, training, and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally determined *goals consistent with the policy of self-determination*."[158] In addition, Congress passed the Indian Self-Determination Act, which was enacted to return governing power to the tribes,[159] and the Indian Financing Act, which provides capital to Indians so that they can exercise responsibility and management of their own resources.[160]

Just as President Nixon was concerned about tribal economies in the 1970's, President Reagan was interested in reservation economic development during the 1980's.[161] He believed that resources on

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families on reservations or trust land lived below the poverty level, compared with eleven percent of families in the entire country. Dirk Johnson, *Economies Come to Life on Indian Reservations*, 143 N.Y. Times A1, A10 (July 3, 1994) (citing the Census Bureau and National Indian Policy Center).

[155] *See* Kalt, Testimony, *supra* n. 3, at 1 ("[T]here are a number of reservations that are sustaining growing economies and breaking the cycles of dependence on federal programs.").

[156] *See* Cohen, *supra* n. 1, at 200-228.

[157] Pub. L. No. 93-638, § (b), 88 Stat. 2203 (1975). For additional information, *see supra* note 2.

[158] *Indian Employment, Training and Related Services Act*, 29 U.S.C. § 3401 (Supp. V. 1993). (Emphasis added).

[159] *Indian Self-Determination Act*, 25 U.S.C. § 450 (1975). "The Indian Self-Determination act of 1975 was enacted to lessen the federal domination of Indian services" and to return governing power to the tribes. Cohen, *supra* n. 1, at 715, 718.

[160] Pub. L. No. 93-262, 88 Stat. 77 (codified as 25 U.S.C. §§ 1451-1453, 1461-1469, 1481-1498). The Indian Financing Act provides capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians fully exercise responsibility for utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities. For a comprehensive list of the Congressionally authorized programs that promote economic development. *See* Cohen, *supra* n. 1, at 718-28.

[161] President Reagan expressed his policy of economic development on reservations:

> [B]oth the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas. Uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations.

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reservations were the foundation for tribal economic development.[162] The sale of these resources would in turn lessen tribal dependence on federal monies and programs.

The above Congressional programs and Presidential policies have given Indian tribes more decision-making authority in the area of economic development. The Harvard Project on Indian Economic Development found that "de facto sovereignty [i.e. genuine decision-making control over the running of tribal affairs] is a necessary prerequisite for economic development on America's Indian reservations."[163] This decision-making ability is crucial because when the federal government or an outside organization controls economic development on Indian reservations, its rules and decisions will reflect outside goals, not Indian goals.[164] It will impose non-Indian values within Indian territory. Because tribal governments want to improve their economy, they need to establish rules that create an environment that will generate revenue and provide employment for tribal members.[165]

As a result of the ability to make their own decisions, tribes are able to create an environment reflective of internal goals and values, yet attractive to both Indian and non-Indian workers and businesses. In recent years, tribes have seen an increase in the number of businesses owned and operated by tribes and individual Indians[166] and more non-Indians are leasing land from Indians to conduct their businesses.[167] The most recent

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Ronald Reagan, *President's American Indian Policy Statement*, 19 Wlky. Comp. Pres. Doc. 98, 100-01 (Jan. 24, 1983).

[162] *Id.*

[163] Kalt, Testimony, *supra* n. 3, at 3. "The project could not find a single case of economic development where the tribe is not in the driver's seat." Kalt, Testimony, *supra* n. 3, at 4.

[164] *See* Cornell and Kalt, *supra* n. 57, at 15. "As long as the BIA or some other outside organization carries primary responsibility for economic conditions on Indian reservations, development decisions will tend to reflect outsiders' agendas." *See* Cornell and Kalt, *supra* n. 57, at 35 (citing Matthew Krepps, *Can Tribes Manage their own Resources? The 638 Program and American Indian Forestry* in *What Can Tribes Do? Strategies and Institutions In American Indian Economic Development* (Stephen Cornell and Joseph P. Kalt eds., Los Angeles: Univ. of Cal., 1992) (reporting that shifting 10 percent of forestry labor force from the Bureau of Indian Affairs control to tribal control under Public Law 638 could increase the average timber tribe's revenues by $60,000 per year)).

[165] Cornell and Kalt, *supra* n. 57, at 41.

[166] For example, the Mashantucket Pequot Tribe owns and operates the Foxwoods Resort in Connecticut, an enterprise that cost over $100,000,000 to construct and that employs over 6,000 people. The Mississippi Choctaw is the fourth or fifth largest employer in Mississippi. More than a thousand non-Indians migrate onto the reservation everyday in order to work in the Choctaw's manufacturing service. The White Mountain Apache Tribe is an economic anchor of the economy in northern Arizona with its forest products, skiing and recreation. In Montana, the Salish and Kootenai Tribes of the Flatland reservation have successfully fostered a strong private sector economy based on agriculture, tourism, and recreation. *See* Kalt, Testimony, *supra* n. 3, at 2.

[167] Land leasing is authorized by 25 U.S.C. § 415(a). In 1973, leasing of land for agricultural, business, and recreation purposes resulted in income of twenty-eight million. Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1063 (1974). In addition, seven million acres were leased to non-Indian farmers.

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economic growth is in the gaming industry. Indian gaming revenue in 1999 was $8.26 billion and the Indian gaming industry employed 170,000 non-Indians and 30,000 Indians.[168] As Indian tribes pursue developmental goals and more non-Indians come on the reservation to work or conduct business, disputes arise over the extent of tribal authority to regulate non-Indian employers and employees.

It is against this background, tribal sovereignty and economic development, that the NLRA should be interpreted. With recent federal programs handing over the decision-making authority to tribes, tribal economies have begun to grow. Maintaining a good economy requires the ability to generate revenue and create an atmosphere conducive to growth. Additionally, genuine decision-making control is also necessary to foster development; a right-to-work ordinance is an example of such control. Thus, an interpretation of the NRLA that allows tribal right-to-work ordinances is consistent with federal policy promoting economic development on Indian reservations.

IV. CONCLUSION

Indian law principles are grounded in the concept of an Indian tribe as a sovereign political body, able to make and enforce its own laws within its boundaries.[169] Congress has committed itself to a firm policy supporting tribal self-government, self-determination and economic development.[170] The NLRA should be interpreted in light of this current federal policy. Courts recognize this policy and require Congress to provide explicit language including Indians within the ambit of a statute before limiting their self-governing status.[171]

The NLRA does not contain express language preempting a tribal right-to-work law.[172] An examination of other labor and employment statutes and other sections of the NLRA support an interpretation of the NLRA that recognizes tribal self-government by allowing a tribal right-to-work law.[173]

Id. See generally Merrion v. Jicarlla Apache Tribe, 455 U.S. 130, 135 (1982) (stating non-Indians have mineral leases on sixty-nine percent of reservations).

[168] Indian Gaming, <http://www.indiangaming.org/library/index.html> (accessed March 23, 2001) (Little Sic, Inc., the tribal corporation owned by the Shakopee Mdewakanton Sioux Community in Minnesota, operates three casinos and related facilities and employs over 4,400 people.); *See generally* Eduardo E. Cordeiro, *The Economics of Bingo: Factors Influencing the Success of Bingo Operations on American Indian Reservations* in *What Can Tribes Do? Strategies and Institutions In American Indian Economic Development* 205 (Stephen Cornell and Joseph P. Kalt eds., Los Angeles: Univ. of Cal. 1992).

[169] *Worchester v. Georgia*, 31 U.S. 515 (1832).

[170] *See supra* nn. 29-57 and accompanying text.

[171] *See supra* nn. 2 and 156-60 and accompanying text.

[172] *See supra* n. 72 and accompanying text.

[173] *See supra* nn. 95-144 and accompanying text.

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Absent any indication of federal preemption, a tribe can enact a right-to-work law as long as it is within their authority over non-Indians.[174] Because non-Indians conducting business on a reservation enter consensual relationships with the tribe or its members, it is within their tribal authority.[175] Lastly, over the past several years, Congress has taken action to promote economic development on Indian reservations by returning some decision-making authority to the tribes. Allowing a tribe to enact a right-to-work law preserves this decision-making ability and ultimately promotes economic development because it reflects internal goals and values. From these tenets, it is clear that the National Labor Relations Act should not preempt a tribal right-to-work law.

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[174] *See supra* nn. 145-53 and accompanying text.
[175] *See supra* nn. 145-53 and accompanying text.

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